

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

ADMINISTRATIVE ORDER RE:)
ADOPTION OF AMENDED PROGRAM) Administrative Order No. 10-039
DESCRIPTION FOR VOLUNTARY)
FACILITATIVE MEDIATION)
_____)

At the regular Judges' Meeting conducted on April 16, 2010, the judges unanimously approved amendments to the Program Description for Voluntary Facilitative Mediation. The amended Program Description has been reviewed and approved by the VFM Advisory Committee. Pursuant to W.D. Mich. LCivR 16.2(b)(1), all facilitative mediations conducted after the date of this order shall be governed by the attached amended Program Description. Now, therefore:

IT IS ORDERED that the attached Program Description for Voluntary Facilitative Mediation be and hereby is ADOPTED, effective immediately.

FOR THE COURT:

Dated: June 3, 2010



PAUL L. MALONEY
CHIEF JUDGE

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN**

**VOLUNTARY FACILITATIVE MEDIATION
PROGRAM DESCRIPTION**

I. Voluntary Facilitative Mediation (VFM)

VFM is a "flexible, nonbinding dispute resolution process in which an impartial neutral third party -- the mediator -- facilitates negotiations among the parties to help them reach settlement. A hallmark of mediation is its capacity to expand traditional settlement discussion and broaden resolution options, often by going beyond the legal issues in controversy."¹ The mediator, who may meet jointly or separately with the parties, serves as a facilitator only and does not decide issues or make findings of fact.

II. VFM Advisory Committee

- A. A standing VFM Advisory Committee ("the Committee") is appointed by the Court from the following constituencies: certified mediators, attorney users of the VFM process, judicial officers, and the Court's ADR Administrator.
- B. Taking into account comments solicited from client-users of the VFM process, the Committee will periodically review the VFM program and its effectiveness and make recommendations to the Court on such issues as the qualification, certification and removal of mediators, the demographic and diversity balance of the panel, optimal size of the panel, mediator training, changes in policy or procedures, and requests for review by applicants or mediators.

III. Mediators

A. Qualifications

- 1. To be considered for certification, a mediator-applicant must:
 - (a) be an attorney with a minimum of ten (10) years of federal practice experience, with preference given to those applicants whose principal practice is in the state and federal courts in the Western District of Michigan,
 - (b) be a member in good standing of this Court's bar,
 - (c) have appeared as counsel of record or served as a facilitative mediator in at least five (5) cases over the past (5) years in this Court or another federal court,
 - (d) have completed a minimum of 16 hours of training sponsored or approved by the Court,

¹Judge's Deskbook on Court ADR, National ADR Institute for Federal Judges, Harvard Law School, November 12-13, 1993, p. 3.

(e) agree to pay the Court's \$100 mediator certification fee, and

(f) agree to serve in a *pro bono* capacity once each year. Additional requests by the Court for pro bono service in a calendar year may be declined.

2. To maintain certification, a mediator must:

(a) continue to meet all certification criteria specified in section III. A., above,

(b) after three (3) successive years as a panelist, be selected twice in two (2) years by the parties,

(c) attend periodic refresher seminars or additional training sponsored by the Court,

(d) pay an annual \$25.00 recertification fee.

3. As mediators serve at the pleasure of the Court, the Court may remove a mediator from the certified list at any time for any reason. In addition, the Court retains discretion to waive or modify the criteria for qualification, certification or removal of any mediator in order to maintain the panel's balance in geography, practice area, and demography.

4. No person shall serve as a mediator in any action in which any of the circumstances specified in 28 USC sec. 455 exist or in good faith are believed to exist, or as are otherwise prohibited by the applicable rules of professional conduct.

B. Immunity. Certified mediators are entitled to quasi-judicial immunity as officers of the Court.

IV. Mediator Panel

A. It is the objective of the Court to maintain a panel of mediators who offer diversity in geography, practice area, and demographics.

B. The panel is limited to fifty (50) certified mediators, or such other number as the Court may determine is appropriate from time to time to serve the needs of the program and provide sufficient experience for each mediator to maintain an adequate level of expertise.

C. Panel maintenance

1. Not later than November 15 of each calendar year, the ADR Administrator shall deliver a letter and biography form to all mediators who continue to meet certification requirements inquiring about each individual's interest in continuing to serve as a panel member during the upcoming calendar year. Mediators' with interest in continuing as a panel mediator must return the biography form and recertification fee to the ADR Administrator not later than December 15. Persons

serving as mediators at the end of a calendar year retain their certified status if interested in doing so and unless removed from the panel.

2. Not later than November 15 of each calendar year, the ADR Administrator shall deliver a letter to all mediators who appear not to meet all qualifications criteria listed in section III above and may thus be subject to removal. Mediators will be invited to offer information to the Court that may bear upon the mediator's continued qualification. For example, a certified mediator who does not meet the retention criterion by reason of illness or other extraordinary cause outside the mediator's control may offer this information in support of a request to be retained as a panel mediator. Mediators must return this information to the Court not later than December 15. Mediators who appear to no longer meet the qualifications criteria will be removed from the panel as of December 15, subject to action by the Committee.
3. The ADR Administrator will report to the Committee in January regarding panelists' ongoing interest and qualifications. The Committee, by a majority of members present, will determine if a mediator who has not continued to meet all qualifications criteria will be removed from the panel.
4. All decisions of the Committee are subject to review by the ADR Judge upon written application filed by a mediator with the ADR Judge no later than ten (10) days after receipt of the decision for which the mediator seeks review.

D. **Panel Vacancies.** When the VFM panel drops below fifty (50) members, or under other circumstances identified by the Committee, additional mediators may be solicited as directed by the Committee.

V. CASE SELECTION

- A. **Eligible Cases.** All civil cases except prisoner civil rights complaints, habeas corpus and social security cases, and § 2255 motions are eligible for voluntary facilitative mediation.
- B. **Referral Method and Notice to Parties.** In preparation for the initial Rule 16 scheduling conference, all parties are required to discuss the use of alternative dispute resolution and indicate their preference in the joint status report. If the district or magistrate judge is satisfied that the selection of facilitative mediation is *purely voluntary* and has the full approval of all parties, the Judge will incorporate that selection in the case management order with instructions to the parties to jointly select a mediator within fourteen (14) days.

VI. THE MEDIATION PROCESS

A. Selection of Mediator

1. Within fourteen (14) days of the issuance of the case management order, the parties must jointly select one mediator from the list of court certified mediators. The plaintiff is responsible for notifying the ADR Administrator of the name of the

selected mediator by electronically filing a Notice of Selection of Facilitative Mediator.

2. If the parties are unable to agree on a mediator, the ADR Administrator will select the mediator for the parties. The ADR Administrator will contact the selected mediator, and request that the mediator check for potential conflicts of interest. If a conflict is found to exist, the mediator will contact the ADR Administrator, who will either select an alternate mediator or request the parties make a new selection.
3. Once the selection of a mediator is finalized, the ADR Administrator will electronically file the Notice of Appointment of Facilitative Mediator.

- B. Mediation Assessment.** The Court assesses a fee of \$50 per referral, of which \$25 is to be paid by the plaintiff(s) and \$25 is to be paid by the defendant(s). The monies are deposited into the Voluntary Facilitative Mediation Training Fund. In a pro bono mediation, the assessment is waived for any indigent party.
- C. Compensation of Mediator.** The mediator is paid his or her normal hourly rate, assessed in as many equal parts as there are separately represented parties, unless otherwise agreed in writing. The mediator is responsible for billing counsel and pro se parties. In the event of noncompliance, the mediator may petition the district or magistrate judge for an order directing payment of his or her fees.
- D. Timing for the Mediation Session.** Within 14 days of the issuance of the Notice of Appointment of Facilitation Mediator, the mediator will consult with the parties and set a time and place for the mediation session. This section is not intended to impose any time limitations on the mediation process, but to encourage its prompt initiation. If the parties and the mediator agree, mediation may continue throughout the life of the case. The mediator will electronically file a Notice of Hearing of Mediation Session as soon as practicable.
- E. Timing and Nature of Submissions Required Before the Mediation Session.** Not less than seven (7) days before the initial mediation session, each party will provide the mediator with a concise memorandum, no more than 10 double-spaced pages in length, setting forth the party's position concerning the issues to be resolved through mediation, including issues relative to both liability and damages. The mediator may circulate the parties' memoranda with the consent of all parties.
- F. Duration of the Mediation Process.** The format for the session is developed by the parties and the mediator. The developed format may involve one session or several sessions. The parties are free to continue with the process as long as they feel it is productive.
- G. Attendance at the Mediation Session.** The *parties themselves* must attend the mediation session. A party other than a natural person (e.g., a corporation or association) satisfies this attendance requirement if it is represented at the session by a person (other than outside counsel) with authority to bind the party to terms of a settlement. A party that is a unit of government need not have present at the session the persons who would be required to approve a settlement before it could become final (e.g., the members of a city council or the chief executive of a major agency), but must send to the session an executive officer,

in addition to counsel, knowledgeable about the facts of the case and the governmental unit's position. In cases involving insurance carriers, representatives of the insurance companies, with authority, must attend the mediation session. Each party must be accompanied at the mediation session by the lawyer expected to be primarily responsible for handling the trial of the matter. A party or lawyer will be excused from attending the mediation session only after approval by the Court upon a showing that attendance would impose an extraordinary or otherwise unjustifiable hardship.

H. Status of Discovery and Motions During Mediation Process. Any case referred to mediation continues to be subject to management by the Judge to whom it is assigned. Unless otherwise ordered, parties are not precluded from filing pretrial motions or pursuing discovery.

I. Mediation Logistics and Location. The mediator will establish the time and place of the mediation session(s). Mediations may take place at the mediator's office or at any other location to which the parties consent. The mediator will determine the length and timing of the sessions and the order in which issues are presented, and will send a notice of the agreed upon time and place to all participating parties.

J. Filing of Mediation Outcome

1. Within fourteen (14) days of the completion of the mediation process, the mediator will electronically file a Facilitative Mediation Report with the Court. The report will indicate only who participated in the mediation session and whether settlement was reached.
2. If settlement is reached, the mediator will help the parties draft a settlement agreement. The settlement agreement, absent unusual circumstances, must be completed and signed within fourteen (14) days. The parties shall file a stipulation and proposed order to dismiss with the Court within twenty-eight (28) days of reaching a settlement.
3. If settlement is not reached, the parties have seven (7) days following the mediation session to inform the mediator whether they desire to continue with the mediation process.

K. Confidentiality. All mediation proceedings are considered to be compromise negotiations within the meaning of Fed. R. of Evid. 408.

VII. COURT ADMINISTRATION OF THE MEDIATION PROGRAM

A. Administrative Structure. The mediation program is administered by the Office of the Clerk of Court.

B. Evaluation of the Program. The ADR Administrator will gather data relevant to a careful, in-depth analysis of the efficacy of the program, and will report to the ADR Judge on a regular basis. In an effort to gather information, the Court may develop questionnaires for participants, counsel and mediators to be completed and returned at the close of the mediation process. Only aggregate information about the program will be reported; specific

responses will be kept confidential and will not be divulged to the Court, the attorneys or the parties.

(Rev. 2/10)