UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

Mediation Procedures for Parties and Mediator

IMPORTANT, PLEASE NOTE: This information sheet should be used in complying with the requirement of Local Bankruptcy Rule 9019-2.

The United States Bankruptcy Court for the Eastern District of Washington (the "court") has established procedures for a mediation to facilitate the voluntary resolution of adversary proceedings and contested matters.

Mediation offers a means to resolve disputes quickly, at less cost and often without the stress and pressure of litigation. Mediation offers a means to utilize the services of a trained mediator to assist the parties in the resolution of their dispute. The parties choose the method of resolution that best suits their needs, subject to court approval.

There is a cost of $500 per side payable directly to the mediator in exchange for six (6) hours of mediation related services, which will generally be incurred in both preparation and conducting the mediation, provided, however, that the mediator will spend a minimum of four (4) hours in actual mediation with the parties. If the federal government or other party not authorized to pay for mediation is involved, this information must be given to the court prior to the entry of order. Any portion of the fee, for one or more of the parties, may be waived at the discretion of the mediator for a matter where one or more of the parties are unable to afford the fee, such as a pro bono matter. Once the mediator has performed six (6) hours of mediation services, the parties and the mediator may agree that the mediation should continue and that compensation to the mediator will be paid at a rate not to exceed $300 per hour, to be split evenly among the parties, unless, however, (i) the mediator agrees to permit a party or parties to continue to participate in the mediation without charge, and (ii) the other party or parties sharing the mediator's additional fees are not charged for the non-paying participant's share. It is suggested that the mediator and the parties confer in advance as to the amount of time the mediator will need for preparation and whether enough time will be allotted to the mediation proceeding.

Procedures for Mediation

The rules governing mediation are found in Local Bankruptcy Rule 9019-2. The rule is available in the clerk's office or at the court's Web site, www.waeb.uscourts.gov. These procedures and the forms related to mediation are also available on the court's Web site.

A matter may be set for mediation by the court with or without the agreement of the parties at any time. Typically, the court might set a matter for mediation at a case management or status conference or hearing. Alternatively, the parties may, at any time, submit a stipulated order requesting that the matter be set for mediation. The stipulated order should recite that all parties to the dispute agree to mediation. Mediation is subject to court approval.

The following steps should be taken whenever a matter is set for mediation:

1. The parties to the dispute are to confer and select a mediator and an alternate mediator from the list of mediation panel members. A complete list of all panel members, including short biographies, is posted on the court's Web site at www.waeb.uscourts.gov. The parties should agree on who is to complete the Stipulation Regarding Selection of Mediator (ADR Form 3) and then submit the Order Appointing Mediator for approval (ADR Form 4). If you are not an electronic filer, then provide two copies of the order to the court for signature, together with a stamped return envelope addressed to the submitting party.

2. Mediation is designed to be a streamlined procedure. Upon receipt of the signed order, the submitting party must immediately serve a copy of the order on the mediator, the alternate (if applicable), and all parties to the dispute.

3. Once the mediator receives a copy of the order, he or she will contact the parties to schedule a conference. The mediator may establish procedures and deadlines relating to the mediation, taking into account deadlines in the court's scheduling order. Possible formats are as follows:

   Facilitation – Facilitation is a collaborative process in which the mediator functions as a neutral party providing information about the process. The mediator does not make substantive contributions regarding the merits of the dispute or possible settlements. A facilitator helps the parties define the issues in order to increase the likelihood that the parties will reach a consensus.

   Mediation – Mediation is a flexible, non-binding, confidential process in which a neutral party facilitates negotiations among the parties to help them reach settlement. The mediator's goals include: improving communication across party lines, helping parties articulate their interests and understand those of their opponent, probing the strengths and weaknesses of each party's legal positions, helping identify areas of agreement, and generating options for a mutually agreeable resolution to the dispute. The mediator generally does not give an overall evaluation of the case. A hallmark of mediation is its capacity to expand traditional settlement discussion and broaden resolution options, often by going beyond the legal issues in the controversy.

   Early Neutral Evaluation – In Early Neutral Evaluation the parties and their counsel, in a confidential session, present summaries of their cases and receive a non-binding assessment by an experienced neutral professional with subject-matter expertise. The evaluator also helps identify areas of agreement, provides case-planning guidance and, if requested by the parties, settlement assistance.

4. Mediation Statements. Upon the request of the mediator, parties will provide a mediation statement directly to the mediator, with service to other parties. Such statements shall not exceed 10 pages (exclusive of exhibits and attachments). While such statements may include any information that would be useful, they must:

   A. Identify the person(s), in addition to counsel, who will attend the session as representative of the party with decision making authority;

B. Describe the key issues and strongest and weakest points in both sides of the controversy, both legal and factual;

C. Address whether there are legal or factual issues whose early resolution might appreciably reduce the scope of the dispute or contribute significantly to settlement;

D. Identify the discovery that could contribute most to equipping the parties for meaningful discussions;

E. Set forth the history of past settlement discussions, including all prior and presently outstanding offers and demands;

F. Describe any perceived impediments to resolution on either side;

G. Make an estimate of the cost and time to be expended for further discovery, pretrial motions, expert witnesses and trial;

H. Indicate presently scheduled key dates related to the dispute, including discovery deadlines, status conferences, pretrial conferences, and trial;

I. Provide the terms of an acceptable settlement that would conclude the matter and end further litigation expenses; and

J. Provide any other information deemed helpful in reaching a mediated resolution of the controversy.

5. Statements Not To Be Filed. The mediation statements shall not be filed with the court and the court shall not have access to them.

6. Identification of Participants. Parties may identify in the mediation statements any persons connected to a party opponent (including a representative of a party opponent's insurance carrier) whose presence at the mediation conference would improve substantially the prospects for making the session productive; the fact that a person has been so identified, shall not, by itself, result in an order compelling that person to attend the mediation conference.

7. Documents. Parties shall attach to their mediation statements copies of documents out of which the dispute has arisen, e.g., contracts, or those whose availability would materially advance the purposes of the mediation conference.

8. Conduct of the Mediation Conference

The mediation conference shall proceed informally. Rules of evidence shall not apply. There shall be no formal examination or cross-examination of witnesses. Where necessary, the mediator may conduct continued mediation conferences after the initial session. As appropriate, the mediator may:

A. Permit each party, through counsel or otherwise, to make an oral presentation of its position;

B. Help the parties identify areas of agreement and, where feasible, formulate stipulations;

C. Assess the relative strengths and weaknesses of the parties' contentions and evidence, and explain as carefully as possible the reasoning of the mediator that supports these assessments;

D. Assist the parties in settling the dispute;

E. Estimate, where feasible, the likelihood of liability and the dollar range of damages;

F. Help the parties devise a plan for sharing the important information and/or conducting the key discovery that will equip them as expeditiously as possible to participate in meaningful settlement discussions or to posture the case for disposition by other means; and

G. Determine whether some form of follow-up to the conference would contribute to the case development process or to settlement.

All of the above are non-binding, voluntary, and confidential. However, nothing herein shall preclude the mediator or a participant from complying with federal and state statutes. A sample Confidentiality Agreement (ADR Form 5) is available on the court's Web site for optional use by the mediator. Other processes and procedures, with the exception of arbitration, may be used by agreement and at the discretion of the parties and the mediator.