Litigation Section of the District of Columbia Bar
Public Statement on the Mediation of Civil Actions
by the Superior Court of the District of Columbia
Summary

The Litigation Section proposes to issue the following statement concerning efforts to improve the efficiency and effectiveness of the mediation program for civil cases at the Superior Court for the District of Columbia. The members of the Steering Committee* have voted regarding the issuance of this statement and the decision to adopt the statement was unanimous. The views expressed herein represent only those of the Litigation Section of the D.C. Bar and not those of the D.C. Bar or of its Board of Governors.

The Multi-Door Dispute Resolution program at the Superior Court of the District of Columbia ("Multi-Door") has a long and proud history. It was one of the first three jurisdictions in the United States to develop an alternative dispute resolution program designed to "match the forum to the fuss."

The door attorneys most often walk through is marked "Civil Actions," and what lies beyond it in the large majority of cases is mediation. The guiding principle of a multi-door courthouse is flexibility and creativity in designing mediation programs that meet the needs of litigants. The Litigation Section recommends that the D.C. Superior Court continue this pattern of innovation by adding more flexibility to its civil mediation program.

The Litigation Section commends the Superior Court for recent efforts to ensure mediators have the requisite subject matter expertise to assist the parties.
To expand the pool of skilled mediators, the Litigation Section recommends allowing mediators, on a trial basis, to convene sessions in their offices rather than at the courthouse. The Litigation Section also recommends greater flexibility with respect to when cases are mediated, and it suggests experimenting with telephonic mediation, particularly in cases that seem very unlikely to settle.

The Litigation Section believes the Superior Court, the parties and attorneys who appear before it, and taxpayers who support the D.C. court system all stand to benefit from continued efforts to improve the civil mediation program.

* The members of the Steering Committee of the Litigation Section of the District of Columbia Bar are Eric Angel, Theresa Coetzee, David Florin, Charles C Lemley, Lorelie S Masters, David T Ralston Jr., Mary L Smith, Bruce V Spiva, and Moxila A. Upadhyaya.

DISTRICT OF COLUMBIA BAR
Sections

Litigation Section of the District of Columbia Bar
Statement on the Mediation of Civil Actions
by the Superior Court of the District of Columbia

The members of the Steering Committee* of the Litigation Section of the District of Columbia Bar voted unanimously on September 6, 2007, to issue the following public statement on behalf of the Section. The views expressed herein represent only those of the Litigation Section of the D.C. Bar and not those of the D.C. Bar or of its Board of Governors.

The Multi-Door Dispute Resolution program at the Superior Court of the District of Columbia ("Multi-Door") has a long and proud history. In 1976, Harvard Law School Professor Frank Sander suggested that courts address their rapidly expanding dockets by developing new alternatives to trial. He envisioned gatekeepers who would evaluate which "door" a particular type of case should go through. The District of Columbia was one of the first three jurisdictions in the United States to implement this vision.

The door attorneys most often walk through is marked "Civil Actions," and what lies beyond it in the large majority of cases, is mediation. Most cases are scheduled for mediation with a court-appointed neutral after discovery has closed, but before a pre-trial conference is held. This process is quite effective. The overall resolution rate is 38%. But rates vary significantly from one subject matter to another. For example, while over 60% of landlord/tenant cases settle in mediation, the success rate for personal injury cases is approximately 25%.

The guiding principle of a multi-door courthouse is flexibility and creativity in designing mediation programs that meet the needs of litigants. By creating different dispute resolution programs for small claims, landlord-tenant, family, general civil, and other types of cases, the D.C. Superior Court became a national and international model for implementation of this principle. The Litigation Section recommends that the D.C. Superior Court continue this pattern of innovation by adding more flexibility to its civil mediation program.

Mediation is costly and time-consuming for both the court and litigants. If the parties reach agreement, the investment is worthwhile because trial would be much more taxing. If no resolution is reached, mediation merely adds to the cost of litigating. Thus, it makes sense to focus the most time and attention on cases that are likely to settle in mediation, and minimize the burden on both the court and litigants of mediating cases that are destined for summary judgment or trial. It also makes sense to ensure the time, place, and manner in which cases are mediated are conducive to settlement. The Litigation Section therefore recommends several specific reforms:

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Subject Matter Expertise

There is a widespread belief among civil litigators that cases are more likely to settle in mediation, and that the parties are more likely to be satisfied with the process and outcome, if the mediator has a strong working knowledge of the governing law. Multi-Door should continue to move in the direction of assigning mediators on a case by case basis, matching the mediator's skills and experience as closely as possible with the needs of a particular controversy. Subject matter, style, and other factors should be taken into account in deciding which of the available neutrals is best suited to helping the parties bridge their differences. In short, to maximize the effectiveness of ADR, it helps not only to guide a case through the correct door, but also to have the right neutral in the room with it.

To increase the pool of available mediators with appropriate expertise, Multi-Door should experiment with allowing mediators to convene mediations in their offices rather than at the courthouse. This would save mediators a significant amount of transit time, making service as a mediator more attractive to busy practitioners. Many litigants are also likely to appreciate the convenience of not having to travel downtown.

We commend Multi-Door for its recent efforts to expand the pool of mediators with appropriate expertise through Open Enrollment, which allows experienced mediators to bypass some of the traditional requirements. The DC Bar should help publicize this effort.

Timing

The greatest savings occur when cases are mediated early. The parties avoid the costs of discovery and of filing and defending motions. The court avoids the costs associated with overseeing discovery and ruling on motions. Multi-Door should heighten awareness among litigators of the option to request mediation prior to the close of discovery. The Litigation Section is willing to assist by educating its members about the availability of early mediation.

To encourage parties to exercise this option, the Superior Court should allow them to opt out of a second mediation if the first is unsuccessful. In other words, if the parties voluntarily mediate prior to the close of discovery but do not reach an agreement, they should be allowed but not required to mediate again. However, we recognize that to avoid adding to the cost of the mediation program, the parties might have to pay costs associated with the second mediation.

Early mediation is particularly appropriate in employment cases. Multi-Door should experiment with making early (pre-discovery) mediation of employment cases the default option, with parties having the right to request a later mediation date based on the need for discovery or on some other legitimate basis.

While early resolution may be ideal, the reality is that most litigants are not prepared to settle until they have completed discovery and are faced with the prospect of trial. Nothing drives parties to make the concessions needed to reach agreement like an impending trial date. Thus, the civil mediation settlement rate also might rise significantly if pre-trial conferences preceded mediations. While these conferences consume scarce judicial resources, they are surely far less time-consuming than the average civil trial. Thus, if reversing the order of pre-trial conferences and mediations significantly increases the percentage of cases settled in mediation, there would be an overall saving of resources.

Currently, a significant number of civil cases fail to resolve in mediation because one or more of the parties is awaiting a ruling on a dispositive motion. Parties often are very reluctant to make significant concessions in mediation when they believe they will prevail on a pending motion. The court should permit parties to delay mediating until the court rules on their dispositive motions.

Format

As is mentioned above, the Litigation Section recommends that Multi-Door consider allowing mediators to convene sessions in their offices. In addition, Multi-Door should experiment with telephonic mediation of cases where the likelihood of settlement is low. This may be particularly appropriate for personal injury cases in which the participation of a claims adjuster with significant settlement authority is needed. Requiring parties to participate in person when at least one party has made it clear in advance that no settlement offer will be forthcoming is inefficient.

In summary, for decades the Multi-Door Dispute Resolution Program has responded creatively and effectively to the evolving needs of a vibrant judicial system. This trend should continue. The Litigation Section believes Multi-Door can improve the operation of its civil action mediation program by expanding the options for when, where, and how mediations are held, and how mediators are selected. The court, the parties and attorneys who appear before it, and taxpayers who support the court system all stand to benefit.