

## **LCvR 84**

### **MEDIATION**

#### **PURPOSE AND SCOPE OF RULES**

(a) These rules govern the administration of the United States District Court Mediation Program. The Mediation Program was designed to give litigants an opportunity to discuss settlement of their claims with the help of a trained, neutral third party. Mediation, while not appropriate in all cases, can benefit many litigants. It can, for example, lead to resolutions more quickly, with less expense and with results that are more satisfying to the litigants than those that result from judicial disposition of a claim. The Court makes mediation services available to litigants on a *pro bono* basis.

(b) These rules apply only to mediation proceedings that are formally conducted through the United States District Court's Mediation Program. Nothing in these rules shall preclude litigants from independently retaining a private mediator or other ADR professional to facilitate negotiations in their case.

## **LCvR 84.1**

### **ADMINISTRATION OF MEDIATION PROGRAM**

(a) The United States District Court Mediation Program is administered by the Office of the Circuit Executive for the United States Courts for the District of Columbia Circuit. The mediation staff consists of a Director and Deputy Director of Dispute Resolution, who are responsible for assigning cases to qualified volunteer mediators and providing parties with the proper notification and instructions. They also oversee volunteer training, monitor the progress of mediated cases, collect pertinent statistical information and serve as a resource for program mediators as they work on cases.

(b) The Director and Deputy Director of Dispute Resolution may be reached at the following address and phone numbers:

Office of the Circuit Executive  
E. Barrett Prettyman United States Courthouse  
333 Constitution Avenue N.W.  
Washington D.C. 20001  
(202) 216-7350  
fax: (202) 273-0331

The Court encourages litigants and counsel to contact these officials to secure general information about the Mediation Program, to discuss the suitability of mediation for a particular case, or to raise any concerns they may have about the operation of the Program.

## **LCvR 84.2**

### **DESCRIPTION OF THE MEDIATION PROCESS**

#### **(a) DESCRIPTION.**

Mediation is a flexible, non-binding, confidential process in which a neutral lawyer-mediator facilitates settlement negotiations. The mediator improves communication across party lines, helps parties articulate their interests and understand those of their opponent, probes the strengths and weaknesses of each party's legal position, helps identify key legal and factual issues, identifies common interests and areas of agreement and helps generate options for a mutually agreeable resolution of the dispute. If appropriate, the mediator may provide an evaluation of the merits of the case. A hallmark of mediation is its capacity to expand traditional settlement discussion and broaden resolution options, often by exploring litigant needs and interests that may be independent of the legal issues in controversy.

#### **(b) LIMITS ON ROLE OF MEDIATOR.**

The mediator has no authority to render a decision or to dictate a settlement.

## **LCvR 84.3**

### **MEDIATORS**

#### **(a) PANEL.**

The Court shall maintain a panel of mediators serving in the Mediation Program. Mediators will be selected from time to time by the Court from applications submitted by lawyers willing to serve on a volunteer basis. The Director and Deputy Director of Dispute Resolution may also serve as mediators.

#### **(b) QUALIFICATIONS AND TRAINING.**

Each lawyer serving as a mediator in the Court's Mediation Program shall be a member of the bar of this Court and shall successfully complete training as required by the Court. Additional minimum requirements for serving on the Court's panel of mediators, which the Court may modify in individual circumstances, are as follows:

(1) Mediators shall have been admitted to the practice of law for at least ten years and shall be knowledgeable about civil litigation in federal court.

(2) Mediators shall have strong mediation process skills and the temperament and training to listen well, facilitate communication across party lines and assist the parties with settlement negotiations.

**(c) MEDIATOR IMMUNITY.**

All lawyers serving as mediators in the Court's Mediation Program are performing quasi-judicial functions and shall be entitled to absolute quasi-judicial immunity for acts performed within the scope of their official duties.

**(d) COMPLAINTS AGAINST MEDIATORS.**

Complaints against a mediator or concerns about a mediator's performance shall be brought to the attention of the Director of Dispute Resolution. The parties shall not bring such complaints to the attention of the assigned judge.

**LCvR 84.4**

**REFERRAL TO MEDIATION**

**(a) METHOD OF REFERRAL.**

District judges may refer civil cases to mediation, subject to the availability of qualified mediators:

(1) by encouraging litigants to submit to mediation voluntarily and entering a consent order referring the case to the Circuit Executive's Office, or

(2) by requiring litigants to participate after giving them an opportunity, in response to

an order to show cause, to explain why mediation would not be appropriate in their case.

### **Cross Reference**

Local Civil Rule 16.3 requires counsel to meet, within fifteen days after defendant enters an appearance in a case, to discuss whether mediation might be appropriate and to submit their views to the court within ten days after the meeting. Counsel must also indicate whether they discussed mediation with their clients before filing their report.

#### **(b) TIMING OF REFERRAL.**

Cases may be referred to mediation, with the consent of the assigned judge, at any point during the course of the litigation.

### **Cross Reference**

Local Rule 16.3 requires counsel to discuss the question of timing. Litigants may refer to the Court's brochure, "Mediation in the United States District Court for the District of Columbia," for a discussion of timing considerations.

#### **(c) *PRO SE* CASES.**

Cases in which one of the parties is proceeding *pro se* are generally considered ineligible for mediation, unless the *pro se* party is represented by counsel for the purposes of mediation.

#### **(d) MAGISTRATE JUDGES CONSENT CASES.**

In cases in which the parties have consented to jurisdiction by a magistrate judge under 28 U.S.C. s 636(c), the magistrate judge shall have the same authority to refer cases to the Mediation Program as do district judges under Local Rule 84.1(b) above.

#### **(e) BANKRUPTCY PROCEEDINGS.**

Mediation is also available to litigants in bankruptcy proceedings.

### **LCvR 84.5**

#### **APPOINTMENT OF MEDIATOR**

**(a) APPOINTMENT BY CIRCUIT EXECUTIVE.**

After entry of an order referring a case to mediation, the mediation staff will appoint from the Court's panel a mediator who is available during the appropriate period and who has confirmed, following such inquiry as may be appropriate, that no personal or professional conflict precludes his/her participation as mediator. The Circuit Executive's Office will notify the parties of the appointment.

**(b) OBJECTIONS TO APPOINTMENT.**

Litigants who object to the appointment of a particular mediator for any reason shall make their concerns known to the Director of Dispute Resolution, who will make every reasonable effort to substitute a new mediator who is acceptable to all parties. Such concerns may be brought to the Director's attention at any point during the course of the mediation.

**LCvR 84.6**

**MEDIATION STATEMENTS**

**(a) CONTENT AND TIMING.**

No later than seven days prior to the first mediation session, each party shall submit directly to the mediator a confidential mediation statement. The mediation statement shall not exceed ten pages and shall outline the underlying facts of the dispute, the key legal issues in the case, possible areas of agreement and options for settlement, and the settlement history of the dispute, if any. The mediation statement shall also identify, by name and title or status:

- (1) the person(s) with decision-making authority, who, in addition to counsel, will attend the mediation as representative(s) of the party; and
- (2) persons connected with either party (including insurer representatives) whose presence might substantially improve the utility of the mediation or the prospects for settlement.

**(b) CONFIDENTIAL NATURE OF STATEMENT.**

Mediation statements shall not be filed with the Court or served upon other parties to the lawsuit.

## LCvR 84.7

### THE MEDIATION PROCESS

#### (a) SCHEDULING.

Promptly after being appointed to a case, the mediator shall fix the date and time of the first mediation session, which shall be held within three weeks of the date of the mediator's appointment.

#### (b) DISCRETION OF MEDIATOR.

The mediation shall be informal. Mediators shall have discretion to structure the mediation so as to maximize prospects for settling all or part of the case.

#### (c) JOINT AND SEPARATE MEETINGS.

The mediator typically begins with a joint mediation session, to be attended by all counsel and parties. S/he may hold separate, private caucuses with each side or each lawyer or, if the parties agree, with the clients only. The mediator may choose to conduct any joint session or private caucus by telephone or e-mail.

#### (d) COMPLETION OF PROCESS.

(1) The mediation ends when one of the following events occurs:

(A) the parties settle the dispute;

(B) the mediator and the parties conclude that further discussion would be fruitless; or

(C) the *mediation deadline* -- a date established in the assigned judge's order of referral -- is reached.

(2) If a settlement is reached, counsel shall notify the Court by filing a stipulation of dismissal or other appropriate document.

(3) Mediators shall notify the Court of the outcome of a mediation by promptly completing a Mediator Evaluation Form and returning it to the

Circuit Executive's Office.

**(e) EXTENSION OF MEDIATION DEADLINE.**

The assigned judge may alter or extend the mediation deadline *sua sponte* or at the parties' request.

**(f) AGREEMENTS TO BE REDUCED TO WRITING.**

Agreements reached during mediation shall not bind the parties unless they are reduced to writing and signed by counsel and the parties. In cases involving government or corporate parties, an authorized representative of the governmental or corporate entity may sign.

**LCvR 84.8**

**ATTENDANCE REQUIREMENTS**

**(a) IN GENERAL.**

The Court requires counsel and parties with settlement authority to attend mediation sessions.

**(b) CORPORATION OR OTHER ENTITY.**

A party other than a natural person (e.g., a corporation or an association) satisfies this attendance requirement if it sends a representative (other than outside counsel) who possesses authority to settle, or if it makes such a person immediately available to the mediator by telephone.

**(c) GOVERNMENT ENTITIES.**

A party that is a government or governmental agency, in addition to counsel, shall send a representative with settlement authority or, alternatively, a representative who is knowledgeable about the facts of the case and will play a major role in submitting a recommendation to the person or body with decision-making authority.

**(d) EXCEPTION**

Notwithstanding (b) or (c) above, mediators may require the presence of or participation by telephone of the ultimate governmental or corporate decision-maker, or other appropriate senior

manager, if they conclude, with the concurrence of the Director of Dispute Resolution, that such participation is advisable.

## **LCvR 84.9**

### **CONFIDENTIALITY**

#### **(a) CONFIDENTIAL TREATMENT.**

(1) The Court hereby prohibits the mediator, all counsel and parties and any other persons attending the mediation from disclosing any written or oral communications made in connection with or during any mediation session.

(2) There shall be no communication between the mediator and the assigned judge regarding a case that has been referred to mediation. Disputes and complaints of any kind, the resolution of which may require the disclosure of information acquired through a mediation, shall not be heard by the assigned judge but shall be brought to the attention of the Compliance Judge as outlined in Local Rule 84.10 below.

(3) Information acquired through mediation shall not be used for any purpose, including impeachment, in any pending or future proceeding in this or any other court or forum. Mediators shall not respond to subpoenas or requests for such information or disclose such information voluntarily. Mediators who are served with a subpoena or otherwise asked for information about any mediation in which they have participated shall immediately inform the Director of Dispute Resolution of the request.

#### **(b) CONFIDENTIALITY AGREEMENT.**

The mediator may ask the parties and all persons attending the mediation to sign a confidentiality agreement on a form provided by the Court, but the confidentiality requirements of this section apply regardless of whether a confidentiality agreement is signed.

#### **(c) EXCEPTIONS**

(1) Nothing in this rule shall be construed to prohibit disclosures to persons not directly participating in a mediation (such as corporate or government officials) whose possession of mediation-related information counsel believe to be necessary to further the progress of the talks in the case; or to help the institution respond to the mediation program generally. Persons not attending a mediation who are given information on this "need to know" basis shall also be bound by this rule regarding confidentiality.

(2) This rule shall not be construed to prohibit parties from entering written agreements resolving some or all of the case or from entering and filing procedural or factual stipulations based on suggestions or agreements made in connection with a mediation.

(3) Information which is obtained through discovery or other means outside the mediation process shall not be rendered inadmissible or non-discoverable because it is used or presented in mediation.

(4) This rule does not preclude a report to or an inquiry by the Compliance Judge pursuant to Local Rule 84.10 below regarding a possible violation of these rules.

(5) Nothing in this rule shall be construed to prohibit the mediator, counsel or litigants from discussing, with the Court's ADR staff, the progress of a mediation or the specific facts and ideas discussed in the course of mediated negotiations. Such communications are encouraged to permit the staff to monitor the quality of the mediation services being provided.

(6) This rule does not preclude dissemination of information about the types of cases going through the Mediation Program or about overall program results. Generic information about the program and cases entering mediation is available, and reports are generated for analysis and evaluation. Individual cases that have been resolved through mediation may be publicly identified, discussed or brought to the Court's attention if the parties consent to such a disclosure.

#### **LCvR 84.10**

#### **DISPUTE RESOLUTION COMPLIANCE JUDGE**

The Court has designated a district judge to serve as the Dispute Resolution Compliance Judge. Complaints alleging a material violation of these mediation local rules or of a judicial order referring a case to mediation must be made to the Director of Dispute Resolution, who may then refer them to the Compliance Judge for appropriate action. If the Compliance Judge believes judicial intervention is necessary, s/he will so inform the parties and will ask them to address the matter. The Compliance Judge will have the authority to impose sanctions as s/he deems appropriate. *Litigants and mediators may not bring compliance issues directly to the attention of the Compliance Judge or to the attention of the judge who is assigned to the lawsuit.*