By Donald L. Swanson

ADR Act of 1998: A Reflection of Its Effectiveness and Shortfalls

Oct. 31, 2018, is the 20th anniversary of the Alternative Dispute Resolution Act of 1998 (the "ADR Act"),[1] which has had a profound impact on the practice of law throughout the federal court system. However, it also has shortfalls that are yet to be rectified.

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A Mediation Model: From Circuit Courts of Appeals

Congress explicitly identified, in the ADR Act, a mediation model for district courts to emulate. Section 2 of the ADR Act's preamble[2] is Congress's official "Findings and Declaration of Policy" supporting the ADR Act. Section 2(3) states:

> Congress finds that ... (3) the continued growth of Federal appellate court-annexed mediation programs suggests that [mediation] can be equally effective in resolving disputes in the Federal trial courts; therefore, the district courts should consider including mediation in their local alternative dispute resolution programs.

Here is a translation of Congress's finding in Part (3): "Hey, district courts, the U.S. circuit courts of appeals are using mediation effectively — and you might try following their model!"

A D.C. Circuit Example

Nearly all of the 13 circuit courts of appeals have similar mediation programs. One such exemplary program that Congress had in mind in 1998 was the District of Columbia (D.C.) Circuit Court's mediation program.

According to a 1998 report by the D.C. Circuit,[3] its program began in 1987 as a "one year experiment" to address case-management problems arising from "a [60] percent increase in filings and pending cases over a two-year period." The mediation program quickly became "an integral part of the Court's case-management system," because mediated settlements resolve cases, reduce demands on judges and law clerks, curtail the expense of protracted appeals, and meet the needs of parties "more effectively" than judicial disposition. Even when cases do not settle, (1) mediation might still result in settlement "weeks or even months later, " and (2) issues and positions "are clarified" in mediation, resulting in "more efficient briefing." The D.C. Circuit's mediation program assigns civil cases to mediation by staff attorneys based on a number of factors, such as nature of the issues, incentives to settle or limited issues. Parties are encouraged to request mediation, and "confidentiality is ensured."[4]

In 1998, such details were common among mediation programs in nearly all 13 circuit courts of appeals and were precisely what Congress had in mind when it adopted the ADR Act. Indeed, § 2(3) of the preamble states that the "[f]ederal appellate court-annexed mediation programs" are a model for what district courts "should consider" doing.

ADR Act Directives

The ADR Act directs each district court to create an alternative dispute resolution (ADR) plan. Nearly all district courts have complied with this directive, with mediation becoming a primary focus of such plans. The ADR Act also directs each district court to do such things as "encourage and promote" the use of ADR, "require" litigants to "consider" using ADR at "appropriate" stages of litigation, and "provide" at least one ADR process "in all civil cases."

The ADR Act's Effectiveness

The ADR Act's effectiveness has been profound. In many U.S. district courts these days, where the ADR Act's directives have been ingrained over many years, mediation reigns supreme: Litigators in civil cases focus on mediation as a primary case-resolution tool. Judicial actions that provide ADR processes, "encourage and promote" ADR, "require" litigants to "consider" using ADR and persist over time (as required by the ADR Act) are effective. A mediation culture in such courts takes hold so that attorneys routinely incorporate mediation into their case strategies, whether required to do so or not.

Bankruptcy courts have been lagging adopters of ADR, but 80 percent of all 94 districts have a local

1 The ADR Act passed the House of Representatives by a vote of 405-2 on April 21, 1998, and passed the Senate unanimously on Oct. 7, 1998. Then-President Bill Clinton signed it into law on Oct. 30, 1998, and it is codified at 28 U.S.C. §§ 651, *et seq.*

2 The ADR Act's preamble is printed in the "Congressional Findings and Declaration of Policy" notes, under 28 U.S.C. § 651.

3 "Appellate Mediation Program," Report by the U.S. Court of Appeals for the District of Columbia Circuit, dated April 14, 1998.

4 *Id.*

mediation rule of some type,[5] and mediation is an important — if not central — tool in many highly complex and contentious bankruptcy cases.[6] Two examples of expanding and successful uses of mediation in bankruptcy courts come from Delaware and New Jersey.

In 2004, the U.S. Bankruptcy Court for the District of Delaware adopted a local rule mandating mediation for all preference cases. In 2013, it extended mandatory mediation to "all adversary proceedings filed in Chapter 11 cases," and added an early mediation requirement for preference cases with less than $75,000 at stake.

In 2013, the U.S. Bankruptcy Court for the District of New Jersey added a mandatory element to its local mediation rules. It is called "presumptive mediation," which means that a case will go through mediation before a trial can occur, unless a specified exception applies.

Surprising Shortfall: Mandated Mediations

"I'm not comfortable requiring parties to mediate, because mediation is a voluntary process." This is a common — if not ubiquitous — sentiment among federal judges. Then, there is a typical follow-on and rhetorical (it assumes no adequate answer) question: Where do I get legal authority to order parties into mediation? It is always surprising to hear such comments from a federal judge, because the entire sentiment is off-base. There is a clear-and-adequate answer to the rhetorical question — in the ADR Act. Here's how the ADR Act grants such authority, in clear and unequivocal language:

> Any district court that *elects to require the use of* alternative dispute resolution ... *may do so only with respect to mediation*, early neutral evaluation, and, if the parties consent, arbitration.[7]

Since each bankruptcy court is established by Congress as a "unit" of its district court,[8] this "district court" authority also extends to bankruptcy courts. The language of the ADR Act supports this extension by explicitly including "adversary proceedings in bankruptcy" in the "civil actions" to which the ADR Act applies.[9]

Moreover, the ADR Act's identification of circuit court mediation programs as a model is significant to the mandated-mediation issue. Nearly all circuit court mediation programs assign cases to mediation — *i.e.*, the vast majority of all circuit court mediations are mandated, and few are voluntary. By identifying circuit court mediation programs in the ADR Act as models to be emulated, Congress endorsed the mandatory feature of those programs. Accordingly, one shortfall in the ADR Act's implementation is a failure of education on Congress's grant of authority for mandated mediations.

A Confidentiality Shortfall: Federal Rule vs. Local Rules

Regarding ADR "confidentiality," the ADR Act states: "Until such time" as a federal rule is adopted on "confidentiality of" ADR processes, "each district court shall, by local rule," provide for "confidentiality of" ADR processes and "prohibit disclosure of confidential" ADR communications.[10]

This language (1) presumes a federal rule on ADR confidentiality will be adopted, and (2) directs the prompt adoption of local confidentiality rules to fill the gap until a federal rule is adopted.

Federal Confidentiality Rule

Two decades have passed since the ADR Act's enactment, and we still do not have a rule on ADR confidentiality in the Federal Rules of Civil Procedure, Federal Rules of Evidence or Federal Rules of Bankruptcy Procedure. Not one.

Moreover, ABI's Mediation Committee has been promoting a federal bankruptcy rule on mediation confidentiality — without success. How can a two-decades-long inaction be consistent with the ADR Act's federal confidentiality rule presumption? It can't. This is a shortfall in compliance with the ADR Act.

Local Confidentiality Rules

The vast majority of all U.S. district courts and bankruptcy courts have local rules on mediation confidentiality. However, the effectiveness of such rules to ensure confidentiality is uncertain. For example, the Ninth Circuit Court of Appeals has declared that since "privileges are created by federal common law," it is "doubtful that a district court can augment the list of privileges by local rule";[11] a district court ruling that excluded mediation information under a state mediation privilege must be reversed because "the federal law of privilege applies"[12]; and although the "federal privilege law governs" the admissibility of mediation information into evidence, the court "need not determine" whether a mediation privilege "should be recognized under federal common law" or what "the scope of such a privilege" might be.[13] These Ninth Circuit rulings create a direct and controlling confidentiality problem for district and bankruptcy courts throughout the western U.S. — and an indirect problem elsewhere.

However, the Ninth Circuit rulings seem to conflict with § 652(d) of the ADR Act. Shouldn't ADR Act provisions be considered in disputes over ADR confidentiality? After all, Rule 501 of the Federal Rules of Evidence declares that privileges are governed by the "common law — as interpreted" by U.S. courts, unless a federal statute or rule "provides otherwise." In addition, 28 U.S.C. § 652(d) provides otherwise: It directs that local rules fill the ADR confidentiality gap until

5 *See* Donald L. Swanson, "A List of Bankruptcy Districts that HAVE and HAVE NOT Adopted Local Mediation Rules," *available at* mediatbankry.com (Dec. 6, 2016; updated to Dec. 1, 2017).

6 *See, e.g., City of Detroit* bankruptcy (Case No. 13-53846 in the U.S. Bankruptcy Court for the Eastern District of Michigan) and *Commonwealth of Puerto Rico* proceedings (Case No. 17-03283 in the U.S. Bankruptcy Court for the District of Puerto Rico).

7 28 U.S.C. § 652(b) (emphasis added).

8 28 U.S.C. § 151 states that "bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter."

9 28 U.S.C. § 651(b) states: "AUTHORITY — Each United States district court shall authorize, by local rule ... the use of alternative dispute resolution processes in all civil actions, *including adversary proceedings in bankruptcy*, in accordance with this chapter" (emphasis added).

10 28 U.S.C. § 652(d) states: "CONFIDENTIALITY PROVISIONS — Until such time as rules are adopted under chapter 131 of this title providing for the confidentiality of alternative dispute resolution processes under this chapter, each district court shall, by local rule adopted under section 2071(a), provide for the confidentiality of the alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications."

11 *The Facebook Inc. v. Pac. Nw. Software Inc.*, 640 F.3d 1034, 1041 (9th Cir. 2011).

12 *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 835 F.3d 1155, 1158 (9th Cir. 2016).

13 *Wilcox v. Arpaio*, 753 F.3d 872, 876-77 (9th Cir. 2014); *see also Babasa v. Lenscrafters Inc.*, 498 F.3d 972, fn.1 (9th Cir. 2007).

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a federal confidentiality rule has been adopted. Therefore, shouldn't local confidentiality rules have the same force and effect, for privilege purposes, as a federal rule? This author believes they should.

A Compliance Shortfall: Delinquent Courts

Despite the ADR Act's successes, some courts are still delinquent in complying with the ADR Act's directives. For example, some courts still do not have local ADR confidentiality rules — and some have no ADR rules at all.[14] A handful of bankruptcy courts have a one- or two-sentence mediation rule authorizing mediation, but provide nothing on confidentiality.[15] For example, this is the entire set of local mediation rules in the U.S. Bankruptcy Court for the District of Minnesota:

> Local Rule 9019-2. Mediation. The court may refer any adversary proceeding or contested matter for mediation by any other federal judge or any mediator chosen by the parties.

Then there is the U.S. Bankruptcy Court for the Northern District of Illinois, which had a full set of local mediation rules that were in compliance with ADR Act directives, but it no longer wanted such rules, so it revoked them as being "unnecessary."[16] The court replaced those rules (effective April 16, 2018) with Local Rule 9060-1, which provides that "parties to an adversary proceeding or contested matter need not request court approval before pursuing mediation or arbitration" unless the Bankruptcy Code or Federal Bankruptcy Rules require otherwise. These actions are particularly striking in today's context of federal laws (*e.g.*, the ADR Act and the Administrative Dispute Resolution Act of 1996) establishing ADR as a preferred dispute-resolution process throughout the entire federal government.

Conclusion

The ADR Act has had a meaningful impact on the practice of law in federal courts. Mediation is now predominant in many district courts throughout the U.S. and is also becoming increasingly significant in bankruptcy courts. There are still deficiencies in the ADR Act's effectiveness, most notably in (1) judicial attitudes toward mandated mediations, (2) deficiencies in federal and local rules on ADR confidentiality, and (3) failures by some courts to comply with ADR Act directives. However, at the 20-year anniversary of the ADR Act's enactment, we should acknowledge its constructive impact as an alternative dispute-resolution tool. abi

14 *See* Swanson, *supra* fn. 5.
15 *Id.*
16 Robert M. Fishman, "It's All About the Culture," *available at* mediatbankry.com (March 22, 2016).