



Dispute Resolution Procedures

A. Introduction

The United States District Court for the Eastern District of New York provides in this introduction an overview of Court-sponsored processes which may result in faster and less costly civil dispute resolution than full-scale, formal litigation. The Court urges counsel to share this material with their clients so that together they can explore the full range of dispute resolution and case management methods available.

Traditional litigation may impose substantial costs long before the trial commences. Further, the current congestion of trial calendars in Federal Courts, caused in part by the substantial criminal docket, may result in lengthy delays. In this environment, alternative processes for dispute resolution offer many advantages, including the following:

Reduced time to disposition;

Streamlined and less costly discovery;

More effective case management (for pre-and post-trial matters);

Increased confidentiality;

Facilitation of early, direct communication and understanding among the parties of the essential issues on each side of the dispute;

Preservation of ongoing party relations;

Savings in trial expenses;

Providing qualified, neutral experts to hear complex matters (with the parties having a role in selecting them under some processes).

While this introduction describes only the programs that the Court sponsors, there are other dispute resolution procedures that have been developed in the private sector and that have proven effective in a wide range of cases.

One of the Court-sponsored options, (Court-Annexed Arbitration) is mandatory for cases that fit the criteria and are valued at less than \$150,000. However, the parties to any type of case may voluntarily refer their matter to any of the Court programs. All the Court-sponsored procedures except consent trials before Magistrate Judges are not binding, meaning that if they fail to resolve the case, the parties retain their full rights to a trial. Of course, if the parties agree, all these procedures can be binding and appeals can be waived.

Parties and counsel who are considering voluntary participation in alternative dispute resolution should weigh the comparative benefits of each dispute resolution process before deciding which is most appropriate for their particular case. For example, Court-Annexed Arbitration can be effective for many contract and tort cases, especially when outcome is likely to turn on credibility of witnesses. In contrast, the Court appointment of a special master may be warranted for technical or complicated matters involving multiple parties and substantially greater sums. With the consent of the parties, a United States Magistrate Judge may preside over any civil trial, jury or non-jury, in the same manner as an

Article III Judge, and can usually hear the case much sooner as a result of a lighter trial calendar. Some factors parties should consider in deciding which option to pursue include:

- The cost of the process relative to the amount of the dispute involved;
- The importance of prompt resolution;
- Whether an informal or formal proceeding would be beneficial;
- Whether privacy interests need special protection;
- What role the parties want the third-party neutral to play;
- Whether binding or non-binding options should be pursued;
- The number of issues and parties involved in the dispute;
- Whether a transcript of the proceeding should be made; and
- The desirability of establishing precedent.

B. Court-Sponsored Dispute Resolution Processes

The Eastern District of New York sponsors five special procedures to facilitate resolution of disputes;

- I. Court-Annexed Arbitration;
- II. Mediation;
- III. Consensual Jury or Court Trial Before a United States Magistrate Judge;
- IV. Settlement Conferences; and
- V. Special Masters.

These programs are briefly described below. The referenced authorities and contacts, at the end of each subsection, may be consulted for additional information.

I. Court-Annexed Arbitration

The Eastern District of New York is one of ten districts with a mandatory Court-Annexed Arbitration program. The Eastern District of New York program was established in January, 1986, when the Court adopted a Local Arbitration Rule.

The Clerk's Office designates and processes for compulsory Court-Annexed Arbitration all civil cases (excluding Social Security cases, tax matters, prisoners' Civil Rights cases and any action based on an

alleged violation of a right secured by the Constitution of the United States or if jurisdiction is based in whole or in part on Title 28 U.S.C. S 1343) wherein money damages only are being sought in an amount not in excess of \$150,000 exclusive of interest and costs.

The cases referred to Court-Annexed Arbitration are heard by one qualified arbitrator, unless one or more parties request a panel of three, usually within six months of the filing of the answer. Attendance at the arbitration hearing and the production of documents may be compelled by subpoena. Testimony is given under oath and witnesses may be cross-examined. The Federal Rules of Evidence serve as guidelines but are not rigidly enforced. A party may arrange to have the proceedings reported and transcribed at the party's own expense.

Numerous benefits can be obtained from Court-Annexed Arbitration. Because arbitration is held relatively early in the case, parties can save time and money. The process is fair, as a neutral assessment of the case is made by a qualified, impartial attorney selected by the Clerk's Office from a Court certified list of arbitrators. An absolute right to a full trial is preserved. To obtain a trial de novo, a party must file a written demand within thirty (30) days of entry of judgment on the arbitration award. If no such demand is filed, the award becomes the final judgment of the Court (and is not subject to appellate review). Absent a stipulation, the amount of any arbitration award would not be admissible at a subsequent trial de novo. Pursuant to 28 U.S.C. S 655 and the EDNY's Local Arbitration Rule at Section 7, upon a timely demand for a trial de novo the action shall be restored to the docket and the case shall proceed as if it had not been referred to arbitration. The arbitration award also may provide a useful starting point for settlement discussions. As important, the imminence of the arbitration hearing often encourages counsel to evaluate their case carefully and to enter serious settlement negotiations before the arbitration is held.

For parties whose cases have not been referred to arbitration, the Local Civil Rule 83.10 permits parties to stipulate to arbitration.

Subject Matter Scope: compelled in cases that involve an amount in controversy not exceeding \$150,000 (excluding punitive or exemplary damages, interest and costs). Consult the Eastern District of New York's Local Arbitration Rule for particulars.

Invocation: Referral by the Clerk of Court where the subject matter criteria and the dollar amount threshold pursuant to the Local Arbitration Rule are satisfied, or by stipulation of the parties and approval of the Court.

Right of Appeal: Right to de novo trial if demanded within thirty days of entry of judgment on arbitration award. If timely demand for trial de novo is not made, the arbitrator's award becomes the final judgment and is not reviewable by appeal. Upon making a demand for trial de novo, the moving party shall, unless permitted to proceed in forma pauperis, deposit with the Clerk of Court an amount equal to the arbitration fees paid to the arbitrator. The sum so deposited shall be returned to the party demanding a trial de novo in the event that party obtains a final judgment more favorable than the arbitration award. If the party demanding a trial de novo does not obtain a more favorable result after trial or if the Court determines that the party's conduct in seeking a trial de novo was in bad faith, the sum so deposited shall be paid by the Clerk to the Treasury of the United States.

II. Court-Annexed Mediation

Mediation is a Court-Annexed ADR program available to litigants in civil cases filed in the Eastern District of New York. Litigants choosing to avail themselves of Court-Annexed Mediation will be offered the options of (a) using a mediator from the Court's qualified panel; (b) selecting a mediator on their own; or seeking the assistance of a reputable neutral ADR organization in the selection of a mediator.

Mediation is distinguished from adjudication. Unlike a judge or arbitrator, a mediator has no power to impose a solution on the parties. The mediator's sole function is to help the litigants resolve their matter consensually. The introduction of a mediator into negotiation can prove to be a remarkable catalyst for settlement.

The mediator's role and the mediation process can take various forms, depending on the nature of the dispute and the relationship of the parties. The mediator can identify and narrow issues; focus on each sides' underlying interests; convey messages between the parties; and explore agreement and highlight the consequences of not settling. The mediator can often identify options beyond the view of any one party.

Eligible Cases: Judges and Magistrate Judges may designate civil cases for inclusion in the mediation program, and when doing so shall prepare an order to that effect. Alternately, and subject to the availability of qualified mediators, the parties may consent to participate in the mediation program by preparing and executing a stipulation signed by all parties to the action and so ordered by the Court.

Invocation: May be ordered by the Court or initiated by the parties.

Right to Appeal: Not applicable because this is a non-binding process. If there is no final agreement between the parties, the case can proceed to trial with all appellate rights preserved.

III. Consent to Jury or Court Trial Before a Magistrate

By written stipulation, the parties to any civil action may elect to have a Magistrate Judge (instead of the assigned Article III Judge) conduct all proceedings in any civil case, including presiding over a jury or a non-jury trial. A trial before a Magistrate Judge is governed by exactly the same procedural and evidentiary rules as trial before a district judge and a right of appeal is automatically preserved directly to the United States Court of Appeals under the same standards which govern appeals from district Court judgments.

Parties often consent to resolution of their civil disputes by Magistrate Judge bench or jury trial because: (1) Magistrate Judges have less crowded trial calendars and do not set multiple cases for trial on the same date (as many judges do), thus usually permitting the parties to secure an earlier and firm trial date; (2) jurisdiction extends to any civil matter within the jurisdiction of the federal Courts; (3) a formal trial is conducted under the Federal Rules of Evidence and the Federal Rules of Civil Procedure; (4) a full right of appeal is retained; and (5) a transcript of the proceedings may be taken by Court reporter or by electronic sound recording.

Subject Matter Scope: Any civil proceeding.

Invocation: Written consent of the parties indicated on a form available from the Clerk's Office. 28 U.S.C. S 636(c)(2).

The parties may also discuss reference to a Magistrate Judge at pretrial conference. See Fed.R.Civ.P. 16(C)(6).

Right of Appeal: There is a direct appeal to the U.S. Court of Appeals. See 28 U.S.C. § 636(c)(3); Fed.R.Civ.P. 73(c). As an alternative, the parties may choose to preserve a right to appeal to the U.S. District Court. See 28 U.S.C. § 636(c)(4); Fed.R.Civ.P. 73(d) & 74-76.

Authority: 28 U.S.C. § 636(c); Fed.R.Civ.P. 16(c)(6) & 73-76.

Contact: Courtroom Deputy Clerk for the Judge to whom the action is assigned or the Clerical Assistant for the Magistrate Judge to whom the case had been referred for pretrial matters.

IV. Settlement Conferences Conducted by a Judge or Magistrate Judge

A judicially conducted settlement conference may be held at any time during the pendency of a civil case. Most settlement conferences are conducted by Magistrate Judges but district judges also help with settlement negotiations as their calendars permit. Normally, the settlement process is initiated upon the request of a party, by the judge to whom the action is assigned, or by the Magistrate Judge to whom the case was referred. However, the parties should be prepared to discuss the possibility of settlement at any pretrial conference, including the initial status conference.

Counsel who attend the settlement conference are required to be thoroughly familiar with the case and have authority to negotiate a settlement.

The settlement judge or Magistrate Judge acts as a mediator or facilitator at the settlement conference, promoting communication among the parties, holding one-on-one sessions with each side, offering an objective assessment of the case, and suggesting settlement options. A Magistrate Judge or Judge has no power to impose settlement and does not attempt to coerce a party to accept any proposed terms. If settlement is reached, the parties will sign an agreement, thereby avoiding the cost of trial or other litigation. If no settlement is reached, the case proceeds to trial before the Judge or Magistrate Judge to whom the action is assigned.

Confidentiality is maintained at the conference, which fosters frank, open discussions. Written settlement conference statements are submitted directly to the Judge or Magistrate Judge and are not made part of the case file. Positions taken in settlement negotiations generally may not be referred to if the case ends up being tried.

A settlement conference is suitable for any kind of civil case, from the most straightforward to the most complex. A special master may be selected when the available judicial officers do not have the time for the negotiation or when specialized subject-matter expertise is required.

The settlement conference may aid the identification and narrowing of issues in dispute. Creative lawyers also can use settlement conferences to establish streamlined discovery plans. A settlement conference may be conducted at any time.

Subject Matter Scope: Any civil action.

Invocation: On motion of the Judge or Magistrate Judge to whom the action is assigned or on motion of a party with approval by the Court. The parties may also discuss "the possibility of settlement" at the pretrial conference. Fed.R.Civ.P. 16(c)(7).

Right of Appeal: Not applicable; the case proceeds to trial if settlement is not reached.

Authority: Fed.R.Civ.P. 16(a)(5) & (c)(7). See also Fed.R.Evid.P. 408 (concerning inadmissibility for certain purposes of statements made in settlement negotiations).

Contact: Courtroom Deputy Clerk or the Clerical Assistant for the Judge or Magistrate Judge to whom the civil case is assigned or referred.

V. Special Masters

A Special Master is a private lawyer, retired judge, law professor, or other person who may be appointed to perform any of a wide range of tasks, including case management, discovery resolution, fact-finding, and settlement. The Court may also appoint a Magistrate Judge to serve as a Master. A master may be appointed in response to a motion or on the Court's own initiative. Special masters have contributed significantly to dispute resolution in several roles, including:

Managing the case development process;

Resolving discovery disputes;

Monitoring discovery (e.g., depositions and document production);

Reviewing documents to determine whether they are protected by privilege or fall within the terms of a protective order;

Performing technical or specialized functions (such as auditing);

Fact-finding;

Assisting in settlement negotiations, (e.g. in complex cases and class actions); and

Monitoring the implementation of equitable decrees after trial.

Compensation for masters is determined by the Judge. The court may appoint a Magistrate Judge. The parties may be ordered to share equally the master's hourly fee if a private lawyer was chosen. When a Magistrate Judge is designated to serve as a master, no fee is charged.

The authority of the master is fixed by the Court's order of reference. Depending on the terms of the appointment, a master may compel the production of evidence, rule on the admissibility of evidence, and examine witnesses or parties under oath. Witnesses may be subpoenaed by the parties to appear before the master. Masters' determinations are subject to district court review. In non-jury trials, a

Court accepts the findings of fact of the master unless clearly erroneous. Within ten (10) days of service, a party may file an objection to such findings. In jury trials, a master's findings are admissible as evidence. The parties may also stipulate that a master's finding be deemed final.

There can be several advantages to using a special master. The order of reference to a master can be carefully tailored to fit a particular case need. Although the direct cost of a special master can be substantial (depending on the terms of compensation), in appropriate cases the appointment of a special master resulted in substantial savings to the litigants. Masters can reduce dramatically the time to resolve pretrial disputes. The master's immediate availability and thorough familiarity with the details of the case can discourage litigants from taking disruptive and costly positions. The master can bring expertise in a specialized field to the case that a generalist judge may not have. In addition, parties retain the right to have the Court review decisions made by the master. The use of a master is generally appropriate in matters where the amount in controversy is substantial and technical issues are involved. Masters may be used to conduct lengthy settlement negotiations for which a Judge or Magistrate Judge may not have time. In class actions, masters have been used successfully not only to administer distributions of funds, but also to facilitate negotiations about the substantive terms of settlement, about attorneys' fees and about setting up claims procedures.

Subject Matter Scope: Any civil matter referred by the district Court and subject to the specifications and limitations of the appointment order.

Invocation: At the request of the parties or by the Court without request. Fed.R.Civ.P. 53.

The parties may discuss reference to a master at any pretrial conference. Fed.R.Civ.P. 16(c)(6).

Right of Appeal: Fixed by order of reference or Fed.R.Civ.P. 53. Rulings and findings generally are reversible only if clearly erroneous.

Authority: Fed.R.Civ.P. 16 (6) & 53, as well as the Court's inherent authority. Concerning the possibility of a Magistrate Judge serving as a special master, see 28 U.S.C. § 636(b)(2); Fed.R.Civ.P. 53(a),(b)&(f).

Contact: Courtroom Deputy Clerk or the Clerical Assistant for the Judge or Magistrate Judge to whom the civil case is assigned or referred.