

## GENERAL ORDER NO. 37

### MEDIATION

#### **I. PURPOSE**

The court adopts a mediation program to broaden the range of alternative dispute resolution (ADR) processes that the court makes available to litigants. The mediation process is designed to provide a quicker, less expensive and potentially more satisfying alternative to continuing litigation without impairing the quality of justice or the right to trial.

The Northern District of California is one of three federal courts specifically mandated by Congress, under the Civil Justice Reform Act of 1990, to "experiment with various methods of reducing cost and delay in civil litigation, including alternative dispute resolution." 28 U.S.C. §471 Note. The mediation program is one part of the court's response to this mandate.

#### **II. DESCRIPTION OF MEDIATION**

Mediation is a non-binding, confidential process in which a neutral attorney-mediator helps counsel and their clients explore settlement alternatives. The mediator has been specially trained by the court, is experienced in communication and negotiation techniques, and is knowledgeable about federal litigation. The mediator works with the parties and their counsel to improve communication across party lines, helps parties clarify their understanding of their own and their opponent's interests, probes the strengths and weaknesses of each party's legal positions, identifies areas of agreement and generates options for a mutually agreeable resolution to the dispute. The mediator generally does not give an overall evaluation of the case.

#### **III. ELIGIBLE CASES**

Cases assigned to the ADR Multi-Option Pilot (under General Order No. 36) are eligible for the mediation program. The court will make mediation available to litigants in other civil cases filed on or after July 1, 1993 who stipulate to participate in the program if appropriate resources are available.

#### **IV. MEDIATORS**

##### **A. Assignment**

After entry of an ADR order (pursuant to General Order No. 36) or other court order in which mediation is selected, the ADR Directors shall appoint a mediator from the court's roster of qualified mediators and shall notify the parties of the appointment.

**B. Qualifications**

Mediators on the court's roster shall have strong mediation process skills and familiarity with civil litigation in federal court. Each mediator must have been admitted to the practice of law for at least seven years and be a member of the bar of this court or of the faculty of an accredited law school. The court may modify these requirements in individual cases for good cause.

**C. Conflicts of Interest**

No mediator may serve in violation of the standards set forth in 28 U.S.C. §455. If a circumstance covered by subparagraph (a) of that section might exist such that the mediator's impartiality might reasonably be questioned, the mediator shall promptly disclose that circumstance to all counsel in writing. A party who believes that the assigned mediator has a conflict of interest shall bring this concern to the attention of the ADR Director, in writing, within 10 calendar days of learning the source of the potential conflict or shall be deemed to have waived objection. Further guidance regarding the rules governing conflicts appears in the memorandum entitled *Conflicts of Interest* provided to mediators and available from the court's ADR unit.

**V. SCHEDULING THE MEDIATION**

Promptly after being appointed to a case, the mediator shall fix the specific date and place of the mediation session within the time frame set by the ADR order.

**VI. WRITTEN MEDIATION STATEMENTS / CONTACT WITH MEDIATOR**

No later than 10 calendar days before the first mediation session, each party shall submit directly to the mediator, and shall serve on all other parties, a written Mediation Statement. The statements shall **not be filed** with the court and the assigned judge shall not have access to them. The statements shall not exceed 10 pages (not counting exhibits and attachments) and shall:

- identify the person(s) with decision-making authority, who, in addition to counsel, will attend the mediation as representative(s) of the party,
- describe briefly the substance of the suit, addressing the party's views on the key liability issues and damages,
- identify persons connected to a party opponent (including an insurer's representative) whose presence might substantially improve the prospects for settlement, or the utility of the mediation,

- contain the status of any settlement negotiations and any other information that might be useful to the mediator, and
- include copies of documents likely to make the mediation more useful or productive or materially advance settlement prospects.

The mediator may request that the parties submit an additional confidential written statement or may discuss the case in confidence with an attorney during a telephone conversation. The mediator shall not disclose any party's confidential communication without permission.

## **VII. ATTENDANCE AT SESSION**

### **A. Clients**

The **parties themselves** shall attend the mediation unless excused as provided in paragraph C, below. A party other than a natural person (*e.g.*, a corporation or an association) satisfies this attendance requirement if represented by a person (other than outside counsel) with full authority to settle and knowledgeable about the facts of the case.

In cases involving insurance carriers, representatives of the insurance companies, with full authority to settle, shall attend the mediation. A party that is a governmental unit shall send a representative, in addition to counsel, knowledgeable about the facts of the case and the governmental unit's position.

### **B. Attorneys**

Each party shall be accompanied at the mediation by the attorney expected to be primarily responsible for handling the trial of the matter.

### **C. Requests to be Excused**

A party or lawyer will be excused from personally attending the mediation only after a showing that personal attendance would impose an extraordinary or otherwise unjustifiable hardship. A party or attorney seeking to be excused shall submit a letter to the ADR Director, for transmittal to the assigned judge, and provide a copy to the mediator, no fewer than 15 calendar days before the date set for the session. The letter shall set forth all considerations that support the request, state realistically the amount in controversy in the case, and indicate whether the other party or parties join or object to the request. The letter shall be accompanied by a proposed order. A party or attorney excused from appearing in person at the session shall be available to participate by telephone.

## **VIII. PROCEDURE AT THE MEDIATION**

The mediations shall be informal. Within guidelines fixed by the court, mediators shall have discretion to structure the mediation so as to maximize prospects for settling all or part of the case. The mediator may hold separate, private caucuses with any party or counsel but may not, without the consent of that party or counsel, disclose the contents of that discussion to any other party or counsel.

## **IX. FOLLOW UP**

At the close of the mediation session, the mediator and the parties shall jointly determine whether it would be appropriate to schedule follow up. Such follow up could include, but need not be limited to, written or telephonic reports that the parties might make to one another or to the mediator, exchange of specified kinds of information, and/or another mediation session.

Within 10 days of the close of each mediation session and on the form provided by the court, the mediator shall report to the ADR Director whether the mediation resulted in full or partial settlement and whether any follow up was set.

## **X. CONFIDENTIALITY**

This court, the mediator, all counsel and parties shall treat as confidential all written and oral communications made in connection with or during any mediation session. The court hereby extends to all such communications all the protections afforded by Federal Rule of Evidence 408 and by Federal Rule of Civil Procedure 68.

No written or oral communication made by any party, attorney, mediator or other participant in connection with or during any mediation may be disclosed to anyone not involved in the litigation. Nor may such communication be used for any purpose (including impeachment) in any pending or future proceeding in this court. Such communication may be disclosed, however, if all participants in the mediation, including the mediator, so agree.

None of the substance of any mediation may be communicated by anyone to the assigned judge.

Nothing in this section shall be construed to prevent parties, counsel or mediators from responding, in absolute confidentiality, to inquiries or surveys by persons authorized by this court to evaluate the mediation program. Nor shall anything in this section be construed to prohibit parties from entering into written agreements resolving some or all of the case or entering and filing procedural or factual stipulations based on suggestions or agreements made in connection with a mediation session.

## XI. COMPENSATION OF MEDIATORS

Mediators shall volunteer their preparation time and the first four hours of their time in the mediation. After four hours of mediation, the mediator may either (1) continue to volunteer his or her time or (2) give the parties the option of concluding the procedure or paying the mediator for additional time at an hourly rate of \$150. The procedure will continue only if all parties and the mediator agree. (See General Order 36, § VII.F.2)

All terms and conditions of payment must be clearly communicated to the parties. The parties may agree to pay the fee in other than equal portions. The parties shall pay the mediator directly. The mediator shall promptly report to the court the amount of any payment received.

## XII. ENFORCEMENT

Mediators shall promptly report any violation of this order to the ADR Director for transmittal to the assigned judge, including failure to submit timely written Mediation Statements or failure to comply with the attendance requirements of this Order.

## XIII. EVALUATION

Congress has mandated that the court's ADR programs be evaluated. Neutrals, attorneys and clients shall promptly respond to any inquiries or questionnaires from persons authorized by the court to evaluate the programs. Questionnaire responses will be used for research and monitoring purposes only and the sources of specific information will not be disclosed to the assigned judge or in any report.

ADOPTED: July 1, 1993

FOR THE COURT

  
\_\_\_\_\_  
CHIEF JUDGE