THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

For the Adoption of the Revised MEDIATION PROGRAM PROCEDURES	)	GENERAL ORDER NO.**130** Amending General Order No. 121

In 1990, Congress enacted the Civil Justice Reform Act (CJRA) mandating that each United States District Court implement a civil justice expense and delay reduction plan. One of the principles to be considered in each plan is the referral of appropriate cases to alternative dispute resolution (ADR) programs such as arbitration, mediation, and judicial settlement conferences.

On November 7, 1995, General Order No. 121 was entered by this Court adopting the Mediation Program Procedures. On November 1, 1996, certain revisions were approved by the Court of the District of Idaho.

THEREFORE, IT IS HEREBY ORDERED by this General Order that the revisions to the Mediation Program Procedures of November 6, 1995, as approved by the Court and as attached hereto shall be adopted as the Mediation Program Procedures from this date forward.

IT IS FURTHER ORDERED that the Mediation Roster shall be maintained by the ADR Coordinator of the District of Idaho in accordance with the procedures revised and adopted as of this date.

DATED this 13th day of November, 1996.

Edward J. Lodge, Chief
United States District Judge

B. Lynn Winmill
United States District Judge

Jim D. Pappas, Chief
United States Bankruptcy Judge

Alfred C. Hagan
United States Bankruptcy Judge

Mikel H. Williams, Chief
United States Magistrate Judge

Larry M. Boyle
United States Magistrate Judge

UNITED STATES DISTRICT COURT
and
UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

MEDIATION PROGRAM PROCEDURES

November 1996

(a) Description and Scope

These procedures govern the referral of certain federal civil cases and bankruptcy adversary and contested proceedings to mediation. Mediation is a process whereby a trained, experienced and impartial neutral, selected by the parties or the Court, will facilitate discussions, and assist in identifying issues and generating options in an attempt to resolve the dispute which prompted the litigation. Unlike the 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 all sides of the case. Also, even when mediation does not result in full settlement, the process may benefit the parties as it may assist in identifying disputed areas, reducing misunderstandings, clarifying priorities, exploring areas of compromise, and developing points of agreement.

(b) 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 even after the case has been assigned to mediation.

(c) Case Eligibility

At the Rule 16 Scheduling Conference, certain civil cases will be referred to mediation except the following: (1) those involving prisoner petitions; (2) Social Security matters; (3) student loan recovery; (4) Medicare; (5) forfeiture; (6) bankruptcy appeals; (7) federal tax suits; (8) Federal Tort Claims Act cases in excess of $1 million; and (9) cases involving temporary restraining orders, preliminary injunctions, or other actions involving

extraordinary injunctive relief. Certain bankruptcy adversary and contested cases will be referred to mediation at the discretion of the bankruptcy judges.

(d) Method of Referral to or Withdrawal from Mediation

Prior to the Rule 16 Scheduling Conference, counsel will be expected to review the procedures and options of mediation with their clients. During the Rule 16 Scheduling Conference, a party can move for withdrawal from the mediation process upon a showing that reasons exist as to why mediation would not be productive or otherwise should not occur. If a request for withdrawal from mediation is made, the judge to whom the case is assigned will make the final determination. If the matter proceeds to mediation, the Court will refer the case to the court ADR Coordinator.

(e) Selection of a Mediator

When the case is referred to mediation, the court ADR Coordinator will contact the parties. Counsel will then be provided with the appropriate forms and a list of court-authorized mediators from which the parties will make their selection. The list will contain professional affiliations, experience, qualifications, and fee and expense information.

Each party will be given ten (10) days to strike out the unacceptable names, rank in order of descending preference the names of ten (10) 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 the lists are not returned by all parties within ten (10) days or all parties fail to agree on a mutually acceptable mediator, the court ADR Coordinator will then appoint a mediator.

By mutual written agreement, the parties may designate a mediator who is not an attorney or who is not on the court-authorized mediator roster. Under these circumstances, the parties will negotiate all compensation arrangements with the chosen mediator. If a mediator is chosen from outside the Court-maintained roster, the mediator will be required to report to the ADR Coordinator in the same manner required by these procedures.

(f) Scheduling of Mediation Session

After the mediator is selected by the parties, or alternatively appointed by the court ADR Coordinator, the mediator will 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 court ADR Coordinator will then be notified of the date(s) of the mediation. The mediator will also determine whether any follow-up mediation sessions are necessary.

(g) Roster of Mediators

The Court shall maintain a roster of mediators which will be updated annually by the Court. To be eligible for selection on the mediator roster by the Court, an attorney:

(1) must have been admitted to practice for not less than five 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 attended a minimum of forty (40) 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, ethical concerns, the role of a mediator as a neutral third party, control of the mediation process, and problem analysis.

In order for a person to remain on the list of mediators maintained by the District of Idaho, the attorney must submit proof that the mediator has completed a minimum of twenty (20) hours of additional training or education during the preceding two (2) calendar years.

The training required by this section shall be acquired by completing programs approved by an accredited college or university or by one of the following organizations: Idaho State Bar, Idaho Mediation Association, or Society of Professionals in Dispute Resolution.

(h) Removal from the Roster

A mediator can be removed from the mediation roster either at the mediator's request or by Court order. If removed from the mediation roster by Court order, the person shall not be returned to the roster absent a Court order obtained upon motion and affidavit sufficiently explaining the circumstances of such removal and reasons justifying the return of the person to the mediation roster.

(i) Compensation of Mediators

Mediators shall be compensated at their regular fees and expenses 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 fees and expenses. Unless other arrangements are made among the parties, the plaintiff(s) and defendant(s) shall each be responsible for ½ of the mediator's fees and expenses, including travel. If a party withdraws from the mediation process prior to the conclusion of the session, the parties are still responsible for payment of their portion of the mediator's fees and expenses 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(s) is(are) concluded. If a mediator's bill is not paid in full within thirty (30) days after the mediation session, the

Court will enter an order mandating immediate payment, except in cases involving the United States.

(j) Conflict of Interest

Upon notification of appointment, the mediator shall disclose to all parties all actual or potential conflicts of interest. Those conflicts of interest as set out in 28 U.S.C. § 455, as they apply to justices, judges, or magistrates, shall also apply to mediators. 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 U.S.C. § 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.

(k) Place of Mediation Session

The mediation session will be held at any location 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 during business hours at the United States Courthouse in Boise or at the divisional offices in Moscow, Coeur d'Alene, or Pocatello, depending upon availability of facilities.

(l) Submission of Materials

If requested by the mediator, each party may submit to the mediator, a written, confidential statement which may be exchanged among the parties if they so desire. This statement should not exceed ten (10) pages, excluding exhibits and attachments such as copies of relevant documents, i.e, contracts, medical reports, or insurance policies, that would materially advance the purpose of the session. While such statements may include any information that would be useful, they should:

(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 issue;

(4) address whether there are legal or factual issues that early resolution might appreciably reduce, thus 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.

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 to the mediator in connection with the mediation session will be destroyed by the mediator immediately following the session.

(m) 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 party's interpretation of matters in dispute, all parties shall attend the session unless otherwise excused by the mediator upon showing of good cause.

Each party shall be accompanied by their respective attorney(s) who will be primarily responsible for handling the actual trial of the matter, should it occur in the future.

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, representative, attorney, 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 attorney who is excused from appearing in person at the session shall be available to participate by telephone.

(n) Conduct of Mediation Session

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

(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 into stipulation;

(3) help the parties assess the relative strengths and weaknesses of their case; and

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

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

If any settlement is achieved, the parties, with the assistance of the mediator, shall memorialize the agreement before concluding the mediation session.

(o) Transcription or Recordings

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

(p) Limits on the Powers of the Mediator

(1) Mediators will 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.

(q) Report to the Court

(1) Within ten (10) days following the mediation session, the mediator shall advise the Court via a form directed to the ADR 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 thirty (30) days of a mediated full settlement, plaintiff shall dismiss the underlying action, with or without prejudice, as the parties agree.

(r) 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 of compromise. All materials used in connection with the mediation session will be destroyed after the mediation by the mediator. 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 the mediator) for any purpose (including impeachment or to prove bias or prejudice of a witness) in any pending or future proceeding.