Chapter 21

ADR IN THE (COLORADO) STATE AND FEDERAL COURTS

SYNOPSIS

§ 21.1 • INTRODUCTION

All courts in Colorado utilize some form of alternative dispute resolution (ADR), although not usually arbitration. In the federal district court, mediation is often conducted by magistrate judges or referred to private mediators. In the Tenth Circuit, there are staff mediators. In the Colorado state district court, sometimes cases are referred to a settlement judge for mediation and, more often, to private mediators. Mediation is alive and well in the Colorado courts. However, the courts rarely use other forms of ADR.

§ 21.2 • ADR IN THE COLORADO STATE COURTS

The Colorado Dispute Resolution Act, C.R.S. §§ 13-22-301, *et seq.*, is discussed in Chapter 24. The discussion in this chapter is limited to the provisions of the Act relating to and providing for ADR in the Colorado courts.

Colorado state courts have the power under the Dispute Resolution Act to employ alternative means of dispute resolution.[1] It is probable that at common law the courts have power to invoke some ADR processes. The Dispute Resolution Act eliminates any question about the power of the courts to invoke ADR processes, although any binding result probably must be agreed to by the parties.[2]

Many of the provisions of the Act apply to both judicially invoked ADR and private ADR. These provisions are discussed in Chapter 24, "Mediation, Settlement Agreements, and the Colorado Dispute Resolution Act." However, certain procedures apply solely to the courts, as discussed in the following paragraphs:

C.R.S. § 13-22-305(1) provides that "dispute resolution programs shall be established or made available in such judicial districts . . . subject to moneys available for such purpose."

The term "dispute resolution programs" is not defined, but "for all office of dispute resolution programs," the director establishes the rules, regulations, and procedures, "for the purpose of allowing each participant, on a voluntary basis, to define and articulate the participant's particular problem for the possible resolution of such dispute."[3] Under § 13-22-305(2), persons are eligible for the mediation services either before or after filing a civil action in either county or district court. Section 13-22-305(3) provides for fees to be paid by the parties using "the mediation services or ancillary forms of dispute resolution."

C.R.S. § 13-22-311 provides that any court of record may, in its discretion, refer any case for "mediation services or dispute resolution services."[4] However, there are two exceptions:

1) Where one of the parties claims that he or she has been the victim of physical or psychological abuse by the other party and is unwilling to proceed with ADR; and
2) If a party objects to referral to mediation and demonstrates compelling reasons why the mediation should not be ordered.

Parties referred to the Office of Dispute Resolution for mediation services or dispute resolution services may select from mediators and mediator organizations that have contracted with the Office of Dispute Resolution. The Colorado Dispute Resolution Act also specifically provides for court referral of cases to multiple forms of alternative dispute resolution — "dispute resolution services." Perhaps it can be said that the Colorado Dispute Resolution Act was drafted primarily for alternative dispute resolution in the judicial system, so, to that extent, it has been a beneficial addition. However, ADR existed in the judicial system long before the passage of the Act. Today, most ADR cases pending in Colorado courts are done through private mediators and arbitrators.

C.R.C.P. 16.2, providing for court-facilitated management of and disclosures of domestic relations cases, provides in subsection (i) for ADR, pursuant to C.R.S. § 13-22-301, provided that both parties consent in writing to the process. However, there does not appear to be anything in the Rules of Civil Procedure relating to use of ADR in civil actions generally. C.R.C.P. 16(b)(7) does provide that "[t]he proposed order shall confirm that the possibility of settlement was discussed, describe the prospects for settlement and list proposed dates for any agreed upon or court-ordered mediation or other alternative dispute resolution."

§ 21.2.1—Compulsory Mediation And Arbitration

Can the courts "require" litigants to mediate their dispute? Can a litigant refuse to mediate? If parties can be ordered to mediate, what is the obligation of the parties in that mediation? *See* Chapter 24 for a partial answer, and § 21.2.

Apparently, since "January 2012, all Denver County Court Judges mandate mediation in their courtrooms." Basacca, "DBA Court Mediation Services," *Docket* 29 (March 2016). *See* http://courtmediationservices.org.

See discussion *supra* in this § 21.2, particularly with respect to C.R.S. §§ 13-22-311 and -305(1).

- Annot., *Validity and Effect of Local District Court Rules Providing for the use of Alternative Dispute Resolution Procedures as Pretrial Settlement Mechanisms*, 86 A.L.R. Fed. 211.

§ 21.3 • ADR IN THE FEDERAL COURTS

In the author's experience, most federal judges have assumed that they have power to require parties to participate in "non-binding" ADR.[5] The passage of the Alternative Dispute Resolution Act in 1988 and subsequent amendments generally confirm that power and encourage the use of ADR in disputes before the federal court. However, to the extent the Act supersedes common law powers, it may restrict the use of ADR.

§ 21.3.1—ADR In The Federal District Court Under Chapter 44, U.S.C. (28 U.S.C. §§ 651, *et seq.*)

Title 28, Chapter 44 (§§ 651-658) of the U.S. Code is entitled "Alternative Dispute Resolution" and provides for ADR in the federal courts. The Act defines its purpose as to expand significantly the use of ADR in civil cases in the federal courts.[6] However, any arbitration award under the act is subject to *de novo* trial.

28 U.S.C. § 651 is titled "Authorization of alternative dispute resolution." Subsection (a) defines for purposes of the chapter that an alternative dispute process includes "any process or procedure, other than an adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, minitrial, and arbitration as provided in sections 654 through 658."

28 U.S.C. § 651(b) provides that each U.S. district court shall authorize by local rule the use of ADR processes in all civil actions, including adversary proceedings in bankruptcy, except that the use of arbitration may be authorized only to the extent set forth in § 654. Each district court is required to devise and implement its own alternative dispute resolution program by local rule "to encourage and promote the use of alternative dispute resolution in its district."

28 U.S.C. § 651(d) requires each U.S. district court to designate a person "knowledgeable in alternative dispute resolution practices and processes to implement, administer, oversee, and evaluate the court's alternative dispute resolution program," which may include the recruiting, screening, and training of attorneys to serve as neutrals and arbitrators in the court's alternative dispute resolution program.

Lastly, 28 U.S.C. § 651(f) provides that "[t]he Federal Judicial Center and the Administrative Office of the United States Courts are authorized to assist the district courts in the establishment and improvement of alternative dispute resolution programs by identifying particular practices employed in successful programs and providing additional assistance as needed and appropriate."

28 U.S.C. § 652(a) is the jurisdiction provision. It provides:

> (a) Consideration of alternative dispute resolution in appropriate cases. Notwithstanding any provision of law to the contrary and except as provided in subsections (b) and (c), each district court shall . . . require that litigants in all civil cases consider the use of an alternative dispute resolution process at an appropriate stage in the litigation. Each district court shall provide litigants in all civil cases with at least one alternative dispute resolution process, including, but not limited to, mediation, early neutral evaluation, minitrial, and arbitration as authorized in sections 654 through 658. Any district court that elects to require the use of alternative dispute resolution in certain cases may do so only with respect to mediation, early neutral evaluation, and, if the parties consent, arbitration.

Thus, the district may require litigants to "consider the use of an alternative dispute resolution process." The Act stops short of defining a power to order the parties to use an alternative dispute resolution process.

28 U.S.C. § 652(b) allows the district courts to exempt from the ADR requirement cases or categories of cases in which use of alternative dispute resolution would not be appropriate.

28 U.S.C. § 652(d) provides that until rules are adopted under 28 U.S.C. §§ 2071, *et seq.* providing for the confidentiality of alternative dispute resolution processes, each district court shall provide by local rule for the confidentiality of alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications.

Confidentiality

28 U.S.C. § 652(d) is entitled "Confidentiality provisions" and provides:

> Until such time as rules are adopted . . . providing for the confidentiality of alternative dispute resolution processes . . . , each district court shall, by local rule . . . , provide for the confidentiality of the alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications.[7]

In *Federal Deposit Insurance Corp. v. White*,[8] the Texas federal district court ordered the case to mediation, and a settlement was reached. Thereafter, the defendant repudiated the settlement agreement on the grounds of duress and coercion. The court held that notwithstanding that the mediation

communications were confidential under 28 U.S.C. § 652(d), they were not privileged. The Act does not preclude a litigant from challenging the validity of a settlement agreement based upon events that transpired at a mediation proceeding. The court allowed the defendants and their attorneys to testify about statements made at mediation, without any mention of the mediator.

The Tenth Circuit affirmed a district court's dismissal of the plaintiff's claims as a sanction because of the plaintiff's breach of confidentiality of mediation proceedings.[9] The plaintiff filed a suit against a sailing club in which he was formerly a member for alleged non-compliance with the Americans with Disabilities Act. The district court ordered the parties to participate in mediation, which they did. No settlement resulted. The plaintiff e-mailed at least 44 club members and others, disparaging the club's position and relating details of the mediation, including what the mediator said and the amount of the club's settlement offer. Citing 28 U.S.C. § 652(d), the district court dismissed the complaint with prejudice. The court emphasized the importance of confidentiality in mediation.

28 U.S.C. § 653 provides guidelines for the qualification and training of neutrals. Subsection (a) requires each district court that authorizes the use of ADR procedures to adopt processes for making neutrals available for use by the parties for each category of process offered. However, each district court shall promulgate its own procedures and criteria for the selection of neutrals on its panels. Subsection (b) requires that each person serving as a neutral be qualified and trained as a neutral in the appropriate ADR process. The district court may use, among others, magistrate judges who have been trained to serve as neutrals in ADR processes, professional neutrals from the private sector, and persons who have been trained to serve as neutrals in the ADR process. Until rules are adopted under 28 U.S.C. §§ 2071, *et seq.*, relating to the disqualification of neutrals, each district court shall issue rules relating to the disqualification of neutrals (including, where appropriate, disqualification under 28 U.S.C. § 455, other applicable law, and professional responsibility standards).

Arbitration

Under 28 U.S.C. § 654, a district court may refer most civil actions to arbitration (including adversary proceedings in bankruptcy) *when the parties consent*, except claims alleging a violation of a right secured by the Constitution, claims asserting jurisdiction under 28 U.S.C. § 1343 (civil rights claims), and claims seeking to recover money damages greater than $150,000.[10] The FAA and case law thereunder contain no such limitations on the right of the parties to agree to arbitration. However, 28 U.S.C. § 654 appears to apply only to court referrals to arbitration under Chapter 44 and not to orders compelling arbitration under the FAA. This section raises interesting questions; for example, what if after a lawsuit was filed in which more than $150,000 in damages was sought, both parties agreed to arbitration and asked the court to stay the litigation pending arbitration?

Until rules are adopted under Chapter 131, the district court is required to establish local rules under § 2071(a), establishing procedures to ensure that in any civil action in which arbitration by consent is allowed under subsection (a), consent to arbitration is freely and knowingly obtained, and no person or attorney is prejudiced for refusing to participate in arbitration. Lastly, § 654 does not apply to any program in which arbitration is conducted pursuant to Title IX (§ 905) of the Judicial Improvements and Access to Justice Act.

28 U.S.C. § 655 defines the powers of arbitrators to whom an action is referred under § 654. The powers appear to be territorially limited to the judicial district of the district court that referred the action to arbitration. The statute defines the powers as: (1) to conduct arbitration hearings; (2) to administer oaths and affirmation; and (3) to make awards.

In addition, under 28 U.S.C. § 655(b), each district court that authorizes arbitration shall establish standards for the certification of arbitrators and shall certify arbitrators to perform services in accordance with those standards. They must include the arbitrator's taking an oath or affirmation described in 28 U.S.C. § 453 (oath of justices and judges) and shall provide for disqualification under the provisions of § 455 (disqualification of justice, judge, or magistrate judge). Lastly, the statute, in 28 U.S.C. § 655(c), expressly provides that "[a]ll individuals serving as arbitrators in an alternative dispute resolution program under this chapter are performing quasi-judicial functions and are entitled to the immunities and protections that the law accords to persons serving in such capacity."

Subpoenas

Subpoena power is granted to arbitrators. 28 U.S.C. § 656 provides that F.R.C.P. 45, relating to subpoenas, "applies to subpoenas for the attendance of witnesses and the production of documentary evidence at an arbitration hearing under this chapter." It is unclear whether this power to issue subpoenas is to be exercised by the court or by the arbitrator. Similarly, it is unclear whether the subpoena power extends to discovery.

Arbitration Award and Judgment

Under 28 U.S.C. § 657, promptly after the administrative hearing is concluded, the arbitration award (along with proof of service of such award on the other party by the prevailing party or by the plaintiff) is filed with the clerk of the district court that referred the case to arbitration. The award shall then be entered as the judgment of the court after the time has expired for requesting a trial *de novo*. After time had expired for requesting trial *de novo*, a claim by the prevailing party for enhancement of damages under the Pennsylvania Unfair Trade Practices and Consumer Protection Law was barred.[11] However, a court may extend the 30-day period.[12] The judgment so entered shall be subject to the same provisions of law and shall have the same force and effect as a judgment of the court in a civil action, except the judgment shall not be subject to review in any other court of appeal or otherwise. The district court shall, by local rule, provide that the contents of any arbitration award made under the chapter shall not be made known to any judge who might be assigned to the case until the district court has entered final judgment in the action or the action is otherwise terminated.

28 U.S.C. § 657(c) effectively provides for trial *de novo* of all arbitration awards. Within 30 days after the filing of an arbitration award with the district court, any party may file a written demand for a trial *de novo.* Upon such a demand, the action shall be restored to the docket of the court and treated for all purposes as if it had not been referred to arbitration. The court shall not admit at the trial *de novo* any evidence that there has been an arbitration proceeding, the amount of any award, or any other matter concerning the conduct of the arbitration, unless the evidence would otherwise be admissible in the court under the Federal Rules of Evidence or the parties have otherwise stipulated.

Lastly, 28 U.S.C. § 658 provides that the district court, subject to regulations approved by the Judicial Conference of the United States, shall establish the compensation that each arbitrator or neutral shall receive for services rendered in each case, as well as transportation allowance.

Relationship Between the FAA and Arbitration Under Chapter 44

The provisions of Chapter 44 do not apply to private arbitration agreements, which are governed by the FAA.[13] Thus, in consenting to arbitration under Chapter 44, the parties should be explicit that Chapter 44, and not the FAA, governs the proceedings.

In some instances, the parties to an arbitration agreement might want to request the court by order to make the arbitration a "Chapter 44 arbitration" so as to obtain the benefits of 28 U.S.C. §§ 651-658.[14]

Local Rules of the U.S. District Court for the District of Colorado

The U.S. District Court for the District of Colorado has adopted a single local rule. Local Rule 16.6 is entitled "Alternative Dispute Resolution" and provides that pursuant to 28 U.S.C. § 652, all litigants in a civil case "shall consider the use of an alternative dispute resolution process."

> D.C. Colo. L. Civ. R. 16.6 — Alternative Dispute Resolution
> **(a) Alternative Dispute Resolution.** Pursuant to 28 U.S.C. § 652, all litigants in civil actions shall consider the use of an alternative dispute resolution process. A district judge or a magistrate judge exercising consent jurisdiction may direct the parties to engage in an early neutral evaluation or other alternative dispute resolution proceeding. To facilitate settlement or resolution of the suit, the district judge or a magistrate judge exercising consent jurisdiction may stay the action in whole or in part during a time certain or until further order. Relief from an order under this rule may be had upon motion showing good cause.
> **(b) Definition of Early Neutral Evaluation.** Early neutral evaluation means a nonbinding, non-adjudicative assessment of a case by a magistrate judge.
> **(c) Disqualification of Neutrals.** A magistrate judge providing early neutral evaluation may be disqualified under the provisions of 28 U.S.C. §§ 144 or 455.
> **(d) Designation of Court ADR Administrator.** Under 28 U.S.C. § 651(d), the clerk of the court is designated to implement, administer, oversee, and evaluate the court's alternative dispute resolution program.
> **(e) Confidentiality.** A party or the magistrate judge in an alternative dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any information concerning any communication provided in confidence to the magistrate judge in connection with an early neutral evaluation or other alternative dispute resolution proceeding.

The above quotation of the Rule reflects the December 1, 2011, amendments to the Rule. These amendments cut back the use of magistrate judge settlement conferences.

To obtain a settlement conference before a magistrate judge, a motion must be filed with the district judge (or magistrate judge, if there is concurrent jurisdiction), setting forth why a conference is needed and will be useful. The judge retains the right to direct the parties (upon motion or *sua sponte*) to pursue early neutral evaluation or other ADR procedures.

§ 21.3.2—Mediation In The Tenth Circuit Court Of Appeals

Federal Rules of Appellate Procedure 33 and Tenth Circuit Rule 33.1 provide for mediation in the Tenth Circuit. The Office of the Clerk of the Tenth Circuit has published a section on its mediation office in its "Practitioners' Guide to the United States Court of Appeals for the Tenth Circuit." In general, cases filed in the Tenth Circuit are automatically scheduled for a mediation conference, usually before briefing and sometimes before the trial court transcript is completed. A party can also request a mediation conference, and "if appropriate, the fact that a conference has been requested is kept confidential." The guide lays out how the mediation office operates in some detail.

§ 21.3.3—Federal Civil Justice Reform Act Of 1990, 28 U.S.C. §§ 471, *et seq.*

A court may require counsel in a civil action to certify to the court that counsel has discussed with his or her client the estimated cost of litigation, anticipated results, and alternative means of dispute resolution.[15]

§ 21.3.4—Compulsory Mediation And Arbitration

The First Circuit held that the federal district court had inherent power to impose non-consensual mediation, provided the order has adequate safeguards to protect the rights of the parties and procedural fairness.[16]

It would be a rare trial attorney who has not been "ordered" to mediation or settlement negotiations. The source of such power is unclear, but it would be a unique attorney who chose to ignore such an order.

See § 21.2.1 and Chapter 24.

§ 21.4 • BIBLIOGRAPHY

Martin, "The Alternative Dispute Resolution Act of 1998," 28 *Colo. Law.* 37 (April 1999).
Tarpey, "ADR Forum: One Step in an Evolving Process," 30 *Colo. Law.* 53 (June 2001).
Harris Crowne, "The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice," 76 *N.Y.U. L. Rev.* 1768 (2001).

NOTES

1. C.R.S. § 13-22-313(1) provides that nothing therein "shall impinge upon the right of parties to have their dispute tried in a court of law, including trial by jury."

2. *See* C.R.S. §§ 13-22-305(1) and -313.

3. C.R.S. § 13-22-305(1).

4. This provision seems somewhat contrary to C.R.S. § 13-22-305(1), suggesting participation in ADR is voluntary.

5. *See* Pugh & Bales, "The Inherent Power of the Federal Courts to Compel Participation in Nonbinding Forms of Alternative Dispute Resolution," 42 *Duq. L. Rev.* 1 (2003).

6. 28 U.S.C. § 651(a).

7. Apparently, at least if local rules are adopted, state regulation of communications made during federally sponsored mediation is not preempted by the Alternative Dispute Resolution Act. *See Olam v. Congress Mortg. Co.*, 68 F. Supp. 2d 1110 (N.D. Cal. 1999).

8. *Fed. Deposit Ins. Corp. v. White*, 76 F. Supp. 2d 736 (N.D. Tex. 1999).

9. *Hand v. Walnut Valley Sailing Club*, 475 F. App'x 277 (10th Cir. 2012).

10. *See generally Ritzer v. Nat'l Org. of Indus. Trade Unions Ins. Trust Fund Hosp.*, *Med.*, *Surgical Health Benefit*, 807 F. Supp. 257 (E.D.N.Y. 1992). (Portions of the applied statutes were subsequently amended.)

11. *Haug v. Toyota Motor Sales, USA, Inc.*, 944 F. Supp. 421 (E.D. Pa. 1996).

12. *CNA Fin. Corp. v. Brown*, 162 F.3d 1334 (11th Cir. 1998); *Hamilton v. J.C. Penney Co.*, 127 F. App'x 47 (3d Cir. 2005) (party could have filed a Rule 6(b) motion for enlargement of time to file demand for trial *de novo*, or a motion under Rule 60(b)).

13. *AlphaGraphics, Inc. v. Shapiro*, 935 F. Supp. 1012 (N.D. Ill. 1996).

14. *See* Commentary of David D. Siegel to each of these sections in 28 U.S.C.A. §§ 651-658.

15. *Schwarzkopf Techs. Corp. v. Ingersoll Cutting Tool Co.*, 142 F.R.D. 420 (D. Del. 1992).

16. *In re Atlantic Pipe Corp.*, 304 F.3d 135 (1st Cir. 2002).