Best Practices in ADR:
Pilot Project in Bavaria for Administrative Courts

I. The Pilot Project

Form: Integration model

Duration: June 2009 to June 2011

15 participating judges from 3 first instance courts and the high administrative court

No legal framework

Qualification as a task of judiciary

The deciding judge refers the case to the mediator

Main principles: voluntariness, confidentiality, self-responsibility, institutional separation of mediator and the judge who decides the case

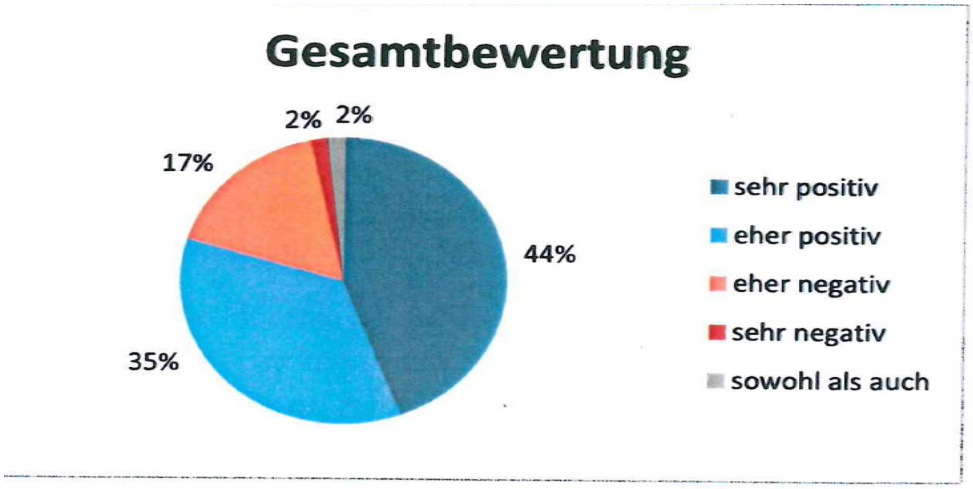
Agreement of all participants to ensure confidentiality at the beginning of the mediation

135 disputes referred to mediation

At the end of project a hearing had taken place in 84 cases.

Questionnaires had been distributed to plaintiffs, their lawyers and the representatives of the authorities

General assessment of the participating citizens:



sehr positiv: extremely positive

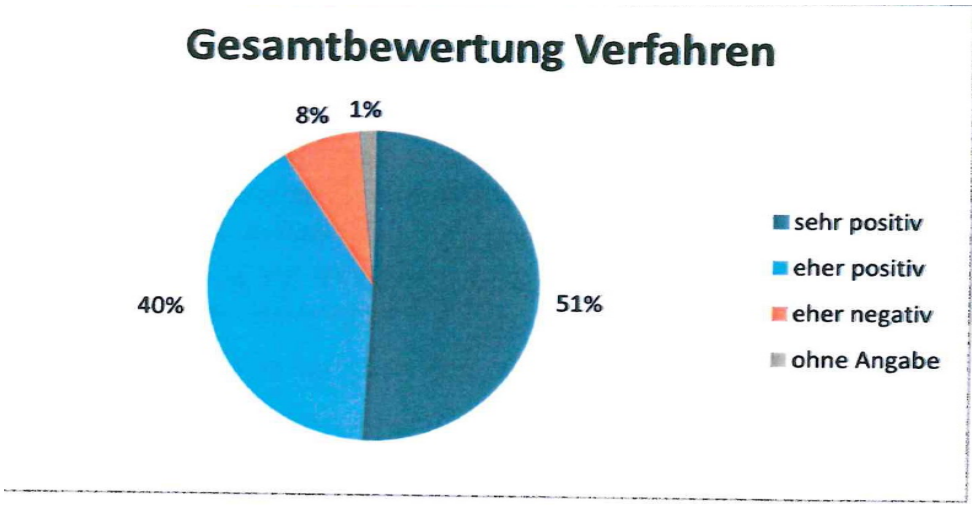
eher positiv: rather positive

eher negativ: rather negativ

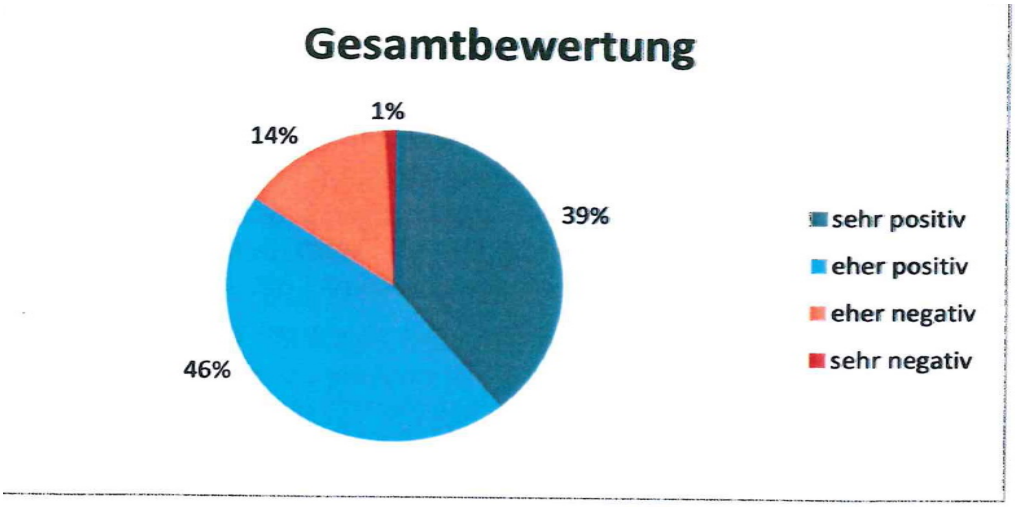
sehr negativ: extremely negative

sowohl als auch. both or without statement

General assessment of the participating lawyers:



General assessment of the representatives of the authorities:



The conclusions of the pilot project were the following:

- Mediation can be a method to solve conflicts even when the court proceedings had already started

- The possibilities to perform mediation at administrative courts are restricted, because at one side of the conflict stands an authority that has to fulfill public concerns and is subjected to legal provisions, procedural rules, common principles as the principles of equality and proportionality including budgetary laws that reduce the scope for individual solutions where the focus is on the interests of the parties

- Nearly all participants who completed the questionnaires approved mediation as an additional method of dispute resolution at the courts
- Mediation was causal for the solution on which the conflict parties agreed.
- Of importance for the agreement were the training of the judges and how they conducted the negotiations, the setting and the time spent with and for the parties
- The method chosen by the mediators to conduct the negotiations didn´t influence the successful settlement of the dispute. It was reported frequently that a solution proposed by the mediator was the reason for the settlement of the dispute

The recommendations for the Bavarian Ministry of the Interior were:

- to provide a legal framework for alternative dispute resolution by judges who don´t decide the dispute after the start of the court proceedings
- to establish a coordinating office that examines whether the cases at the court are suitable for mediation and gives a recommendation to the deciding judge
- to include elements of mediation in the general procedure

II. Legal framework to implement in-court mediation after the end of the Pilot Project

Act for the implementation of the Directive 2008/52/EC of the European Parliament and the Council on certain aspects of mediation in civil and commercial matters: Gesetz zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Streitbeilegung (Act to advance mediation and other procedures of alternative dispute resolution; Mediationsförderungsgesetz **(Mediation Act)**

Section 173 Code of Administrative Court Procedure
Unless this Act contains provisions with regard to the proceedings, the Courts Constitution Act and the Code of Civil Procedure, including section 278 subsection 5 and section 278a, shall apply *mutatis mutandis* if the fundamental differences between the two types of procedure do not rule this out….

Section 278 Code of Civil Procedure
(5) The court may refer the parties for the conciliation hearing, as well as for further attempts at resolving the dispute, to a judge delegated for this purpose, who is not authorized to take a decision **(Güterichter, conciliation judge). The conciliation judge may avail himself of all methods of conflict resolution, including mediation.**

Section 278a Code of Civil Procedure
Mediation, alternative conflict resolution
(1) The court may suggest that the parties pursue mediation or other alternative conflict resolution procedures.
(2) Should the parties to the dispute decide to pursue mediation or other alternative conflict resolution procedures, the court shall order the proceedings stayed.

Provisions to separate the conciliation hearing and the court proceedings:

Section 42 Code of Civil Procedure
Recusal of a judge from a case
(1) A judge may be recused from a case both in those cases in which he is disqualified by law from exercising a judicial office, and in those cases in which there is a fear of bias.
(2) A judge will be recused for fear of bias if sound reasons justify a lack of confidence in his impartiality.
(3) In all cases, both parties shall have the right to recuse a judge.

Section 48 Code of Civil Procedure
Self-recusal; recusal ex officio
The court competent for conclusively dealing with the motion to recuse a judge is to decide on the matter also in those cases in which such a motion is not appropriate, **but in which the judge notifies the court that a relationship exists that might**

justify his recusal, or in which other reasons give rise to concerns that the judge might be disqualified by law.

Section 383 Code of Civil Procedure
Refusal to testify on personal grounds
(1) The following persons are entitled to refuse to testify:
1. The fiancé of a party, or that person to whom the party has made a promise to establish a civil union;
2. The spouse or former spouse of a party;
2a. The partner or former partner under a civil union with a party;
3. Those who are or were directly related to a party, either by blood or by marriage, or who are or were related as third-degree relatives in the collateral line, or who are or were second-degree relatives by marriage in the collateral line;
4. Clerics, with a view to what was entrusted to them in the exercise of their pastoral care and guidance;
5. Persons who collaborate or have collaborated, as professionals, in preparing, making or distributing printed periodicals or radio or television broadcasts, if their testimony would concern the person of the author or contributor of articles or broadcasts and documents, or the source thereof, as well as the information they have been given with regard to these persons' activities, provided that this concerns articles or broadcasts, documents and information published in the editorial part of the periodical or broadcast;
6. **Persons to whom facts are entrusted, by virtue of their office, profession or status, the nature of which mandates their confidentiality, or the confidentiality of which is mandated by law, where their testimony would concern facts to which the confidentiality obligation refers.**
(2) The persons designated under numbers 1 to 3 are to be instructed about their right to refuse to testify prior to being examined.
(3) Even if the persons designated under numbers 4 to 6 do not refuse to testify, their examination is not to be aimed at facts and circumstances regarding which it is apparent that no testimony can be made without breaching the confidentiality obligation
Provisions to secure confidentiality

Provisions to secure confidentiality:

Section 169 Courts Constitution Act
The hearing before the **adjudicating** court, including the pronouncement of judgments and rulings, shall be public. Audio and television or radio recordings as well as audio and film recordings intended for public presentation or for publication of their content shall be inadmissible.

Section 105 Code of Administrative Court Procedure
Sections 159 to 165 of the Code of Civil Procedure shall apply *mutatis mutandis* to the minutes.

Section 159 Code of Civil Procedure
Recording the hearing
(1) A record is to be prepared of the hearing and of all evidence taken. A records clerk of the court registry may be involved in order to keep the record if this is required due to the expected scope of the record, in light of the particular complexity of the matter, or for any other grave cause.
(2) Subsection (1) shall apply mutatis mutandis to hearings taking place outside of the session of the court before judges of a local court (Amtsgericht, AG) or before judges correspondingly delegated or requested. **Records of conciliation hearings or of further attempts made at resolving the dispute before a conciliation judge (Güterichter) pursuant to section 278 (5) will be prepared solely based on a petition of the parties in congruent declarations.**

Section 46 German Judiciary Act
Application of federal civil service law
Except as otherwise provided in this Act the provisions applying to federal civil servants shall apply *mutatis mutandis* to legal relations of judges in federal service until special provision is made.

Section 67 Federal Civil Service Act
Duty of Confidentiality
The civil servants have the duty of confidentiality in matters they get knowledge in during or on the occasion of their professional work.

Main difference between mediation and a conciliation hearing:
The conciliation judge may give legal advice, propose solutions, and advice the parties how to solve their dispute.

III. The conciliation hearing

Criteria for referring a case to the conciliation judge:

- A litigation is obviously the consequence of a conflict on the interpersonal level, mostly neighborhood disputes where the authority stands between neighbors. This we have in many legal fields, the main fields are: construction law and pollution control law (noise)

- The parties of the dispute have a long-lasting personal relationship: civil service law, local affairs, school legislation

- Disputes where third persons who are not party of the legal proceedings should be involved

- One plaintiff brings more actions at one court or a higher number of plaintiffs file suits against one authority measure

- Cases which should be solved quickly and/or in camera

- The dispute can only be settled in consideration of legally non-relevant issues.

Preparation of the conciliation hearing:

Analysis of the conflict, the relationship of the conflict parties, the development and the background of the conflict

Analysis of the legal situation

Ending the conciliation hearing:

If unsuccessful: the files are returned to the deciding judge without any further information

If successful: final agreement which ends also the court proceedings: declaring the matter terminated or withdrawal of the action or enforceable settlement.

Section 160 Code of Civil Procedure
Content of the hearing record
(1) The record of the hearing shall set out:
1. The place and date of the hearing;
2. The names of the judges, of the records clerk of the court registry, and of any interpreter who may have been involved;
3. The designation of the legal dispute;
4. The names of the parties appearing, of third parties intervening in support of a party to the dispute, of representatives, attorneys-in-fact, advisers, witnesses and experts, and, in the case provided for by section 128a, the place at which they are attending the hearing;
5. The information that the hearing was held in open court or in camera.
(2) The record is to set out the essential course of the hearing and actions taken therein.
(**3) The record of the hearing is to set out:**
1. Any acknowledgments, abandonments of claims, and settlements;
2. The petitions;
3. Any admission and declaration as to a petition for the examination of a party, as well as any other declarations the determination of which is required;
4. The testimony by witnesses, experts and parties examined; in the event of a repeated examination, the testimony need be included in the record of the hearing only insofar as it deviates from the testimony previously given;
5. The results of taking visual evidence on site;
6. The decisions (judgments, orders, and rulings) of the court;
7. The pronouncement of the decisions;
8. The withdrawal of legal action or of appellate remedies;
9. The waiver of appellate remedies;

10. The results of a conciliation hearing.

(4) The parties involved may apply to have specific actions and events, or statements, included in the record of the hearing. The court may refrain from so including them if the determination of the actions and events or of the statements is not relevant. Such order shall not be contestable and is to be included in the record of the hearing.

Conclusions:

- In-court mediation offers a possibility of reaching a fast settlement of a dispute in accordance with the interests of the parties also in administrative law

- Meanwhile in- court mediation is institutionalized at administrative courts

- In-court mediation in administrative law can´t relieve the clogged dockets of the courts to a substantial extent but is a mean of quality management

- The role of a judge conducting mediation is not in contradiction to his statutory authority and mandate in court proceedings, because the conciliation judge isn´t authorized to render binding decisions and is submitted to strict confidentiality obligations.

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High Administrative Court of Bavaria