PENNSYLVANIA- WESTERN

December, 2009

Summary

The mission of the United States District Court for the Western District of Pennsylvania is to preserve and enhance the rule of law while providing an impartial and accessible forum for the just, timely and economical resolution of legal proceedings within the court's jurisdiction, so as to protect individual rights and liberties, promote public trust and confidence in the judicial system, and to maintain judicial independence. One of the critical functions in achieving this mission is the promotion and use of Alternative Dispute Resolution (ADR) in civil cases.

In 2001, the Court, following the directives of the Civil Justice Reform Act of 1990 (28 U.S.C. 471, et seq.) and the Alternative Dispute Resolution Act of 1998 (28 U.S.C. 651), established an Advisory committee made up of members of the bar and bench to develop a vigorous ADR program. Members of the ADR subcommittee included: Carole Katz, Maria Greco Danaher, Magistrate Judge Lisa Pupo Lenihan, Sheryl Kashuba and Karen Engro. Together with the Court's Case Management/ADR Committee, ADR Policies and Procedures were developed and approved by the Board of Judges in August, 2005. The Court's ADR Rule (16.2) was modified and approved by the Court's Rules Committee (chaired by Judges Conti and Lancaster). The new rule was posted for comment in September, 2005 and, beginning in June 2006, four district court judges (Ambrose, Cercone, Hardiman and Schwab) will implement new local rule 16.2 which mandates the use of one of the following methods of ADR in all civil cases (except social security and those involving prisoners): mediation, early neutral evaluation and arbitration. Parties will be required to determine which ADR method they are willing to employ (*see* Local Rule 26 [f]) and be prepared to discuss the choice at the case management conference, subject to the approval of the trial judges. The pilot program will be supervised by the Court's ADR Implementation Committee (chaired by Judges Haridman and Schwab).

As defined in the Policies and Procedures, mediation refers to a process in which an impartial neutral, selected by the parties, facilitates negotiations between the parties to help reach a mutually acceptable agreement. Early neutral evaluation (ENE) is a process wherein an impartial attorney, selected by the parties, with subject matter expertise, provides a non-binding evaluation of the case and is available to assist the parties in reaching agreement. Arbitration involves referral of the case to an impartial third party (or a panel of three) for a binding (subject to a *de novo* review) determination in settlement of the claim(s) following the presentation of evidence and arguments.

The cost generally will be shared among or between the parties. If a party is appearing *pro se*, volunteer attorneys may be available to assist in the ADR process. The cost of arbitrating under the Court's program is paid by the court. Parties maintain the ability to utilize private ADR providers.

The Policies and Procedures also explain the requirements for those interested in serving as a mediator, evaluator or arbitrator.

LCvR 16.2 ALTERNATIVE DISPUTE RESOLUTION

A. Effective Date and Application. LCvR 16.2 shall govern all actions as the Board of Judges shall determine, from time to time, commenced on or after June 1, 2006, with the exception of Social Security cases and cases in which a prisoner is a party. Cases subject to LCvR 16.2 also remain subject to the other Local Rules of the Court.

B. Purpose. The Court recognizes that full, formal litigation of claims can impose large economic burdens on parties and can delay resolution of disputes for considerable periods. The Court also recognizes that an alternative dispute resolution ("ADR ") procedure can improve the quality of justice by improving the parties' understanding of their case and their satisfaction with the process and the result. The Court adopts LCvR 16.2 to make available to litigants a broad range of Court-sponsored ADR processes to provide quicker, less expensive and potentially more satisfying alternatives to continuing litigation without impairing the quality of justice or the right to trial. The Court offers diverse ADR services to enable parties to pursue the ADR process that promises to deliver the greatest benefits to their particular case. In administering these Local ADR Rules and the ADR program, the Court will take appropriate steps to assure that no referral to ADR results in an unfair or unreasonable economic burden on any party.

C. ADR Options. The Court-sponsored ADR options for cases include:

1. Mediation
2. Early Neutral Evaluation
3. Arbitration

D. ADR Designation. At the Rule 26(f) "meet and confer" conference, the parties are required to discuss and, if possible, stipulate to an ADR process for that case. The Rule 26(f) written report shall (1) designate the specific ADR process that the parties have selected, (2) specify the time frame within which the ADR process will be completed, and (3) set forth any other information the parties would like the Court to know regarding their ADR designation. The parties shall use the form provided by the Court. W hen litigants have not stipulated to an ADR process before the Scheduling Conference contemplated by LCvR 16.1, the assigned Judge will discuss the ADR options with counsel and unrepresented parties at that conference. If the parties cannot agree on a process before the end of the Scheduling Conference, the Judge will make an appropriate determination and/or selection for the parties.

E. ADR Practices and Procedures. The ADR process is governed by the ADR Policies and Procedures, as adopted by the Board of Judges for the United States District Court for the Western District of Pennsylvania, which sets forth specific and more detailed information regarding the ADR process, and which can be accessed either on the Court's official website (www.pawd.uscourts.gov) or from the Clerk of Court.

ALTERNATIVE DISPUTE RESOLUTION POLICIES AND PROCEDURES

1. DEFINITIONS

1.1 **"Mediation"** refers to a nonadjudicative, third-party intervention wherein an impartial neutral, selected by the parties, facilitates negotiations between the parties to help them reach a mutually acceptable agreement. The parties are responsible for negotiating a settlement. The neutral's role is to assist the process in ways acceptable to the disputants.

1.2 "**Early Neutral Evaluation**" refers to a nonadjudicative, third-party intervention by an impartial experienced attorney, selected by the parties, with subject matter expertise. After reviewing concise presentations of the parties' claims, the neutral provides a non-binding evaluation of the case and thereafter is available to assist the parties in reaching an agreement.

1.3 "**Arbitration"** involves the referral of a dispute to an impartial third party (or a panel of three), selected by the parties, who, after giving the parties an opportunity to present evidence and arguments, renders a non-binding determination in settlement of the claim(s). Arbitration in the federal district court is further defined in 28 U.S.C. § 654. Parties may agree to be bound by the arbitrator's decision which is non appealable. 1.4 Other ADR Processes. See Section 7.

2. GENERAL PROVISIONS

2.1 Staff and Responsibilities. An ADR Coordinator will oversee the Court's ADR programs and must have expertise in ADR procedures. The ADR Coordinator is responsible for designing, implementing, administering and evaluating the Court's ADR programs. These responsibilities include educating litigants, lawyers, Judges, and Court staff about the ADR program and rules. In addition, the ADR Coordinator must be responsible for overseeing, screening and orienting neutral arbitrators, mediators and evaluators (hereinafter "neutrals") to serve in the Court's ADR programs.

2.2 ADR Internet Site. www.pawd.uscourts.gov, contains information about the Court's ADR processes, information about neutrals and their fees, answers to frequently asked questions, various forms approved by the Court, and information about becoming a neutral in the Court's programs.

2.3 Contacting the ADR Coordinator

The ADR Coordinator's contact information is: 5 **Revised 7/15/09** ADR Coordinator United States District Court For the Western District of PA 700 Grant Street Pittsburgh, PA 15219 Telephone: (412) 208-7458 Fax: (412) 208-7517 E-Mail: ADRCoordinator@pawd.uscourts.gov The Court encourages litigants and counsel to consult the ADR Internet site (**www.pawd.uscourts.gov**) and to contact the ADR Coordinator to discuss the suitability of ADR options for their cases or for assistance in tailoring an ADR process to a specific case.

2.4 ADR JUDGE

The Court has appointed the United States District Judge (who serves as the Chair of the Court's Standing Committee on Case Management and ADR) to serve as the ADR Judge. The ADR Judge is responsible for overseeing the ADR program, consulting with the ADR Coordinator on matters of policy, program design and evaluation, education, training and administration. When necessary, the Chief District Judge may appoint another Judicial Officer of this Court to perform, temporarily, the duties of the ADR Judge.

2.5 NEUTRALS

A. Panel. The ADR Coordinator must maintain a panel of neutrals serving in the Court's ADR programs. Neutrals will be selected from time to time by the Court from applications submitted by lawyers willing to serve or by other persons as set forth in section B(1)(b) below.

B. Qualifications and Training. Each person serving as a neutral in a Court ADR program must be a member of the bar of this Court, a member of the faculty of an accredited law school, or be approved by this Court to serve as a neutral and be determined by the ADR Judge to be competent to perform the applicable duties, and must successfully complete initial and periodic training sessions as required by the Court and be a registered user of the Electronic Case Filing (ECF) system for the United States District Court, Western District of Pennsylvania. (**All neutrals, including those who are retained privately, are required to be registered users of the Court's ECF system**.) Additional minimum requirements for serving on the Court's panel of neutrals, which the Court may modify in individual circumstances for good cause, are as follows:

1. Mediators.

a. Attorney Mediators. Mediators who are attorneys must have been admitted to the practice of law for at least seven years and must have:

i. substantial experience with civil litigation in federal court;

ii. completed 40 hours of mediation training, including training in the facilitative method of mediation. At least 16 hours of mediation training must be participating in simulated facilitative mediations;

iii. strong mediation process skills and the temperament and training to listen well, facilitate communication across party lines and assist the parties with settlement negotiations.

b. Non-attorney Mediators. Non-attorney mediators may be appointed to a case only with the consent of the parties. Mediators who are not attorneys may be selected to serve on the Court's panel of mediators if they are knowledgeable about civil litigation in federal courts and have:

i. appropriate professional credentials in another discipline;

ii. 40 hours of mediation training, including training in the facilitative method of mediation;

iii. experience mediating at least five cases; and

iv. strong mediation process skills and the temperament and training to listen well, facilitate communication across party lines and assist the parties with settlement negotiations.

c. All Mediators. All mediators must adhere to the Model Standards of Conduct for Mediators as last adopted or amended by the American Arbitration Association, American Bar Association and Association for Conflict Resolution, as well as any other applicable standards of professional conduct which may be required by the Court. (Availableathttp://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf.)

2. Early Neutral Evaluators. Evaluators must have been admitted to the practice of law for at least 15 years and must have:

a. substantial experience with civil litigation in federal court;

b. substantial expertise in the subject matter of the cases assigned to them; and

c. the temperament and training to listen well, facilitate communication across party lines and, if called upon, assist the parties with settlement negotiations.

d. agreed to adhere to the Model Standards of Conduct for Mediators as last adopted or amended by the American Arbitration Association, American Bar Association and Association for Conflict Resolution, as well as any other applicable standards of professional conduct which may be required by the Court. (Available athttp://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf.)

3. Arbitrators. Arbitrators must have been admitted to the practice of law for at least 10 years and must have:

a. For not less than five years, committed 50% or more of their professional time to matters involving litigation; or

b. Substantial experience serving as a neutral in dispute resolution proceedings; and

c. agree to adhere to the Model Standards of Conduct for Arbitrators. (Available at http://www.abanet.org/dispute/commercial_disputes.pdf.)

C. Immunities. All persons serving as neutrals in any of the Court's ADR programs are performing quasi-judicial functions and are entitled to the immunities and protections that the law accords to persons serving in such capacity.

2.6 EVALUATION OF ADR PROGRAMS

Congress has mandated that the Court's ADR programs be evaluated. Neutrals, counsel and parties must promptly respond to any inquiries or questionnaires from persons authorized by the Court to evaluate the programs. Responses to such inquiries will be used for research and monitoring purposes only and the sources of specific information will not be disclosed to the assigned Judicial Officer in any report.

3. MEDIATION

3.1 DESCRIPTION

Mediation is a flexible, non-binding, confidential process in which a neutral person (the mediator), selected by the parties, facilitates settlement negotiations. The mediator improves communication across party lines, helps parties articulate their interests and understand those of their opponent, probes the strengths and weaknesses of each party's legal positions, identifies areas of agreement and helps generate options for a mutually agreeable resolution to the dispute.

The mediator generally does not give an overall evaluation of the case. A hallmark of mediation is its capacity to expand traditional settlement discussion and broaden resolution options, often by exploring litigant needs and interests that may be formally independent of the legal issues in controversy.

3.2 ELIGIBLE CASES

Appropriate civil cases may be referred to mediation by order of the assigned Judicial Officer.

3.3 MEDIATORS

A. Referral. No later than the Initial Case Management Conference (Rule 16) the parties are to choose a mediator who is available during the appropriate period and has no apparent conflict of interest.

B. Compensation. Unless otherwise agreed by all parties or ordered by the Court, one-half the cost of the mediator's services must be borne by the plaintiff(s) and one-half by the defendant(s) at the rate contained in the neutral's fee schedule filed with the Court. In a case with third-party defendants, the cost must be divided into three equal shares. A neutral must not charge or accept in connection with a particular case a fee or thing of value from any source other than the parties. The Court may review the reasonableness of the fee and, if necessary, enter an Order modifying the fee. Compensation must be paid directly to the neutral upon the conclusion of the ADR process, or as otherwise agreed to by the parties and the mediator. Failure to pay the mediator must be brought to the Court's attention.

C. Fee Waiver. A party who demonstrates a financial inability to pay all or part of that party's *pro rata* share of the neutral's fee may request the Court to appoint a mediator who has agreed to serve *pro bono*. The Court may waive all or part of that party's share of the fee. Other parties to the case who are able to pay the fee must bear their *pro rata* portions of the fee.

3.4 TIMING AND SCHEDULING THE MEDIATION

A. Scheduling by Mediator. Promptly after being chosen to mediate a case, the mediator shall, after consulting with all parties, fix the date and place of the mediation within the deadlines set by paragraph B below, or the order referring the case to mediation.

B. Deadline for Conducting Mediation. Unless otherwise ordered, the mediation shall be held within 60 days after the Initial Case Management Conference (Rule 16) or issuance of the Initial Case Management Order, whichever occurs first.

3.5 REQUEST TO EXTEND THE DEADLINE

A. Motion Required. Requests for extension of the deadline for conducting a mediation must be made no later than 15 days before the session is to be held and must be directed to the assigned Judicial Officer, in a motion under LR 7.1, with a copy to the other parties and the mediator.

B. Content of Motion. Such motion must:

1. Detail the considerations that support the request;

2. Indicate whether the other parties concur in or object to the request; and

3. Be accompanied by a proposed order setting forth a new deadline by which the mediation must be held.

3.6 TELEPHONE CONFERENCE BEFORE MEDIATION

The mediator must schedule a brief joint telephone conference with counsel and any unrepresented parties before the mediation session to discuss matters such as the scheduling of the mediation, the procedures to be followed, the nature of the case, and which client representatives will attend.

3.7 NO WRITTEN MEDIATION STATEMENTS REQUIRED

Written mediation statements are not required for mediations.

3.8 ATTENDANCE AT SESSION

A. Parties. All named parties and their counsel are required to attend the mediation unless excused under paragraph D below. This requirement reflects the Court's view that the principal values of mediation include affording litigants opportunities to articulate directly to the other parties and a neutral their positions and interests and to hear, first hand, their opponent's version of the matters in dispute. Mediation also enables parties to search directly with their opponents for mutually agreeable solutions.

1. Corporation or Other Entity. A party other than a natural person (*e.g.*, a corporation or an association) satisfies this attendance requirement if represented by a decision maker(s) (other than outside counsel) who has full settlement authority and is knowledgeable about the facts of the case.

2. Government Entity. A unit or agency of government satisfies this attendance requirement if represented by a person who has, to the greatest extent feasible, full settlement authority, and is knowledgeable about the facts of the case, the governmental unit's position, and the procedures and policies under which the governmental unit decides whether to accept proposed settlements. If the action is brought by the government on behalf of one or more individuals, at least one such individual also must attend.

3. Any party who fails to have physically in attendance the necessary decision maker(s) will be subject to sanctions.

B. Counsel. Each represented party must be accompanied at the mediation by the lawyer who will be primarily responsible for handling the trial of the matter. If a party is proceeding *pro se*, a request may be made to the Court to name a *pro bono* attorney to represent the *pro se* litigant at the mediation.

C. Insurers. Insurer representatives, including, if applicable, risk pool representatives, are required to attend in person unless excused under paragraph D below, if their agreement would be necessary to achieve a settlement.

D. Request to be Excused. A person who is required to attend a mediation may be excused from attending in person only after a showing that personal attendance would impose an extraordinary or otherwise unjustifiable hardship. A person seeking to be excused must file a motion with the assigned Judicial Officer, no fewer than 15 days before the date set for the session, simultaneously copying all counsel and the mediator. The motion must:

1. Set forth all considerations that support the request;
2. State realistically the amount in controversy in the case;
3. Indicate whether the other party or parties join in or object to the request, and
4. Be accompanied by a proposed order.

E. Participation by Telephone. A person excused from appearing in person at a mediation must be available to participate by telephone.

3.9 PROCEDURE AT MEDIATION

A. Procedure. The mediation must be informal and must employ a facilitative method. Mediators have discretion to structure the mediation so as to maximize the benefits of the process.

B. Separate Caucuses. The mediator may hold separate, private caucuses with each side or each lawyer or, if the parties agree, with the parties only. The mediator may not disclose communications made during such a caucus to another party or counsel without the consent of the party who made the communication.

3.10. FOLLOW UP

At the close of the mediation session, the mediator and parties shall jointly determine whether it would be appropriate to schedule any additional ADR activity. Additional ADR activities to which the parties may agree include, but need not be limited to: written or telephonic reports by the parties to one another or to the mediator; exchange of specified information; another mediation session; or asking the Court for a settlement conference.

3.11 REPORT OF THE NEUTRAL

Within five (5) days of the conclusion of the mediation, the mediator must electronically file the "Report of Neutral" which includes the caption and case number, the date of the mediation, whether any follow up is scheduled, whether the case resolved in whole or in part, and any stipulations the parties agree may be disclosed.

4. EARLY NEUTRAL EVALUATION

4.1 DESCRIPTION

In Early Neutral Evaluation (ENE) the parties and their counsel, in a confidential session, make compact presentations of their claims and defenses, including key evidence as developed at that juncture, and receive a non-binding evaluation by an experienced neutral lawyer, selected by the parties, with subject matter expertise. The evaluator also helps identify areas of agreement, offers case-planning suggestions and, if requested by the parties, settlement assistance.

4.2 ELIGIBLE CASES

Subject to the availability of an evaluator with subject matter expertise, appropriate civil cases may be referred to ENE by order of the assigned Judicial Officer.

4.3 EVALUATORS

A. Referral. No later than the Initial Case Management Conference (Rule 16) the parties are to choose an evaluator who has expertise in the subject matter of the lawsuit, is available during the appropriate period and has no apparent conflict of interest.

B. Compensation. Unless otherwise agreed by all parties or ordered by the Court, one-half the cost of the evaluator's services must be borne by the plaintiff(s) and one-half by the defendant(s) at the rate contained in the evaluator's fee schedule filed with the Court. In a case with third-party defendants, the cost must be divided into three equal shares. An evaluator must not charge or accept in connection with a particular case a fee or thing of value from any source other than the parties. The Court may review the reasonableness of the fee and, if necessary, enter an Order modifying the fee. Compensation must be paid directly to the evaluator upon the conclusion of the ADR process, or as otherwise agreed to by the parties and the evaluator. Failure to pay the evaluator must be brought to the Court's attention.

C. Fee Waiver. A party who demonstrates a financial inability to pay all or part of that party's *pro rata* share of the neutral's fee may request the Court to appoint an evaluator who has agreed to serve *pro bono*. The Court may waive all or part of that party's share of the fee. Other parties to the case who are able to pay the fee must bear their *pro rata* portions of the fee.

4.4 TIMING AND SCHEDULING THE EARLY NEUTRAL EVALUATION

A. Scheduling by Evaluator. Promptly after being appointed to a case, the evaluator must, after consulting with all parties, fix the date and place of the ENE within the deadlines set by paragraph B below, or the order referring the case.

B. Deadline for Conducting Session. Unless otherwise ordered, the ENE must be held within 60 days after the Initial Case Management Conference (Rule 16) or the issuance of the Initial Case Management Order (Rule 16), whichever occurs first.

4.5 REQUESTS TO EXTEND DEADLINE

A. Motion Required. Requests for extension of the deadline for conducting an ENE must be made no later than 15 days before the ENE is to be held and must be directed to the assigned Judicial Officer, in a motion under Civil LR 7.1, with a copy to the other parties and the evaluator.

B. Content of Motion. Such motion must:

1. Detail the considerations that support the request;

2. Indicate whether the other parties concur in or object to the request; and

3. Be accompanied by a proposed order setting forth a new deadline by which the ENE must be held.

4.6 *EX PARTE* CONTACT PROHIBITED

Except with respect to scheduling matters, there must be no *ex parte* communications between parties or counsel and the evaluator, including private caucuses to discuss settlement, until after the evaluator has either delivered orally his or her evaluation or, if so requested by the parties, has committed his or her evaluation to writing, or all parties have agreed that *ex parte* communications with the evaluator may occur.

4.7 TELEPHONE CONFERENCE BEFORE EARLY NEUTRAL EVALUATION

The evaluator must schedule a brief joint telephone conference with counsel before the ENE to discuss matters such as the scheduling, the procedures to be followed, the nature of the case, and which client representatives will attend.

4.8 WRITTEN STATEMENTS

A. Time for Submission. No later than 10 calendar days before the ENE, each party must submit directly to the evaluator, and must serve on all other parties, a written Statement.

B. Prohibition Against Filing. The Statements constitute confidential information, must not be filed and the assigned Judicial Officer must not have access to them.

C. Content of Statement. The Statements must be concise and should include any information that may be useful to the evaluator, for example:

1. Identify, by name and title or status:

a. The person(s) with decision-making authority, who, in addition to counsel, will attend the ENE as representative(s) of the party, and

b. Persons connected with a party opponent (including an insurer representative) whose presence might substantially improve the utility of the ENE or the prospects for settlement;

2. Describe briefly the substance of the suit, addressing the party's views of the key liability issues and damages and discussing the key evidence;

3. Address whether there are legal or factual issues whose early resolution would reduce significantly the scope of the dispute or contribute to settlement negotiations;

4. Identify the discovery that is necessary to equip the parties for meaningful settlement negotiations;

5. Describe the history and status of any settlement negotiations; and

6. Include copies of documents out of which the suit arose (*e.g.*, contracts), or whose availability would materially advance the purposes of the evaluation session, *(e.g.*, medical reports or documents by which special damages might be determined).

4.9 ATTENDANCE AT SESSION

A. Parties. All named parties and their counsel are required to attend the ENE unless excused under paragraph D below. This requirement reflects the Court's view that the principal values of ENE include affording litigants opportunities to articulate directly to other parties and a

neutral their positions and interests and to hear, first hand, both their opponent's version of the matters in dispute and a neutral assessment of the merits of the case and the relative strengths of each party's legal positions.

1. Corporation or Other Entity. A party other than a natural person (*e.g.,* a corporation or an association) satisfies this attendance requirement if represented by a decision maker(s) (other than outside counsel) who has full settlement authority and is knowledgeable about the facts of the case.

2. Government Entity. A unit or agency of government satisfies this attendance requirement if represented by a person who has, to the greatest extent feasible, full settlement authority, and who is knowledgeable about the facts of the case, the governmental unit's position, and the procedures and policies under which the governmental unit decides whether to accept proposed settlements. If the action is brought by the government on behalf of one or more individuals, at least one such individual also must attend.

3. Any party who fails to have physically in attendance the necessary decision maker(s) will be subject to sanctions.

B. Counsel. Each represented party must be accompanied at the ENE by the lawyer who will be primarily responsible for handling the trial of the matter. If a party is proceeding *pro se,* a request may be made to the Court to name a *pro bono* attorney to represent the *pro se* litigant at the ENE.

C. Insurers. Insurer representatives, including, if applicable, risk pool representatives, are required to attend in person unless excused under paragraph D below, if their agreement would be necessary to achieve a settlement.

D. Request to be Excused. A person who is required to attend an ENE may be excused from attending in person only after a showing that personal attendance would impose an extraordinary or otherwise unjustifiable hardship. A person seeking to be excused must file a motion with the assigned Judicial Officer, no fewer than 15 days before the date set for the session, simultaneously copying all counsel and the evaluator. The motion must:

1. Set forth all considerations that support the request;
2. State realistically the amount in controversy in the case;
3. Indicate whether the other party or parties join in or object to the request, and
4. Be accompanied by a proposed order.

E. Participation by Telephone. A person excused from appearing in person at an ENE must be available to participate by telephone.

4.10 PROCEDURE AT AN EARLY NEUTRAL EVALUATION

A. Components of Early Neutral Evaluation Unless otherwise agreed to by the parties and evaluator, the evaluator must:

1. Permit each party (through counsel or otherwise), orally and through documents or other media, to present its claims or defenses and to describe the principal evidence on which they are based;

2. Help the parties identify areas of agreement and, where feasible, enter stipulations;

3. Assess the relative strengths and weaknesses of the parties' contentions and evidence, and explain the reasoning that supports these assessments;

4. Estimate, where feasible, the likelihood of liability and the dollar range of damages;

5. Help the parties devise a plan for sharing the important information and/or conducting the key discovery that will equip them as expeditiously as possible to enter meaningful settlement discussions or to position the case for disposition by other means;

6. Help the parties assess litigation costs realistically; and

7. If the parties are interested, help them, through private caucusing or otherwise, explore the possibility of settling the case; and

8. Determine whether some form of follow up to the session would contribute to the case development process or to settlement.

B. Process Rules. The session must be informal. Rules of evidence must not apply. There must be no formal examination or cross-examination of witnesses and no recording of the presentations or discussion must be made.

C. Evaluation. The evaluation must be presented orally to all parties (including, as applicable, party representatives, insurers and risk pool representatives), and may be supplemented by a written evaluation within ten days of the ENE if so requested by the parties. The evaluation constitutes confidential information which shall not be disclosed to the assigned Judicial Officer or anyone else except as provided in Section 6.D. *Comment: See Prohibition Against Disclosing ENE Communications to Settlement Judges, 494 F. Supp. 2d 1097 (N.D. CA. 2007).*

D. Settlement Discussions. At any point during the ENE, if all parties agree, they may proceed to mediation and/or discuss settlement.

4.11 FOLLOW UP

At the close of the ENE session, the neutral evaluator and parties shall jointly determine whether it would be appropriate to schedule any additional ADR activity. Additional ADR activities to which the parties may agree include, but need not be limited to: written or telephonic reports by the parties to one another or to the neutral evaluator; exchange of specified information; a mediation session; or asking the court for a settlement conference

4.12 LIMITATION ON AUTHORITY OF EVALUATOR.

Evaluators have no authority to compel parties to conduct or respond to discovery or to file motions. Nor do evaluators have authority to determine what the issues in any case are, to impose limits on parties' pretrial activities, or to impose sanctions.

4.13 REPORT OF THE NEUTRAL
Within five (5) days of the conclusion of the ENE, the evaluator must electronically file "Report of Neutral which includes the caption and case number, the date of the session, whether any follow up is scheduled, whether the case resolved in whole or in part, and any stipulations the parties agree may be disclosed.

5. COURT SPONSORED ARBITRATION (in accordance with 28 U.S.C. §651.) **(For private arbitration, see Section 7.)**

5.1 Description
Arbitration is an adjudicative process in which an arbitrator or a panel of three arbitrators, selected by the parties, issues a non-binding judgment ("award") on the merits after an expedited, adversarial hearing. Either party may reject the non-binding award and request a trial *de novo*. An arbitration occurs earlier in the life of a case than a trial and is less formal and less expensive. Because testimony is taken under oath and is subject to cross-examination, arbitration can be especially useful in cases that turn on credibility of witnesses. Arbitrators do not facilitate settlement discussions.

5.2 ELIGIBLE CASES
A case may be referred to arbitration by order of the assigned Judicial Officer. .

5.3 ARBITRATORS

A. Selection. After entry of an order referring the case to arbitration, the parties must choose an arbitrator from the Court's panel or, if the parties cannot decide, an arbitrator must be randomly selected by the Arbitration Clerk. The parties have the option of choosing a panel of three arbitrators. If the parties cannot agree upon the panel of three, one or more arbitrators may be selected by the Arbitration Clerk.

B. Notification by Clerk. The Arbitration Clerk must promptly notify the person or persons who is selected to serve. If any person so selected is unable or unwilling to serve, the Arbitration Clerk will secure another arbitrator after conferring with the parties. When the requisite number of arbitrators has agreed to serve, the Arbitration Clerk must promptly send written notice of the selections to the arbitrator(s) and to the parties. When a panel of three arbitrators is selected, the Arbitration Clerk must designate the person to serve as the panel's presiding arbitrator.

C. Compensation. Arbitrators are paid by the Court $250, per Judicial Conference Policy, per day or portion of each day of hearing in which they serve as a single arbitrator or $100 for each day or portion of each day in which they serve as a member of a panel of three. No party may offer or give the arbitrator(s) any gift. No compensation is permitted for preparation time on the case.

D. Payment and Reimbursement. When filing an award, arbitrators must submit a voucher on the form prescribed by the Arbitration Clerk for payment of compensation and for reimbursement of any reasonable transportation expenses necessarily incurred in the performance of duties. No reimbursement will be made for any other expenses.

5.4 TIMING AND SCHEDULING THE HEARING

A. Scheduling by Arbitrator. Promptly after being appointed to a case, the arbitrator(s) must arrange for the pre-session phone conference and, after consulting with all parties, must fix the date and place for the arbitration within the deadline fixed by the assigned Judicial Officer, or if no such deadline is fixed, within 90 days after the notice of appointment. Counsel and unrepresented parties must respond promptly to and cooperate fully with the arbitrator(s) with respect to scheduling the pre-session phone conference and the arbitration hearing. The hearing date must not be continued or vacated except for emergencies as established in writing and approved by the assigned Judicial Officer. If the case is resolved before the hearing date, or if due to an emergency a participant cannot attend the arbitration, counsel or an unrepresented party must notify the arbitrator(s) immediately upon learning of such settlement or emergency.

B. Place and Time. The hearing may be held at any location within the Western District of Pennsylvania selected by the arbitrator(s), including a room at a federal courthouse, if available. In selecting the location, the arbitrator(s) must consider the convenience of the parties and witnesses. Unless the parties agree otherwise, the hearing must be held during normal business hours.

5.5 *EX PARTE* CONTACT PROHIBITED

Except with respect to scheduling matters, there must be no *ex parte* communications between parties or counsel and an arbitrator.

5.6 WRITTEN ARBITRATION STATEMENTS

A. Time for Submission. No later than 10 calendar days before the arbitration session, each party must submit directly to the arbitrator(s), and must serve on all other parties, a written Arbitration Statement.

B. Prohibition against Filing. The statements must not be filed and the assigned Judicial Officer must not have access to them.

C. Content of Statement. The statements must be concise and must:

1. Summarize the claims and defenses;
2. Identify the significant contested factual and legal issues, citing authority on the questions of law;
3. Identify proposed witnesses; and
4. Identify, by name and title or status, the person(s) with decision-making authority, who, in addition to counsel, will attend the arbitration as representative(s) of the party.

D. Modification of Requirement by Arbitrator(s). After jointly consulting counsel for all parties and any unrepresented parties, the arbitrator(s) may modify or dispense with the requirements for the written Arbitration Statements.

5.7 TELEPHONE CONFERENCE BEFORE ARBITRATION

The arbitrator(s) must schedule a brief joint telephone conference with counsel and any unrepresented parties before the arbitration to discuss matters such as the scheduling of the arbitration, the procedures to be followed, whether supplemental written material should be submitted, which witnesses will attend, how testimony will be presented, including expert testimony, and whether and how the arbitration will be recorded.

5.8 ATTENDANCE AT ARBITRATION

A. Parties. Each party must attend the arbitration hearing unless excused under paragraph D below. This requirement reflects the Court's view that principal values of arbitration include affording litigants an opportunity to articulate their positions and to hear, first hand, both their opponent's version of the matters in dispute and a neutral assessment of the merits of the case.

1. Corporation or Other Entity. A party other than a natural person (*e.g.*, a corporation or an association) satisfies this attendance requirement if represented by a decision maker(s) (other than outside counsel) who has full settlement authority and who is knowledgeable about the facts of the case.

2. Government Entity. A unit or agency of government satisfies this attendance requirement if represented by a person who has, to the greatest extent feasible, full settlement authority, and who is knowledgeable about the facts of the case, the governmental unit's position, and the procedures and policies under which the governmental unit decides whether to accept proposed settlements. If the action is brought by the government on behalf of one or more individuals, at least one such individual also must attend.

3. Any party who fails to have physically in attendance the necessary decision maker(s) will be subject to sanctions.

B. Counsel. Each represented party must be accompanied at the arbitration session by the lawyer who will be primarily responsible for handling the trial of the matter. If a party is proceeding *pro se*, a request may be made to the Court to name a *pro bono* attorney to represent the *pro se* litigant at the arbitration.

C. Insurers. Insurer representatives, including, if applicable, risk pool representatives, are required to attend in person unless excused under paragraph D below, if their agreement would be necessary to achieve a settlement.

D. Request to be Excused. A person who is required to attend an arbitration hearing may be excused from attending in person only after a showing that personal attendance would impose an extraordinary or otherwise unjustifiable hardship. A person seeking to be excused must file a motion with the assigned Judicial Officer, no fewer than 15 days before the date set for the

session, simultaneously copying the Arbitration Clerk, all other counsel and unrepresented parties and the arbitrator(s). The motion must seeking to be excused must:

1. Set forth with specificity all considerations that support the request;
2. State realistically the amount in controversy in the case;
3. Indicate whether the other party or parties join in or object to the request; and
4. Be accompanied by a proposed order.

E. Participation by Telephone. A person excused from attending an arbitration in person must be available to participate by telephone.

5.9 AUTHORITY OF ARBITRATORS AND PROCEDURES AT ARBITRATION

A. Authority of Arbitrators. Arbitrators must be authorized to:

1. Administer oaths and affirmations;
2. Make reasonable rulings as are necessary for the fair and efficient conduct of the hearing; and
3. Make awards.

B. Prohibition on Facilitating Settlement Discussions. Arbitrators are not authorized to facilitate settlement discussions. If the parties desire assistance with settlement, the parties or arbitrator(s) may request that the case be referred to mediation (see Section 3 above), or a settlement conference before the Court.

C. Presumption against Bifurcation. Except in extraordinary circumstances, the arbitrator(s) must not bifurcate the arbitration.

D. Quorum. Where a panel of three arbitrators has been named, any two members of a panel must constitute a quorum, but the concurrence of a majority of the entire panel must be required for any action or decision by the panel, unless the parties stipulate otherwise.

E. Testimony.

1. Subpoenas. Attendance of witnesses and production of documents may be compelled in accordance with F.R.Civ.P. 45.
2. Oath and Cross-examination. All testimony must be taken under oath or affirmation and must be subject to such reasonable cross-examination as the circumstances warrant.
3. Evidence. In receiving evidence, the arbitrator(s) must be guided by the Federal Rules of Evidence, but must not thereby be precluded from receiving evidence which the arbitrator(s) consider(s) relevant and trustworthy and which is not privileged.

F. Transcript or Recording. A party may cause a transcript or recording of the proceedings to be made but must provide a copy to any other party who requests it and who agrees to pay the reasonable costs of having a copy made.

G. Default of Party. The unexcused absence of a party must not be a ground for continuance, but damages must be awarded against an absent party only upon presentation of proof thereof satisfactory to the arbitrator(s).

5.10 AWARD AND JUDGMENT

A. Form of Award. An award must be made after an arbitration under this Rule. Such an award must state clearly and concisely the name or names of the prevailing party or parties and the party or parties against which it is rendered, and the precise amount of money, if any, awarded. It must be in writing and (unless the parties stipulate otherwise) be signed by the arbitrator or by at least two members of a panel. No arbitrator must participate in the award without having attended the hearing. Costs within the meaning of F.R.Civ.P. 54 and Civil LR 54.1 may be assessed by the arbitrator(s) as part of an arbitration award.

B. Filing and Serving the Award. Within 10 days after the arbitration hearing is concluded, the arbitrator(s) must deliver the award to the Arbitration Clerk in an unsealed envelope with a cover sheet stating: "Arbitration Award." The cover sheet also must list the case caption, case number and name(s) of the arbitrator, but must not specify the content of the award. The Clerk must note the entry of the arbitration award on the docket and promptly serve copies of the arbitration award on the parties.

C. Sealing of Award. Each filed arbitration award must promptly be sealed by the Clerk. The award must not be disclosed to any Judicial Officer who might be assigned to the case until the Court has entered final judgment in the action or the action has been otherwise terminated, except as necessary to assess costs or prepare the report required by Section 903(b) of the Judicial Improvements and Access to Justice Act.

D. Entry of Judgment on Award. If no party has filed a demand for trial *de novo* (or a notice of appeal, which must be treated as a demand for trial *de novo*) the Clerk must enter judgment on the arbitration award in accordance with F.R.Civ.P. 58. A judgment so entered must be subject to the same provisions of law and must have the same force and effect as a judgment of the Court in a civil action, except that the judgment must not be subject to review in any other court by appeal or otherwise.

5.11 TRIAL *DE NOVO*

A. Time for Demand. If any party files and serves a demand for trial *de novo* within 14 days of entry of the filing of the arbitration award, no judgment thereon must be entered by the Clerk and the action must proceed in the normal manner before the assigned Judicial Officer. Failure to file and serve a demand for trial *de novo* within this 14-day period waives the right to trial *de novo*.

B. Limitation on Admission of Evidence. At the trial *de novo* the Court must not admit any evidence indicating that there has been an arbitration proceeding, the nature or amount of any award, or any other matter concerning the conduct of the arbitration proceeding, unless:

1. The evidence would otherwise be admissible in the trial under the Federal Rules of Evidence, or

2. The parties have otherwise stipulated.

C. Award Not to be Attached. A party filing a demand for a trial *de novo* must not attach the arbitration award.

5.12 STIPULATION TO BINDING ARBITRATION

At any time before the arbitration hearing, the parties may stipulate in writing to waive their rights to request a trial *de novo.* Such stipulation must be submitted to the assigned Judicial Officer for approval and must be filed. In the event of such stipulation, judgment must be entered on the arbitration award after the award is received by the Arbitration Clerk.

5.13 FEDERAL ARBITRATION ACT

Nothing in these ADR Policies and Procedures Rules limits any party's right to agree to arbitrate any dispute, regardless of the amount, pursuant to Title 9, United States Code, or any other provision of law.

6. CONFIDENTIALITY

A. General Rule. Except as provided in subsection D of this Section 6, this Court, the ADR Coordinator, all neutrals, all counsel, all parties and any other person who participates (in person or by telephone) in (i) any ADR process described in Sections 1 through 5 of these Policies and Procedures, or (ii) any private ADR process pursuant to Court order, shall treat as "confidential information" (i) the contents of all documents created for or by the neutral, (ii) all communications and conduct during the ADR process, and (iii) all "communications in connection with" the ADR process.

B. "Communications in connection with" any ADR process include nonverbal, oral and written communications made by, between, or among (i) a party, (ii) counsel for a party, (iii) a neutral, (iv) a member of the neutral's staff, (v) the ADR Coordinator, or (vi) any other person present to further the ADR process, when the communication occurs (x) during any ADR process, or (y) before or after any ADR process and is made by or to the neutral, a member of the neutral's staff, or the ADR Coordinator.

C. "Confidential information":

1. shall only be disclosed to those involved in the ADR process, and shall not be disclosed to any other person, specifically including the assigned Judicial Officer or his or her staff;

2. shall not be used for any purpose, including impeachment, in any pending or future proceeding.

D. Limited Exceptions to Confidentiality. This Section 6 does not prohibit:

1. Disclosure of any confidential information the neutral is required to report to the Court pursuant to (a) Sections 3.3B or 4.3B hereof, both of which provide that a failure to

pay the neutral must be brought to the Court's attention, or (b) Sections 3.10 or 4.12 hereof, both of which address the mandatory report of the neutral.

2. Disclosure to the Court in writing of the failure of any party, party representative, insurer or risk pool representative to appear as required pursuant to Sections 3.8, 4.9 or 5.8 of these Policies and Procedures and as designated in a Court Order. The disclosure permitted by this exception is only that the party, party representative, or insurer or risk pool representative failed to appear and does not include any portion of any communication in connection with the ADR process relating to the failure to appear.

3. Disclosure of specifically identified confidential information when all parties agree in writing that such specifically identified information may be disclosed.

4. Disclosure of confidential information by the neutral to the extent that such disclosure is necessary for the neutral to respond to, or defend against, a claim or allegation of professional misconduct or malfeasance.

5. Disclosure of a written settlement document signed by the parties in an action or proceeding to enforce the settlement agreement expressed in the document, unless the settlement document by its terms states that it is unenforceable or not intended to be legally binding.

6. To the extent that the communication or conduct is relevant and admissible evidence in a pending criminal proceeding, as determined by a court, disclosure of:

a. a threat of bodily injury;

b. a threat to damage real or personal property under circumstances constituting a felony; or

c. conduct causing direct bodily injury.

7. Disclosure of a fraudulent communication made during a mediation or ENE process to the extent that such communication is relevant and admissible evidence in a pending action to enforce or set aside an agreement reached in the mediation or ENE process as a result of that fraudulent communication.

8. Disclosure of any document which, although referenced or used in an ADR process, exists independently of the ADR process.

9. Disclosure of an arbitration award if no party timely files a demand for trial de novo (or a Notice of Appeal) as provided in Section 5.11.A of these Policies and Procedures.

E. Miscellaneous

1. The neutral shall not be called to testify as to what transpired in an ADR process.

2. No one shall make any recording or transcript of any ADR session or proceeding without the prior written consent of all parties and other person participating in the ADR session.

3. A mediator or neutral evaluator shall: (a) ask the parties to sign an agreement to mediate or to engage in ENE; (b) ask all persons participating in a mediation or ENE to sign a confidentiality agreement, as part of the mediation or ENE agreement or as a separate document; and (c) clarify by agreement or engagement letter (i) that he or she serves only as a neutral and not as legal counsel for any participant and (ii) all fees and expenses that will be charged and payment terms.

7. OTHER ADR PROCESSES

7.1 Private ADR There are numerous private sector providers of ADR services including arbitration, mediation, fact-finding, neutral evaluation and private judging. Private providers may be lawyers, law professors, retired judges or other professionals with expertise in dispute resolution techniques. Virtually all 28 private sector providers charge fees for their services. The Court is willing to refer cases to private providers with the stipulation of the parties. The assigned Judicial Officer will take appropriate steps to assure that a referral to private ADR does not result in an imposition on any party of an unfair or unreasonable economic burden. At the conclusion of the private ADR session, with the exception of private arbitration, the neutral is to complete and file the Report of the Neutral, indicating that the session was held and if the session resulted in a settlement. At the conclusion of the private arbitration, the arbitrator is to file a report only indicating the date that the arbitration was held.

7.2 Special Masters.
The Court may appoint special masters to serve a wide variety of functions, including, but not limited to: discovery manager, fact finder or host of settlement negotiations. Generally the parties pay the master's fees.

7.3 Non-binding Summary Bench or Jury Trial.
A summary bench or jury trial is a flexible, non-binding process designed to promote settlement in complex, trial-ready cases headed for protracted trials. The process provides litigants and their counsel with an advisory verdict after a short hearing in which the evidence may be presented in condensed form, usually by counsel and sometimes through witnesses. This procedure, as ordinarily structured, provides the litigants an opportunity to ask questions and hear the reactions of the Judicial Officer or jury. The Judicial Officer's or jury's non-binding verdict and reactions to the legal and factual arguments are used as bases for subsequent settlement negotiations.