Law Division, Civil Part
Complementary Dispute Resolution (CDR) Programs

Resolving Civil Cases Without A Trial

New Jersey Courts
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Independence • Integrity
Fairness • Quality Service

"The New Jersey Judiciary should provide citizens with a full set of options for resolution of disputes including traditional litigation as well as various complementary forums, so as to continue to fulfill the commitment to provide the highest quality of justice possible."

Final Report Supreme Court Task Force
on Dispute Resolution, 1990

Complementary Dispute Programs (CDR) constitute an integral part of the judicial process, intended to enhance its quality and efficacy. Attorneys have a responsibility to become familiar with available CDR programs and inform their clients of them"

(See *R.* 1:40-1)

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Introduction

Although the Law Division, Civil Part of Superior Court handles many thousands of cases every year, only a relatively small percentage of these - less than 2 percent – ever reach a judge for trial. How are the remainder to be assured quality justice?

The New Jersey Judiciary recognizes that every dispute is unique. In some cases, perhaps, trial would represent the most effective means of resolution. However, in many cases, experience has shown that other techniques may be more effective, efficient and meaningful to the participants.

The purpose of this booklet is to briefly describe court-sponsored complementary dispute resolution (CDR) techniques and programs available to litigants with cases in the Law Division, Civil Part of the Superior Court and to inform attorneys and litigants of alternatives to formal litigation. All of the programs discussed are non-binding unless the parties agree otherwise, and litigants may have recourse to the court for ultimate resolution of their cases.

Even when a case is not required to go to CDR, the parties and their lawyers can choose to voluntarily submit the dispute to the court's existing programs. *New Jersey Court Rules* 1:40 *et seq.* discuss CDR, and place upon attorneys the responsibility to become familiar with available CDR programs and to inform their clients of them.

Without sacrificing quality, court-sponsored CDR programs may offer many benefits, including:

- reduced time to disposition;
- streamlined and less costly discovery;
- more effective case management (for pre-trial and post-trial matters);
- increased confidentiality;
- facilitation of early, direct communication and understanding among the parties about the essential issues on each side of the dispute;
- participation of litigants in the resolution of their case;
- preservation of ongoing party relations;
- savings in trial expenses; and
- decreased psychological and emotional costs to litigants.

While this booklet describes only the programs that the court sponsors, there are other civil dispute resolution procedures that are available in the private sector and have proven effective in a wide range of cases. These include mediation, arbitration, fact-finding, conciliation, negotiation, and private trials. The role of the neutral can be played by experienced attorneys or other professionals with specialized expertise in dispute resolution techniques, retired judges, law professors and former government officials. Virtually all private sector providers charge fees for their services

Should you have any questions about any of the programs discussed in this booklet, please contact the vicinage Civil Division Manager.

Statewide Mediation Program

What is mediation?

Mediation is a dispute resolution process in which an impartial third party - the mediator - facilitates negotiations among the parties to help them reach a mutually acceptable settlement. The parties, with the assistance of their attorneys, work toward a solution with which they are comfortable. The purpose of mediation is not to decide who is right or wrong. Rather, its goal is to give the parties the opportunity to (1) express feelings and diffuse anger (2) clear up misunderstandings, (3) determine underlying interests

or concerns, (4) find areas of agreement, and ultimately, (5) incorporate these areas into solutions devised by the parties themselves.

How is mediation different from other dispute resolution processes?

The major distinction of mediation is that a mediator does not make a decision about the outcome of the case. The parties, with the assistance of their attorneys, work toward a solution with which they are comfortable.

How is a mediator selected for a case?

A roster of mediators is maintained by the court system and is posted on the Judiciary's website at njcourts.gov in a searchable format. When a case is referred to mediation, the parties have 14 days to select a mediator whom they feel is suitable, whether on the roster or not. If the parties do not timely select a mediator, the court-appointed mediator named in the Order of Referral will serve as the mediator. Court-appointed mediators have been approved for inclusion on a roster after careful screening to ensure that they meet educational, training and mentoring requirements set forth in *Court Rule* 1:40-12.

How much does mediation cost?

Under *Court Rule* 1:40-4(b), any mediator who is on the roster will provide the first two hours on a case, including an initial one hour session, without charge before a party may opt out of mediation. Thereafter, mediators will generally be paid their market rate fee which is to be shared by the parties in interest. Fees will be waived in any case covered by *Court Rule* 1:13-2(a). Any mediator selected by the parties who is not on the roster may negotiate a fee with the parties from the outset and need not provide the free time.

What happens in mediation?

There are certain ground rules the mediator will ask participants to follow. The first, and most important, is that with a few exceptions covered in *Court Rules* 1:40-4(c) and (d), what goes on in mediation is confidential. That is, what is said in mediation cannot be discussed outside of the mediation process unless the parties consent. Prior to mediation, the mediator will usually ask the attorneys to prepare a brief summary of the issues in dispute. Then, at the mediation session, the mediator will ask attorneys and their clients to make brief presentations about the issues from their own perspectives. After that, the mediator will help the parties to explore areas of possible compromise and to develop a solution that meets everyone's interests. Sometimes, the mediator may meet with the parties separately for a private discussion that might help move the parties toward a resolution. If an agreement is reached, a document will be prepared detailing the terms of the agreement. Thereafter, the mediator will notify the court that the case can be dismissed. If the case is not resolved, the mediator will advise the court, and the case will remain on the docket.

How about pretrial discovery?

Generally, pretrial discovery is not stayed while a case is in mediation. The case will be placed on the trial calendar at the end of the discovery period. If, however, the court determines that a stay of discovery is necessary, the court shall only provide for a stay of discovery by court order. Even if formal discovery is stayed, the mediator is authorized to facilitate the informal exchange of information materials needed to enhance the effectiveness of the mediation process.

What are the roles of counsel and litigants in mediation?

The goal of mediation is to reach an amicable resolution. Attorneys and parties are required to make a good faith effort to cooperate with the mediator and engage in constructive dialogue toward this end. Attorneys should prepare their clients prior to mediation by explaining what will happen, and particularly what the roles of both attorneys and clients are. They should also agree on who will be the principal spokesperson in presenting the party's view early in the mediation session. Throughout the process, attorneys act as advocates for their clients' interests. For example, attorneys may make brief opening summaries of the issues as they see them, but clients also should be given an opportunity to speak. In

mediation, understanding is often promoted when the parties explain their positions directly to each other. When it comes to discussing terms of settlement, litigants must play an active part, for it is their case and their settlement. During this process, attorneys should provide counsel on the advisability of settlement options, suggest options and be available for further consultation with their clients.

How does a case get into mediation?

Cases appropriate for referral to mediation can be identified by judges, court staff, or the parties themselves, at any point in the life of a case. A form of Order of Referral is prepared and signed by the judge. Certain case types are automatically referred to mediation after an answer is filed by the defendant. Parties desiring their case to be referred to mediation should contact the Civil Division Manager in the county in which the case is pending.

What are some of the advantages of mediation?

Some advantages of mediation include:

- Everything discussed at the mediation session is confidential;
- The result may benefit both or all sides and thus present a win/win solution;
- The outcome can be tailored to meet the unique needs of the case and the particular parties;
- Specially trained mediators assist the parties in fashioning more creative solutions not customarily occurring with other CDR techniques; and
- Mediation can be a more cost-efficient, less formal and more meaningful alternative to the traditional trial process.

What kinds of cases could benefit from mediation?

Mediation has been used successfully in a broad range of cases which exhibit characteristics such as:

- The parties have an ongoing business or personal relationship or have had a significant past relationship;
- Communication problems exist between the parties;
- The principal barriers to settlement are personal or emotional;
- Parties want to tailor a solution to meet specific needs or interests;
- Cases involve complex technical or scientific data requiring particular expertise;
- The parties have an incentive to settle because of time, cost of litigation, or drain on productivity;
- The parties wish to retain control over the outcome of the case; or
- The parties seek a more private forum for the resolution of their dispute.

While there is not any case type that could not potentially benefit from mediation, commercial, construction, environmental, Law Against Discrimination (LAD) cases, and certain General Equity and Probate cases are particularly suited to mediation because they tend to exhibit some of the characteristics described above.

At what time in the court process should a case be referred to mediation?

In the Civil Part of Superior Court, the following cases are referred to mediation within 90 days following an answer:

- Civil Rights (excluding suits filed by prisoners)
- Law Against Discrimination
- Environmental Litigation
- Real Property
- Contract/Commercial Transaction
- Tort
- Other Professional (not Medical Malpractice)

- Employment (other than CEPA or LAD)
- Toxic Tort
- Construction
- Tenancy (not Special Civil Part matters)
- Whistleblower (CEPA).

The earlier a case can be referred to mediation, the greater the likelihood that parties can resolve their dispute at a cost savings to themselves and the court. Parties should feel they have enough information to discuss the dispute, which may mean that some information exchange should be completed. Mediators also can help the parties determine just how much informal discovery is needed. Even if discovery has been completed, settlement negotiations have been unsuccessful, or the parties are close to a trial date, the mediation process may still help the parties reach a mutually acceptable agreement.

What if the case isn't resolved in mediation?

Sometimes the parties are unable to reach agreement, or only agree on certain aspects of the dispute. If certain aspects are still unresolved, the parties may wish to submit that portion to an expert for an opinion (binding or non-binding) or use some other creative means. The case also can be returned to court and continue on track towards trial. Even in these cases, the mediation process may have helped the parties move toward an ultimate settlement.

Non-Binding Arbitration

Arbitration is a process in which a dispute is submitted to experienced and knowledgeable neutral attorneys or retired Superior Court judges who hear arguments, review evidence and render a non-binding decision. It is less formal, less complex and often can be concluded more quickly than a court proceeding.

What types of cases are arbitrated?

Arbitration is mandatory statewide for civil cases involving automobile negligence, personal injury, contracts and commercial matters, and personal injury protection suits against one's own insurance carrier for unpaid insurance benefits. Lemon law cases in which the parties fail to affirmatively select mediation or voluntary binding arbitration also are scheduled for arbitration.

Who are the arbitrators?

Arbitrators are attorneys who have at least seven years of experience in New Jersey in the pertinent substantive area of law and who have completed required training and continuing education. Arbitrators are selected by the Assignment Judge on recommendation of the local bar association and are paid a *per diem* fee by the court for their services. Retired Superior Court judges may also serve as arbitrators.

How does arbitration work?

All attorneys and all parties are notified of their date for an arbitration hearing. Before the hearing, parties must exchange a statement of the factual and legal issues. Although attendance at the hearing by a party or his or her attorney is required, all attorneys and parties are strongly encouraged to appear.

The arbitrator conducts the hearing during which each party presents its case. Parties are permitted to introduce exhibits and other relevant evidence. The arbitrator generally exercises the powers of the court in the management and conduct of the hearing.

After the hearing, the arbitrator renders a non-binding decision and a written award. The decision usually is rendered on the day of the arbitration hearing in the presence of the participants.

What if I am not satisfied with the arbitrator's award?

A party who is not satisfied with the arbitrator's award can reject the award and get a trial by filing a notice called a "demand for a trial *de novo"* with the court and serving it upon all parties within 30 days of the filing of the arbitrator's award. The court is very strict concerning enforcing the 30-day time limit. The effect of not filing the demand for trial *de novo* is that the award, whether a monetary award or a dismissal, can be converted into a judgment.

A party requesting a trial *de novo* must pay a trial *de novo* fee to the Treasurer, State of New Jersey. Under certain circumstances if the requesting party does not significantly improve its position at trial, they may also be liable to pay other reasonable costs, including attorney fees of the other party up to $750, and witness costs up to $500 after the trial is concluded.

What are the advantages of arbitration?

Some of the advantages of arbitration include:

- Arbitrators are knowledgeable and experienced attorneys or retired Superior Court judges.
- Prompt scheduling, expeditious procedures, and established time frames for each step serve to limit the time required to resolve the case.
- Many of the costs associated with the formal court process can be eliminated by arbitration.
- Each party tells his or her side of the case to an arbitrator in an atmosphere that is less formal than a court proceeding.
- An arbitrator's decision and award may resolve a case or serve as the basis for further negotiations to a settlement; and
- Arbitration awards, if accepted by all parties and confirmed by the court, are legally binding and enforceable.

What cases are amenable to resolution by arbitration?

Arbitration has been found to be particularly effective in resolving cases having the following characteristics:

- The parties require an independent decision to resolve the dispute.
- The parties have full information, but seek the opinion of a third party respecting the extent of damages, or the credibility of witness.
- The parties are committed to litigating and are not open to negotiation.
- The parties have no relationship beyond a single incident and the disputed issues involve only the amount of money damages; or
- The amount at stake is relatively small and a quick third-party decision is of primary importance, *e.g.*, simple book account cases.

Voluntary Binding Arbitration Program

In June 1996, the Supreme Court approved implementation of voluntary binding arbitration (VBA) programs to handle verbal threshold cases in any vicinage that chooses to establish such a program. At its June 2005 Administrative Conference, the Court approved the use of VBA in lemon law cases (*N.J.S.A.* 56:12-29 *et seq.*). Other types of cases may also be submitted to the program upon advance notice to the AOC. A copy of the program guidelines and sample forms can be obtained from the vicinage Civil Division Manager.

How does the program work?

The parties file a written consent form, signed by all attorneys and the parties themselves, submitting the case to binding arbitration and voluntarily dismissing their case. Parties are encouraged to enter into

high/low agreements of which the arbitrators are unaware. The purpose of the high/low agreement is to give the parties control over the outcome. The case is presented in abbreviated form to a panel of two arbitrators whom the parties have selected. A sitting Superior Court judge also selected by the parties is present but becomes involved in the process only if, and to the extent that, the arbitrators do not agree. The proceedings are held in the courtroom. The judge explains to the parties at the outset and on the record that the determination of the panel will be final and not appealable. All parties must then agree, on the record, that they understand the final and binding nature of the program. The hearing, however, proceeds off the record. The decision of the arbitration panel is memorialized as a judgment if the court does not receive a stipulation of settlement within 30 days. If the parties had entered into a high/low agreement, the plaintiff could get no less than the "low" and the defendant would not be subject to exposure above the "high."

What kinds of cases could benefit from voluntary binding arbitration?

Voluntary binding arbitration has been found to be especially useful in matters in which the parties want a quick adjudication but also want some degree of control over the parameters of the ultimate outcome because of a need to contain costs or as the result of a cost-benefit analysis.

Summary Jury Trial (Advisory Verdict)

The summary jury trial (SJT) is a technique originally developed to target complex cases, which constitute only a small percentage of the overall caseload, but consume a disproportionate amount of time and resources. Participation in the program is on a voluntary basis. The purpose of the SJT is to provide the parties with a way to learn the probable outcome of an actual jury trial, using an abbreviated trial lasting approximately one-half to one-full day with little or no live testimony before an advisory jury. These cases would otherwise take two weeks or more to try to completion and would involve the concomitant expenditure of substantial time and resources. Since live, expert testimony is not needed, the technique is inexpensive and easy to schedule. No record is made at the proceeding, which is conducted with the same decorum as a trial.

How does the summary jury trial work?

In a summary jury trial, all aspects of the traditional trial are streamlined. A judge presides over an SJT as in a real trial. It employs use of more comprehensible language in the presentation of the case and in the jury charge, limited challenges to the jury are permitted and the attorneys present their respective cases, usually by oral summary, based upon discovery documents and the affidavits of experts. The judge explains to the advisory jury that it is rendering a verdict in a streamlined, innovative proceeding. In order to best approximate an actual trial, however, the jury is not told that the verdict is non-binding.

What are the advantages of a summary jury trial?

The SJT provides a cathartic effect to litigants who, for emotional reasons, require a "day in court," and it does so at a substantially lower cost, in a significantly shorter time, and in a manner which litigants can understand and appreciate. It also avoids litigants having to be subjected to rigorous examination and a complex web of technical legal jargon and procedure. After the jurors have rendered their verdict, the advisory nature of the proceeding is explained to them and the jurors are asked to informally discuss with the participants the strengths and weaknesses of each side's case. This has been recognized as being extremely instrumental in efforts to settle cases. Subjective feedback received from participants indicates that this technique provides a high level of satisfaction and meets the various criteria for which it was developed.

In 1987, the Supreme Court authorized the Superior Court in Gloucester County to conduct an SJT pilot program to study the adapting of this procedure, originally developed for use in the federal courts, to the state trial courts. In the program's early years, 45 cases were scheduled for the SJT. Of these, five were removed before the SJT date, 13 settled prior to the SJT and 27 went to a completed advisory verdict. Of

the 40 cases handled in the program, only three cases, or less than 10 percent, went to a completed trial *de novo*, *i.e*., an actual trial. In two of these cases, the result at the SJT was identical to the verdict at the real trial.

The experience in Gloucester County suggests that the technique also can be efficient in resolving matters not typically regarded as complex, but which nonetheless are resistant to other settlement efforts and would, in fact, result in lengthy trials. For example, one case tried to advisory verdict and settled shortly thereafter was a bodily injury matter involving difficult parties unwilling to compromise.

Expedited Jury Trials (Binding but Appealable Verdict)

An expedited jury trial is a jury trial conducted in an expedited or streamlined manner, which produces an appealable verdict more quickly than a regular trial. It is conducted pursuant to a "Consent Order for Expedited Jury Trial," which is signed by counsel and the court. The expedited jury trial is different from a summary jury trial, in which a jury hears a summary of a civil case and makes an advisory decision which is used in settlement negotiations. Although based on the summary jury trial model, the expedited jury trial results in a verdict on which judgment is entered. The judgment is appealable pursuant to *Court Rule* 2:2-3(a)(1). However, the parties by agreement can waive their right to appeal.

What kinds of cases are amenable to resolution by an expedited jury trial?

The expedited jury trial is well-suited for any case in which the parties wish to save time and expense by using reports, depositions or statements in lieu of live testimony from expert and/or lay witnesses. It is ideally suited for cases in which such witnesses are unavailable; cases with limited potential value for which the cost of bringing experts to trial is not justified; cases involving "matters of principle" but little money which one or both parties insist be decided by a jury; and cases in which litigants and attorneys would rather not spend a lot of time trying because of busy schedules or other commitments.

How does the expedited jury trial work?

In an expedited jury trial, only one or two witnesses - generally, the plaintiff and defendant - testify live and the rest of the evidence, including expert reports and depositions, is presented to the jury by counsel. For example, the parties stipulate, pursuant to *Court Rule* 1:8-2(c), that the jury will consist of six persons with no alternates, with a verdict being rendered by five jurors agreeing if one juror is excused for any reason. Although regular *voir dire* is conducted, the jury selection process is streamlined because of the minimum number of jurors and the limitation of three peremptory challenges. Opening statements are limited to 15 minutes and summations to 30 minutes. Counsel agree to submit requests to charge only on issues not covered by the model civil jury charges.

The key to a successful expedited trial is the preliminary hearing which occurs on the record pursuant to *Evidence Rule* 104. At the hearing, counsel mark for identification all of the items of evidence they intend to use. Uncontested exhibits are marked into evidence right away. Contested exhibits are reviewed by the court, which hears and decides all objections *in limine.* Exhibits which are admitted subject to the redaction of inadmissable material are marked after the redactions are completed.

What are the advantages of this technique?

The major advantage of an expedited jury trial is that it obviates the need to present live expert testimony. It also reduces the number of lay witnesses who need to testify. In fact, usually only the plaintiff and defendant give testimony, although the parties can agree to additional witnesses. After the testimony, the attorneys present to the jury the expert reports, depositions and other evidence. Counsel may read or show the evidence to the jury, summarize it or simply ask the jury to look at it during deliberations. The expedited jury trial can save time and money for litigants, attorneys and the courts and can facilitate the effective and efficient presentation of evidence to juries.

Bar Paneling

Bar paneling is a dispute resolution process in which a matter is scheduled or referred to a panel of two or more experienced, neutral attorneys who hear the case and provide a non-binding recommendation for its disposition, including a settlement range. This is in contrast to mediation, in which the neutrals do not recommend a specific resolution but serve to help find common ground between or among the parties.

How does bar paneling work?

Bar paneling proceedings are confidential, non-binding, and are usually held in court facilities. In all counties where bar paneling is done, the attorney panelists serve without compensation. In many of the counties, bar paneling is conducted with the assistance of the county bar association and usually occurs on the date that a matter is scheduled for trial. However, in some areas, bar paneling occurs as early as the pre-trial stage of the case and is known as an early settlement panel, or "ESP."

For bar paneling to be successful, at least two critical concerns must be met. First, it is important for the attorneys to bring clients and insurance company representatives to the proceedings so they may participate. Second, it is equally important that the attorneys serving as panelists possess a certain degree of expertise in the pertinent substantive area of law.

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