

## APPENDIX Q. GUIDELINES FOR MEDIATION

January 29, 1993; amended February 24, 1994, April 1, 1997, May 27, 1998, April 19, 2000, July 5, 2001, January 31, 2008, March 1, 2010, [new date]

### I. Case Management Responsibility of the Assigned Judicial Officers; Stay of Proceedings

Mediation is intended to afford litigants a less expensive alternative to traditional litigation. L.Civ.R. 301.1, which provides for both compulsory and voluntary mediation, is expected to conserve the resources of litigants which would otherwise be expended in discovery and to concentrate those resources on meaningful and intensive settlement negotiation. Mediation is also intended to conserve judicial resources, enabling Judges to concentrate on cases which have not been referred to mediation. The Court expects and requires both litigants and their attorneys to participate in mediation in good faith.

Any case pending in the Court may be referred to mediation through L.Civ.R. 301.1. Although there are certain categories of cases (described in L.Civ.R.72.1(a)(3)(C)) which the Court has determined are not usually conducive to mediation, an assigned Judge has discretion to determine otherwise and refer the matter to mediation.

A referral to mediation pursuant to L.Civ. R.301.1 may be made by the assigned Judge(s) *sua sponte*, with or without the parties' consent. The parties may also request to be referred to mediation through L.Civ.R. 301.1 and may request a particular mediator from the Court's mediation panel be assigned. Alternatively, the parties may determine to select a private, non-panel mediator for a mediation session that is not governed by L.Civ.R. 301.1, in which case they are to make their own financial and logistical arrangements with that mediator; however, the Court may exercise input into the timing of such mediation and whether any stay will be implemented during the mediation period.

The referral of cases to mediation does not divest the assigned Judges of the responsibility for exercising overall management control over a case during the pendency of the mediation process. However when a case is referred to mediation, the assigned Judges have discretion to stay all proceedings (including pretrial motions or the pursuit of discovery) for a prescribed period to afford a reasonable period of time within which to reach a settlement. If it appears that it would be futile to continue mediation efforts before the stay expires, the mediator or any party may request that the case be restored to the active calendar forthwith.

L.Civ.R. 301.1(b) provides for the designation of a "compliance judge for mediation." The duty of this judicial officer is to administer the mediation program and resolve procedural or substantive issues which might arise. Any such issue (including recusal of a mediator) may be brought to the attention of the compliance judge by either the parties or the mediator.

### II. Mediator's Responsibility for Managing the Mediation Process

A. When a case is referred to mediation under L.Civ.R. 301.1, the referring Judge shall designate a mediator or request that the compliance judge do so. With the designation of a mediator, the Court has delegated to that person the authority to control and regulate the mediation process, including:

(1) Communicating with counsel to establish an expedited schedule for, among other things, the submission of position papers and the selection of dates for first and subsequent mediation sessions.

(2) Communicating on an *ex parte* basis.

(3) Determining and designating the appropriate representatives of parties, including individuals with settlement authority or other specific individuals, to attend mediation sessions.

**B.** The function of the mediator is to serve as a neutral facilitator of settlement. The mediator is expected to conduct the mediation process in an expeditious manner. Neither the parties nor the mediator may disclose any information presented during the mediation process without consent. The only exception to this rule of confidentiality is when disclosure may be necessary to advise the compliance judge of an apparent failure to participate in the mediation process.

Mediation, unlike arbitration, is not intended to be a fact-finding or decision-making process. Instead, the focus of mediation is to resolve the dispute between the parties. Resolution of that dispute may lead the parties and the mediator to explore questions of law or issues of fact beyond the scope of the pleadings or to reach settlements which go beyond the relief sought in the pleadings. Furthermore, a mediation may include the submission of “claims, counterclaims, defenses and other material issues” to the mediator for his or her evaluation as a neutral at any point in the mediation, should the parties agree. See L.Civ.R.301.1(e)(4). The purpose of neutral evaluation by the mediator is to secure his or her views on material issues which, often because of contrary position strongly held by the parties, are erecting barriers to a negotiated settlement. Such a neutral evaluation may result in an advisory opinion as to the strengths and/or weaknesses of a party’s legal or factual position on an issue so presented to the mediator. It is anticipated that, upon completion of any such evaluation and its assessment by the parties, either the action will settle or the mediation will resume to its conclusion. In short, mediation is a flexible process which may be molded to fit the needs of a particular case. No specific procedures have been set for the mediator to follow. Instead, the intent of L.Civ.R. 301.1 is for the mediator to assist the parties to reach a negotiated settlement by conducting meetings, defining issues, defusing emotion and suggesting possible ways to resolve the dispute.

### **III. Attendance of Parties; Participation in a Meaningful Manner**

The attendance of the parties or their representatives may be deemed by the mediator to be appropriate for mediation to proceed in a meaningful manner. Moreover, one of the goals of the mediation program is to involve both parties and attorneys more intimately. Likewise, the assurance of confidentiality furthers the intimate involvement of parties and attorneys as well as the frank and open discussion required for mediation to succeed. Accordingly, appropriate sanctions may be imposed on any party or attorney who fails to participate in a meaningful manner or to cooperate with the mediator or who breaches confidentiality.

### **IV. Compensation of Mediators**

**A.** A mediator who is selected by the court or by the parties from the panel of mediators designated by the Chief Judge shall be compensated at the rate of \$400.00 an hour. The time incurred by a mediator in reviewing the submissions of the parties shall be included in the calculation of his or her time. The compensation, which shall be paid equally by the parties, may not be varied by the consent of the parties.

**B.** A mediator who is selected by the parties who is not a member of the panel of mediators designated by the Chief Judge may be compensated according to the amount and terms mutually agreed to by the mediator and the parties. Such agreement must be in writing.

### **V. Mediation by Consent**

If all parties consent to have a case referred to mediation the parties may request the appointment of a mediator from the panel approved by the Chief Judge or may select any other individual or organization to serve as the mediator. The selection of a mediator who is not on the Court's approved panel renders the mediation a "private" mediation that is not governed by the terms of L.Civ.R. 301.1.