U.S. DISTRICT COURT FOR THE DISTRICT OF IDAHO
MEDIATION PROGRAM
RULES AND PROCEDURES

(a) Description and Scope

These rules and procedures govern the initial referral of most federal civil cases and bankruptcy adversary proceedings to mediation. Mediation is a process whereby a trained, experienced and impartial "neutral", selected by the parties or the Court, will facilitate discussions, assist in identifying issues and generate options in an attempt to resolve the dispute which prompted the litigation. Unlike the normal adversarial, adjudicative process, which ultimately ends in trial by judge or jury, in mediation, the parties never relinquish decision making responsibility, but rather, fashion the ultimate outcome with the mediator's assistance.

Mediation enables parties to communicate and learn directly and productively about their case in an informal but confidential setting. This may result in significant cost savings with respect to formal discovery and pretrial motions and may lead to expeditious settlement since the parties are compelled to develop an early understanding of their case and of the other side's views. Also, even when mediation does not result in full settlement, the process usually benefits the parties because it serves to identify disputed areas, reduce misunderstandings, clarify priorities, explore areas of compromise and find points of partial agreement.

(b) Case Eligibility

All civil cases except prisoner petitions, social security, student loan recovery, Medicare, forfeiture, Bankruptcy appeal, and federal tax suits will be automatically assigned to mediation. In addition, all Bankruptcy adversary proceedings shall be eligible for assignment to mediation.

(c) Opt-Out

A party will be allowed to "opt out" of the mediation process only upon successfully demonstrating to the Court by motion that "compelling reasons" exist as to why this mediation should not occur or could not possibly be productive. The judge to whom the case is assigned would rule on this matter.

(d) Timing

In an effort to minimize discovery costs, the case will be assigned to mediation at some point prior to the Rule 16 scheduling conference. The mediator selected by the parties, or alternatively appointed by the Court, shall make the discretionary determination as to the exact date of the mediation session based upon the

particular circumstances of the case and input from the respective parties. The mediator shall also determine whether any follow-up mediation sessions are necessary or could be productive.

Since mediation has been shown to be productive and beneficial at virtually any stage the litigation, the Court will have the power to assign any case at any time to mediation.

(e) Method of Referral

The Court will notify all parties through their counsel that their case has been referred to mediation. Counsel will be provided with the appropriate forms and a list of Court-authorized mediators, containing biographical sketches, qualifications and billing rate information, from which the parties will make their selection.

(f) Authority of the Court

The referral of civil actions to mediation does not divest the assigned judge of the responsibility for exercising overall management and control of a case during the pendency of the mediation process, nor does it preclude the parties from filing pretrial motions or pursuing discovery. The assigned judge may conduct pretrial conferences, hear motions and otherwise supervise the action.

(g) Roster of Mediators

The Court shall maintain a roster of mediators who shall be selected from time to time by the Court. To be eligible for selection by the Court, an attorney:

(1) must have been admitted to practice for not less than 5 years or possess a particular expertise, training or background in mediation;

(2) must be a member of the bar of this Court or a retired or non-practicing attorney or judge;

(3) must have spent a substantial portion of their professional time in litigation and/or mediation.

(4) must have substantial experience negotiating consensual resolutions to complex matters;

(5) must have attended a minimum of 30 hours of core mediator knowledge and skills training, including role-play simulations of mediated disputes. Such training must have included such competencies as information gathering, effective communication, the role of a mediator as neutral third party, controlling the mediation process, problem analysis and solving, and ethical concerns.

(h) Selection of Mediator not on Court Authorized Roster

The parties may by mutual written agreement designate a mediator who is neither an attorney nor on the Court authorized mediator roster. Under these

circumstances, the parties will work out all compensation arrangements with any mediator not on the court authorized list.

(i) Compensation of Mediators

Mediators shall be compensated at their regular rates, which shall be clearly set forth in the information and materials provided to the parties at the time of notification of case assignment to mediation. In the absence of such rates, mediators shall be compensated at the rate of $100 per hour. The parties shall be wholly responsible for the payment of the mediator's fee. Unless other arrangements are made among the parties, the plaintiff(s) and defendant(s) shall each be responsible for 1/2 of the mediator's fee. If a party withdraws from the mediation process prior to the conclusion of the session, that party is still responsible for payment of their portion of the mediator's fee unless prior arrangements have been made directly with the mediator. A bill will be submitted directly by the mediator to the respective parties immediately after the mediation session is held. If a mediator's bill is not paid in full within 15 days after the mediation session, the Court will enter an order mandating its immediate payment. Unless otherwise excused by the Court upon a showing of good cause, once a mediator accepts a particular case and begins work upon it, he/she cannot withdraw without forfeiting the right to all monetary compensation for the time expended on the matter. Mediators are encouraged to serve pro bono on at least one case per year.

(j) Selection of Mediator by Parties

Upon notification of the parties that their case has been assigned to mediation, the Court will provide each party with a list of 5 potential mediators. Each party will be given 7 days to strike-out the unacceptable names, rank in order of descending preference the names of the remaining mediators they consider acceptable, and return the list to the Court. The Court ADR Coordinator will then select a mediator in accordance with the priorities of the parties. In the event that all 5 potential mediators are stricken by one or both parties and the parties fail to agree on an alternative mediator of their choice, the Court will appoint the mediator. Where possible, geographic proximity will be taken into consideration.

(k) Conflict of Interest

(1) Upon notification of appointment, the mediator shall disclose to all parties all actual or potential conflicts of interest. There is an ongoing duty on behalf of the mediator to immediately disclose any actual or potential conflict of interest as they are subsequently discovered to exist. No person shall serve as a mediator in an action in which any of the circumstances set forth in 28 USC § 455 exist or may in good faith be believed to exist unless there is a signed waiver by each of the parties involved in the mediation.

(2) If, at any stage of the mediation proceedings, any party concludes that a mediator is not competent or not able or otherwise not qualified to serve or to continue serving as mediator, such party shall so advise the mediator, with specific reasons, in writing. The mediator shall forthwith consider the argument made and, if deemed appropriate, recuse him or herself. If the mediator does not so recuse him/herself and any party still wishes to have the mediator removed, a written request detailing the reasons shall be submitted to the Federal Court Mediation Program Coordinator who shall decide the issue of removal. If the mediator is removed or recused under this rule, the Mediation Program Coordinator shall appoint a successor.

(l) Mediation Session Date

The mediator shall set a date for the mediation session, convenient for all parties, not more than 45 days after notification of selection as a mediator in a particular action. The mediator shall inform the participants of all session dates and schedule changes.

(m) Place of Mediation Session

The Mediation session shall be held at any location within the District of Idaho agreeable to the parties. In the absence of such agreement, the mediator may designate a site as convenient for the majority of the parties. Sessions may also be held at the U.S. Courthouse in Boise or at the divisional offices depending upon availability of facilities. Travel costs of the mediator shall be paid for and shared equally by all parties.

(n) Submission of Materials

No later than 10 calendar days prior to the mediation session, each party shall submit to the mediator and serve upon all other parties, a written evaluation statement, not to exceed 10 pages (not counting exhibits and attachments). While such statements may include any information that would be useful, they must:

(1) give a brief statement of the facts;

(2) identify the pertinent principles of law;

(3) identify the legal and factual issues that are in dispute and briefly state each party's position(s) regarding each such issue;

(4) address whether there are legal or factual issues whose early resolution might appreciably reduce the scope of the dispute or contribute significantly to settlement negotiations;

(5) identify the discovery that promises to contribute most to equipping the parties for meaningful settlement negotiations; and

(6) identify the person(s) who, in addition to counsel, will attend the session as that party's representative with decision making authority.

(7) attach and highlight copies of relevant documents (contracts, medical reports, insurance policies) whose availability would materially advance the purpose of the session.

Parties may also identify in these statements persons connected to a party opponent (including a representative of an insurance carrier) whose presence at the session would make it more productive.

These evaluation materials should not be filed with the Court, and the assigned judge will not have access to them. All materials submitted by the parties in connection with the mediation session will be returned immediately following the session.

A party may also, and shall upon the mediator's request, submit additional confidential statements to the mediator which shall not be shared with the other parties.

(o) Attendance at the Mediation Session

Since one of the principal purposes of the mediation session is to afford litigants an opportunity to articulate their position and to hear, first hand, opposing parties' versions of matters in dispute, all parties shall attend the session unless otherwise excused by the Court (upon motion and showing of good cause).

Each party shall be accompanied by the individual lawyer(s) expected to be primarily responsible for handling the actual trial of the matter.

In addition to counsel, a party other than a natural person (corporation, association, partnership, government entity) must be represented at the session by someone with reasonable and actual settlement authority.

Any insurance carrier directly or indirectly involved in the outcome of the case, must designate a company representative with settlement authority to attend the mediation session unless excused by the mediator.

A party or lawyer or insurance carrier may be excused by the mediator from attending the mediation session only after a showing that they reside or are domiciled outside the District of Idaho or that it would impose an extraordinary or otherwise unjustifiable hardship. A party or lawyer who is excused from appearing in person at the session shall be available to participate by telephone.

(p) Conduct of Mediation Session

Mediation sessions shall be conducted in an informal manner. The scope and duration shall be within the discretion of the mediator. Parties and counsel shall participate in the mediation process fully, reasonably and in good faith. The Federal Rules of Evidence shall not apply. There shall be no direct or cross-examination of witnesses. The mediator shall:

(1) permit each party (through counsel or otherwise) to make an oral presentation of its position;

(2) help the parties identify areas of agreement and disagreement and, where feasible, enter stipulations;

(3) help the parties assess the relative strengths and weaknesses of their contentions and evidence, and explain the reasoning that supports these assessments;

(4) explore the possibility of settlement through mediation techniques such as:

(i) in private caucus, ascertain the opinion of each party as to their chance of success on each important issue, the consequences of an unfavorable verdict on that issue to the value of their case, the number of witnesses needed to be deposed regarding that issue, and the cost and fees entailed in proving that issue through discovery and trial;

(ii) in private caucus, ascertain the settlement offer each party is willing to make at that time and whether such offer can be communicated to the opposing party.

(5) If full settlement is achieved, the parties, with the assistance of the mediator, shall memorialize the agreement before concluding the mediation session;

(6) If settlement negotiations and mediation do not result in full settlement, the mediator shall:

(i) memorialize any partial settlements reached;

(ii) identify areas of agreement and enter stipulations;

(iii) identify those issues upon which there is no agreement; and

(iv) help the litigants devise a plan for sharing important information and/or conducting key discovery and determining what follow-up measures will contribute to case development or settlement.

(q) Transcription or Recordings

No transcription or recordings shall be made of the mediation session.

(r) Limits on the Powers of Mediator

(1) Mediators shall have authority to structure and conduct mediation sessions and to fix the time and place thereof. However, mediators shall have no authority to order parties or counsel to take any action outside the mediation session, to compel parties to produce information, or, except as allowed by these rules, to rule on disputed matters.

(2) When the mediator determines that a second mediation session may be fruitful, the mediator may schedule a second session.

(s) Report to the Court

(1) Within 10 days following the mediation session, the mediator shall advise the Court via a letter directed to the ADR Programs Coordinator whether the case has, in whole or in part, settled. The mediator shall not however, report any of the substantive matters discussed during the mediation session.

(2) Within 30 days of a mediated full settlement, plaintiff shall dismiss the underlying action, with or without prejudice, as the parties agree.

(t) Confidentiality

The Court and the mediator shall treat as absolutely confidential all written and oral communications made in connection with or during a mediation session. The same protection shall extend to these communications as Federal Rule of Evidence 408 gives to communications during settlement negotiations or to offers to compromise. All materials used in connection with the mediation session will be returned to the parties. Except for a separate legal action brought to enforce the mediated settlement, no communications made in connection with or during the mediation session may be admitted (by either the parties, their counsel, or mediator) for any purpose (including impeachment or to prove bias or prejudice of a witness) in any pending or future proceeding.