Innovations in the Courts:
A Series on Court Administration

Mediation in the Western District of Washington

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MEDIATION IN THE WESTERN DISTRICT OF WASHINGTON

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FOREWORD

This report focuses on an innovation applied in the Western District of Washington for mediation of selected civil cases. It appears in a recently inaugurated program of publications entitled *Innovations in the Courts: A Series on Court Administration.* The court initiated the mediation program in response to what it perceived as an emergency in the administration of civil cases: there were several vacant judgeships, filings were increasing sharply, and Congress had imposed requirements for the priority scheduling of criminal trials.

In an attempt to alleviate the growing backlog of civil cases, the court and the local federal bar association jointly developed a procedure by which judges may refer civil cases to volunteer attorneys who serve as mediators without compensation to attempt to induce settlements. This procedure is embodied in Local Civil Rule 39.1.

This report describes the mediation procedure as it operates in the Western District of Washington. Attention is given both to the codified procedure and to the manner in which the procedure tends to operate in practice, based on interviews with judges, court clerks, attorneys who have used the procedure, and attorneys who drafted the local rule. The text of the local rule and sample letters designating cases for mediation are included as aids to other courts that might consider adopting such a program.

We are aware that judgments concerning the desirability of particular procedures will vary from district to district, and that each court must assess any proposed change in the light of local conditions. The Center hopes that the information in this report will prove helpful to court personnel concerned with the issues examined here.

A. Leo Levin

I. INTRODUCTION

Scope of the Case Study

By local rule, the United States District Court for the Western District of Washington has established a procedure for the mediation of selected civil cases. Private attorneys serve as mediators without compensation and attempt to induce a settlement among the parties. The procedure is unusual in the federal court system, but several other districts have expressed an interest in establishing similar programs.

This case study describes the operation of the mediation procedure in the Western District of Washington. Attention is given both to the codified procedure and to the manner in which the procedure tends to operate in practice.

The same local rule defines detailed procedures for the appointment of special masters and for arbitration. To date, these provisions have been used rarely in the Western District of Washington, and they are not discussed in any detail here.

This report is largely descriptive. Any critical evaluation is based upon interviews with judges, court clerks, attorneys who have used the procedure, and attorneys who drafted the local rule. The report does not attempt to evaluate the success of the procedure by reference to statistics or the views of clients whose cases have been subject to the procedure.

Methodology

The preparation of this case study began with an analysis of Local Civil Rule 39.1, as it was originally enacted and as it has been amended. The reasons for the amendments were determined by reference to correspondence and discussions with those familiar with the amendments.

Formal interviews were conducted with all but one of the judges in the Western District of Washington. The one judge who declined to be interviewed made his views known through his two law clerks, both of whom contributed generously to the case study. The

interviews with the judges and law clerks covered a wide range of topics, from basic philosophy to procedural details.

A senior staff member who has been familiar with the mediation program since its inception provided a historical perspective and statistical data. The president of the local federal bar association was also interviewed; his views on the recruitment of volunteer mediators were particularly valuable.

At a recent meeting of the federal bar association, the mediation procedures in the Western District of Washington were discussed and amendments to the rule were recommended. This provided a further source of information for this report, as did two articles appearing in the spring 1984 edition of the newsletter published by the Federal Bar Association of the Western District of Washington that confirmed the present recommendations of the bar association. One of the articles, by the president of the bar association, is also the source for the discussion of mediation techniques in chapter 4.

History of Local Civil Rule 39.1

In 1978, the United States District Court for the Western District of Washington sensed an emergency in the administration of justice, particularly with reference to civil cases. Two of five judgeships had been vacant for several months, filings were increasing sharply, and Congress had imposed requirements for the priority scheduling of criminal trials.

At about the same time, the Federal Bar Association of the Western District of Washington was formed. The timing was apparently coincidence, but a fortunate one. Chief Judge Walter T. McGovern met with the officers of the new bar association and urged them to play a major role in developing a procedure to alleviate the growing backlog of civil cases. The officers and the bar association agreed.

The judges and bar members held a series of meetings, which eventually resulted in an agreement that volunteer attorneys would serve as mediators who would attempt to induce settlements but who, unlike arbitrators, would not enter decisions. If a mediator were unable to induce a settlement, the case would proceed to arbitration. The case would be tried by the court only if a party appealed the arbitrator's decision.

The agreement was embodied in Local Civil Rule 39.1. Cases subject to the mediation procedure are often referred to as "rule 39.1 cases."

Rule 39.1 was adopted on January 1, 1979, initially as a temporary rule. The stated objective of the rule was "alleviating congestion in the civil calendar while preserving to all parties their rights in full." The rule was made permanent by order entered July 14, 1981. The rule is set forth in appendix A *infra*. In January 1984, a similar rule was adopted by the United States District Court for the Eastern District of Washington.

II. LOCAL CIVIL RULE 39.1

Summary of the Rule

In general, Local Civil Rule 39.1 provides that the court may designate any civil case for handling under the rule. Once a case is so designated, the parties must engage in at least one settlement conference alone, without a mediator. If the parties are unable to reach a settlement, the case proceeds to mediation. A mediator is chosen from a register of qualified attorneys and attempts to induce a settlement of the case. If the mediator is unable to induce a settlement, the court may, upon agreement of the parties, refer the case to a special master or to an arbitrator. If the case is referred to a special master, the master engages in fact-finding and performs other duties pursuant to Federal Rule of Civil Procedure 53. If the case is referred to an arbitrator, the arbitrator hears and decides the case in the same manner as a judge. Any party may thereafter demand a trial de novo unless the right to a trial has been waived.

Register of Qualified Attorneys

The court maintains a register of qualified attorneys who have volunteered to serve as mediators, special masters, and arbitrators in civil cases. The attorneys are chosen by the judges of the district from a list of qualified attorneys who are recommended by the Federal Bar Association of the Western District of Washington. The attorneys serve without compensation.

Minimum Qualifications

A registered attorney must: (1) have been a member of the bar of a federal district court for at least seven years; (2) be a member of the bar of the United States District Court for the Western District of Washington; (3) have a substantial portion of his or her practice devoted to litigation.

Settlement Conference

If a case is designated for handling under Local Civil Rule 39.1, the attorneys for all parties, except nominal parties and stakeholders, must meet at least once to engage in a good-faith attempt to negotiate a settlement without mediation. The conference must take place within two months after the parties are notified by the court that the case has been designated as a "rule 39.1" case.

Selection of Mediator

If the parties are unable to reach a settlement without mediation, they must attempt to agree upon a mediator from the register of attorneys. If the parties agree upon a mediator, they file a notice of selection with the clerk and send a copy of the notice to the selected attorney. The selected attorney serves as the mediator unless he or she is unwilling or unable to do so.

If the parties are unable to agree upon a mediator, the attorney for the plaintiff is to notify the court and request the appointment of a mediator. The court then designates a mediator from the register and notifies the mediator and the attorneys for the parties.

In designating a mediator, the court is to consider the nature of the action and the nature of the practices of the attorneys on the register. When it is feasible, the court is to designate an attorney who has had substantial experience in the type of action to be mediated.

Mediation Procedure

Upon selection of a mediator, the parties are to furnish the mediator with a copy of the pretrial order, if one has been entered. If no pretrial order has been entered, the parties are to provide the mediator with copies of their pleadings. The mediator fixes a time and place for a mediation conference that is reasonably convenient for the parties and must give them at least fourteen days' written notice of the conference. Each party must provide the mediator with a memorandum of contentions relative to both liability and damages. The memorandum may not exceed ten pages. Copies of

the memorandum must be served on other parties at least seven days before the conference.

Attendance and Preparation Required

The attorney who is primarily responsible for each party's case must personally attend the conference and any adjourned sessions. Each attorney is to come prepared to discuss in detail and in good faith (1) all liability issues, (2) all damage issues, and (3) the position of his or her client relative to settlement.

Availability of Clients

The clients must be available for the conference. The mediator may decide whether they are to be present in the conference room. The mediator has the discretion to excuse a client from attending the conference.

Insured Parties

A party whose defense is provided by a liability insurer need not personally attend the conference, but a representative of the insurer must attend if a representative is available in the district. A representative attending the conference must be empowered to bind the insurer to a settlement within the limits set by the insurer.

Failure to Attend

The mediator must report to the court any willful failure to attend the conference. The court may impose sanctions as it deems appropriate.

Privileged Proceedings

All proceedings of the mediation conference, including statements made by any party, attorney, or other participant, are privileged in all respects. The proceedings may not be reported, recorded, placed in evidence, made known to the trial court or jury, or construed for any purpose as an admission against interest. A party is not bound by anything said or done at the conference unless a settlement is reached.

Notice to Client of Mediator's Suggestions

If the mediator makes any oral or written suggestion as to the advisability of a change in any party's position with respect to settlement, the attorney for that party must promptly transmit the suggestion to his or her client.

Memorandum of Settlement Recommendations

The mediator may, in his or her discretion, provide the attorneys with a written memorandum of settlement recommendations. The memorandum is not filed with the clerk, nor is it made available to the court or the jury in the event of a trial.

Upon receipt of the memorandum, the attorneys are to forward copies to their clients and advise them of the fact that the mediator is a qualified attorney who has volunteered to act as an impartial mediator, without compensation, in an attempt to help the parties reach agreement and avoid the time, expense, and uncertainty of a trial.

Written Agreement

If a settlement is reached, the agreement must be reduced to writing and is binding on all parties.

Procedure When No Settlement Is Reached

If the mediator is unable to induce a settlement, he or she is to explore with counsel the desirability of appointing a special master or arbitrator to resolve any or all of the issues in controversy. With the consent of counsel, the mediator informs the court in writing of the conclusions of the mediator and counsel relative to the appointment of a special master or arbitrator.

If no settlement results from mediation, the plaintiff must file with the clerk a certificate showing compliance with the settlement and mediation requirements and showing that no settlement was reached. Upon the filing of the certificate, the court is to convene a conference of counsel in order to consider the appointment of a special master or arbitrator.

Appointment of a Special Master

If mediation fails to produce a settlement, the court may, with the consent of the parties, refer the case to a special master. The

procedure for selecting a special master is the same as the procedure for selecting a mediator. The special master engages in fact-finding and performs other duties designated by the court, pursuant to Federal Rule of Civil Procedure 53. A special master may make recommendations to the court but does not enter a final decision in the case.

To date, the provisions concerning the appointment of a special master have been used only once in the Western District of Washington, in a case that was later decertified. These provisions are not discussed further in this report.

Arbitration

If mediation fails to produce a settlement, the court may, with the consent of the parties, refer the case to an arbitrator. The procedure for selecting an arbitrator is the same as the procedure for selecting a mediator. Rule 39.1 contains detailed provisions governing pleadings, discovery, hearings, and other matters administered by the arbitrator.

Unlike a special master, an arbitrator makes a decision, or award, in the case. The losing party is entitled to a trial de novo unless the parties waived the right to a trial de novo in the initial agreement to arbitration. Rule 39.1 contains detailed provisions governing time limits, evidence, costs, and other matters relative to a trial de novo.

To date, the provisions concerning arbitration have been used only once (successfully) in the Western District of Washington. These provisions are not discussed further in this report.

Other Agreements for Arbitration

Notwithstanding rule 39.1, the parties may stipulate to refer a case to arbitration upon such terms as they may agree, subject to approval by the court. If the parties do so, the applicable provisions of state and federal law governing voluntary arbitration supersede rule 39.1.

III. ADMINISTRATION OF LOCAL CIVIL RULE 39.1

General Administration

No single person or office is responsible for administering the mediation program. Each judge administers the program with respect to his or her own caseload.

Not surprisingly, the mechanics of administration vary considerably from one judge to the next. One judge refers virtually every civil case to mediation and tends to personally monitor compliance with the rule. Another tends to rely upon the advice and assistance of the person in the clerk's office who manages that judge's caseload. Another judge tends to rely upon his own law clerks. Others seem not to have a systematic way of administering the mediation program.

This decentralized approach to administration is consistent with the general philosophy of caseload management in the Western District of Washington. In that district, as in many others, each judge has considerable authority over the scheduling of trials and other hearings, discovery, pretrial conferences, and other administrative matters, with a minimum of regulation by others.

Those interviewed came to different conclusions about whether the judges should continue to administer the mediation program individually. Some tended to think that individual administration was essential so that each judge could coordinate the mediation program with his or her own system of caseload management. Others tended to think that the present approach contributed to underutilization of the mediation program. A senior staff member stated that some judges and staff members were slow to refer cases to mediation because mediation interrupted the well-established, day-to-day routines within each judge's chambers and because a reference to mediation sometimes creates new problems, such as the disposition of motions pending at the time of reference to mediation. Some thought that the judges and their staffs would be willing to refer more cases to mediation if responsibility for administering the program were shifted to a single person or office to es-

tablish policies and monitor compliance with the rule on behalf of the entire court.

Selecting Cases for Mediation

Criteria

Local Civil Rule 39.1 does not specify any criteria for the selection of cases for mediation. Whether to refer a case to mediation is left to the discretion of the judge to whom the case has been assigned.

One judge makes a practice of referring virtually every civil case to mediation. He believes that a case is not disqualified simply because it is overly complex or because it involves an esoteric area of the law such as patents. His experience has been that a qualified mediator can be found to handle nearly any case.

The other judges refer only selected cases to mediation. None of the judges had a formal, systematic way of choosing cases. Most agreed that mediation is most likely to result in a settlement when the only issue is damages, but most thought that other cases qualified for mediation as well.

Many thought that mediation is a waste of time for the kinds of cases that seldom go to trial. Examples included student loan defaults, forfeitures, habeas corpus petitions, social security appeals, and bankruptcy appeals. Mediation was likewise said to be unproductive in cases that are pursued as a matter of principle, such as civil rights cases, because the parties are rarely willing to settle. Most judges said they would not insist that a case be referred to mediation if both parties objected.

Most judges used rather vague terms, such as "intuition," to describe the selection process, but none expressed a desire for a more specific rule. All seemed satisfied with the present discretionary approach.

The officers and trustees of the federal bar association have urged the judges to refer far more cases to mediation than they currently do. In the *Federal Bar Association Newsletter* (spring 1984), the president of the association wrote, "Indeed, it is the opinion of the Federal Bar Association that all civil cases should be designated for attempted settlement pursuant to the provisions of Civil Rule 39.1."

To date, the court has not acted officially on the recommendation of the bar association, but none of the judges expressed opposition to it, and most seemed to welcome the opportunity to make greater use of mediation.

When and How?

Local Civil Rule 39.1 does not specify the time at which a case should be referred to mediation. The decision is left to the discretion of the judge to whom the case is assigned.

Until recently, the timing of mediation has varied considerably from one judge to the next. Some found that two to three months before trial was an advantageous time; discovery was well under way and yet enough time remained for mediation. One judge referred cases to mediation earlier, soon after a case was at issue. Another referred cases to mediation later, usually about two weeks before trial.

The federal bar association recently urged the court to standardize its practice in this regard. At the recommendation of the bar association, Local Civil Rule 16 was amended in May 1984, to require that discovery be completed seventy-five days before the date for the entry of a pretrial order. It is contemplated that cases will be referred to mediation promptly upon the completion of discovery, allowing approximately seventy-five days for mediation before the next step in the proceeding. The bar association concluded that this was an ideal time for mediation for a variety of reasons (see "The Cost of Mediation" *infra*).

The mechanics of referring a case to mediation are simple. All judges use letters to the attorneys of record, without the entry of a formal order. Sample letters are included in appendix B *infra*. The transfer of a case to mediation is recorded by minute entry in the clerk's office.

Number of Cases

No person or office compiles statistics on mediation on behalf of the entire court. Individual judges have compiled statistics in varying degrees. Most were indefinite about the percentage of cases that were referred to mediation. It is therefore impossible to describe the mediation program with quantitative precision, but some generalizations can be made.

The program was widely used when it was first begun in 1979. This high level of enthusiasm was presumably attributable to the fact that the rule was first adopted for the specific purpose of alleviating a workload crisis caused primarily by two vacancies on the court. Since that time, the level of use has declined noticeably. For example, one judge referred forty-one cases to mediation on or soon after January 10, 1979, and an additional sixty-seven cases on or soon after December 9, 1980; since then he has referred only two cases to mediation. The other judges reported somewhat greater

use of the procedure at the present time. Most estimated that 10 to 20 percent of their civil cases were referred to mediation, though none maintained a record of the exact number. As mentioned in the preceding section, only one judge refers nearly all civil cases to mediation.

Many reasons were given for the decline in the level of use. Interestingly, the decline does not appear to be attributable to an easing of the court's workload. When the rule was adopted in 1979, approximately 500 cases per judge were pending in the Western District of Washington. Today, the court has approximately the same number of cases pending per judge.

Some attributed the decline to a belief by the judges that mediation places an unfair burden on those who have volunteered to serve as mediators. Others attributed it to a growing belief that mediation is "just another layer" in the system, for which clients must pay an additional fee. Still others attributed the decline to administrative considerations internal to the court. It was noted, for example, that each judge now has a much larger staff than in 1979, and that consequently judges can now dispose of more cases in a given amount of time. The pressure to induce settlements is thus diminished. It was also observed that some staff members are reluctant to recommend that cases be referred to mediation because mediation creates new, unfamiliar administrative problems.

A revival in the use of mediation appears to be imminent. As mentioned in the preceding section, the officers and trustees of the federal bar association have recommended that *all* civil cases be referred to mediation. The court has not yet acted officially on the recommendation, but none of the judges expressed opposition to it.

The Cost of Mediation

The cost of mediation to the clerk's office has been minimal. At present, the only involvement by the clerk's office is to make a minute entry when a case is referred to mediation. Some, but not all, judges also request the assistance of a member of the clerk's staff, who is dedicated solely to the management of that judge's caseload, in selecting cases for mediation.

The cost to the clerk's office would increase if the clerk were required to take a more active role in administering the mediation program, as some have suggested (see "Excessive Demand on Some Mediators" *infra*).

The cost to a judge's personal staff depends upon the extent to which the judge uses them to assist in choosing cases for mediation

and monitoring compliance with the rule after a case is referred. The practice in this regard varies considerably.

The cost to a client is more difficult to calculate. The cost in a given case depends, of course, on whether mediation succeeds in producing a settlement. While it is true that mediation is "another layer" for which a client must pay a fee, the client is apt to enjoy a net savings if trial is avoided.

As mentioned above, the court has recently amended Local Civil Rule 16 to require that discovery be completed seventy-five days before the date for the entry of a pretrial order. It is hoped that a referral to mediation, if any, will be made promptly upon the completion of discovery and that this practice will minimize costs for clients. The president of the federal bar association has written in the association's spring 1984 newsletter that

> [t]his is a perfect time for the designation of the case as a 39.1 case. Discovery will have just been completed and all parties and counsel will have the case firmly in mind. Preparation of the 10-page mediation memorandum will require only a minimum amount of time for the attorney in charge of the case. Probably more importantly, the client who is paying his attorney on an hourly basis will have just received a substantial billing and will have a clear understanding of the expense of continuing with the litigation. It is at this time that the case is ripe for settlement, and mediation should be attempted.

Federal Government as a Party

The federal government is frequently named as a party to federal litigation, but experience has shown that the government is usually unwilling or unable to participate in the mediation program. The lawyer or representative from a particular government agency with authority to negotiate a settlement is typically located in Washington, D.C., and cannot engage in face-to-face discussion in Seattle.

The federal bar association has invited a representative from the United States Attorneys' Office to meet with a special bar association committee to find ways in which this problem might be alleviated.

Recruiting Volunteer Mediators

The mediators are not compensated for their time, nor are they reimbursed for their expenses. Fortunately, this approach has not hindered efforts to recruit qualified attorneys.

As mentioned above, the court maintains a register of attorneys available to serve as mediators. The attorneys to be registered are chosen by the judges from a list of attorneys who meet the minimum qualifications (see "Minimum Qualifications" *supra*) and who are recommended by the federal bar association. The task of recruiting mediators is thus assigned to the bar association, not the court.

The officers and trustees of the federal bar association have been aggressive in recruiting mediators. When the program began, members of the federal bar association were contacted by the president and urged to volunteer. Emphasis was placed on the advantages to clients; namely, that the program would increase the chances of a dispute being resolved to the satisfaction of a client without the enormous cost of litigation. Some emphasis was also placed on cooperative spirit, since the program would give attorneys the opportunity to help each other to avoid the delays inherent in civil litigation.

Initial recruiting efforts were followed by a one-hour program of continuing legal education. The program was designed to provide training to those who had volunteered to serve as mediators and to attract additional volunteers. The instructors included well-known, successful arbitrators and mediators from the Seattle-Tacoma area.

This recruiting procedure has worked well in the Western District of Washington. The continuing legal education program was especially effective in generating interest in the mediation program. Nearly all of the judges interviewed stated they were surprised by the willingness of attorneys to serve as mediators. One judge described mediation as "pro bono at its best." Only once has an invited attorney declined to serve.

The judges were impressed by the number of attorneys who have volunteered (eighty in Seattle; twenty-one in Tacoma), as well as by the quality of those who have volunteered. The register includes the names of many of the best-known federal litigators in the Seattle-Tacoma area.

The mediation program has now been operating more than five years, and many attorneys who volunteered when the program began are no longer in practice or no longer able to serve as mediators. The bar association is presently updating the register of attorneys and is planning a second program of continuing legal education to increase interest in mediation and to attract new volunteers.

Excessive Demand on Some Mediators

The bar association's success in attracting well-known attorneys produced one unexpected problem. Rule 39.1 is drafted in a way that encourages the parties to agree upon a mediator (see "Selection of Mediator" *supra*). The rule is advantageous in the sense that, in most cases, the court need not participate in the selection of a mediator. At the same time, however, attorneys tend to glance down the list of available mediators and choose the person they regard as the best-known and most reputable. The unfortunate result is that certain well-known attorneys are chosen time and again, while others with perfectly acceptable qualifications are rarely chosen. Many who are chosen frequently have expressed concern about devoting an inordinate number of hours to the program without compensation. Those who are rarely chosen tend to lose interest in the program.

The bar association is discussing ways in which rule 39.1 might be amended to alleviate this problem. One suggestion has been to eliminate the practice of having the parties agree upon a mediator and, instead, have the court either appoint a mediator or suggest a short list of names to the parties at the time a case is designated for handling under rule 39.1. The clerk of court would be required to monitor the number of mediation appointments accepted by each attorney on the register and to limit each attorney to four appointments per year. It is hoped that this approach would tend to equalize the workload among mediators. The fact that a mediator is appointed by the court may also increase the status of the mediator from the parties' point of view. The disadvantage of this approach is that it requires significantly more involvement by the court than is necessary under the present system.

One of the judges interviewed suggested that mediators be allowed to remove themselves from the register for up to one year, with the right to return to the register as long as they continue to meet the minimum qualifications.

To date, the bar association has not formally recommended an amendment to the rule, but a special committee is continuing its efforts to develop an acceptable recommendation.

IV. SUCCESSFUL MEDIATION TECHNIQUES *

Local Civil Rule 39.1 does not specify any particular procedure to be followed during mediation, and most observers believe this approach is advantageous. The mediator is free to develop his or her own style and can tailor that style to the circumstances of each case and to the personalities of those participating in each conference.

Lawyers who frequently serve as mediators have found certain procedures to be especially helpful in the settlement of civil cases. It is not suggested that these procedures be codified in a rule more specific than Local Civil Rule 39.1. Nevertheless, an understanding of the more successful techniques may be useful in the planning or implementation of mediation programs in other districts.

Clients Should Attend the Initial Conference

Settlements are most often achieved when all parties are present and participating. Rule 39.1 gives the mediator the discretion to excuse a client from attending a mediation conference, but experience has shown that this discretion should be exercised rarely. The mediator will want the parties to at least be available for telephone consultation during the hearing.

Introductory Remarks by the Mediator

The experienced mediator usually convenes the mediation conference in one room with all parties and counsel present. The mediator begins by stating that the purpose of mediation is to settle the case. The parties are told that mediation can save them time, anxiety, and expense. A settlement will end the delay and uncertainty involved in litigation and allow each party to move on to other things. The parties are also told that mediation is a great service to the court because it helps to alleviate the tremendous backlog of cases.

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*The material in this chapter is adapted from Burdell, *Settling Cases in the United States District Court for the Western District of Washington,* Fed. B.A. Newsletter (Spring 1984). Used by permission.

Qualifications of the Mediator Should Be Stated

A recital of the mediator's qualifications is necessary to gain the confidence of the parties. The experienced mediator will briefly mention special qualifications such as bar offices held, special experience relating to the issues involved in the case at hand, or other professional expertise. The parties are reminded that the mediator is serving without compensation in an attempt to resolve the dispute and at the same time reduce the court's caseload.

Conclusion of the Initial Conference

The mediator usually concludes the first meeting of all parties and counsel without engaging in actual settlement negotiations. At this point, the parties often display a noticeable sense of purpose in settling the case. Everyone is confident in the fact that something positive is likely to result from mediation. The reason is that an independent third party has stepped into the case for the first time. Neither party has to worry that the other would deem the first party's suggestions for settlement negotiations as a sign of weakness. All parties are aware of the enormous cost in time and money to continue with litigation, and all share a common goal in avoiding those costs.

Meeting with Plaintiff's Attorney

After the initial conference with all parties and counsel, the experienced mediator usually meets with the plaintiff's attorney alone. The plaintiff's attorney is likely to be more candid in the client's absence. The mediator candidly discusses with counsel the strengths and weaknesses of the case, emphasizing the weaknesses.

Meeting with Plaintiff

Once the areas of weakness have been identified with the plaintiff's attorney, the mediator calls in the plaintiff and reports in detail what occurred during the meeting with counsel. The plaintiff's own opinion on the strengths and weaknesses of the case is discussed. Once the mediator, counsel, and the plaintiff have reached an understanding regarding the strength of the case, the mediator inquires about their position regarding settlement. If the mediator deems the position reasonable, counsel and the plaintiff are asked whether they authorize the mediator to reveal their position to the other side. If the mediator does not deem the position reasonable, he or she should so state and should try to convince counsel and the plaintiff that a different position would more likely lead to settlement.

Meetings with Defendant's Attorney and Defendant

The mediator next meets with the defendant's attorney alone, and then with the defendant, repeating the procedure just discussed. When this procedure has been completed, the mediator asks for the defendant's position regarding settlement.

Subsequent Meetings

After obtaining what is thought to be a reasonable settlement position from the defendant, the mediator again meets with the plaintiff and attempts to obtain a modification of position toward that of the defendant. The mediator then proceeds back and forth between the parties, attempting to find common ground upon which to establish settlement.

Settlement Techniques

Whenever the mediator discusses settlement positions with either party, phrasing is important. The experienced mediator begins the discussion by asking the plaintiff, for example, "Would you accept $50,000 to settle the case?" The mediator does not reveal to the plaintiff whether the figure has actually been offered by the other side. If the mediator states more specifically that "they have offered $50,000 to settle the case," the plaintiff often becomes emotionally involved and offended to the point of refusing to bargain further. Asking whether the plaintiff would accept a certain figure is more likely to produce a reasoned and thoughtful response.

The experienced mediator is not discouraged by large initial disparity in settlement positions. Continued pressure and cajoling frequently result in settlements in the most difficult cases. It is usually not helpful for the mediator to insist upon a "bottom line" figure from either side. Each side must be allowed the dignity of changing its position in order to accomplish settlement.

Written Agreement

Rule 39.1 requires that a settlement be reduced to writing so that nothing is left to misunderstanding or confusion. The experienced mediator will prepare a memorandum immediately. Mediation conferences sometimes extend into the evening, long past normal business hours. In several cases, settlement memorandums have been handwritten by the mediator.

V. CONCLUSIONS AND SUMMARY OF ISSUES

General Conclusions

The reaction to the mediation program among the judges in the Western District of Washington ranged from enthusiasm to general acceptance. Two of the judges said that the program was very successful and that they highly recommended the adoption of similar programs in other districts. The others were a bit more reserved, but all thought the program was a useful tool for inducing settlements in at least some cases. No judge was opposed to the program or thought it should be abolished.

The reaction among members of the federal bar association tended to be more enthusiastic than that of the judges. Members of the bar have shown a surprising willingness to serve as mediators without compensation. Efforts to attract well-known, skilled mediators have been successful.

The program was used extensively when it was first adopted, but interest among the judges declined after about two years. At the present time, interest in the program seems to be increasing among judges and attorneys alike. If the court accepts the recommendation of the bar association to refer all civil cases to mediation, the level of use will soon be higher than it has ever been since the program was adopted.

It is not known whether the mediation program has actually caused more cases to settle than would have settled without the program. Although one of the judges has maintained statistical records on the cases that have been assigned to him, the information presently available is insufficient for meaningful analysis. If the clerk's office begins to maintain statistics on behalf of the entire court, as the bar association has recommended, a more comprehensive statistical analysis may be possible in the future.

Chapter V

Summary of Issues to Be Considered When Adopting Mediation Elsewhere

Which Cases?

A court considering the adoption of a mediation program will want to consider whether certain cases should, by rule, be earmarked for mediation. Local Civil Rule 39.1 does not specify any criteria for the selection of cases for mediation, and the judges and attorneys seemed generally satisfied with this approach. The only complaint by the bar has been that the court has not referred enough cases to mediation. The bar association recently recommended that the court refer all civil cases to mediation but did not recommend a formal amendment to the rule to accomplish this result.

When and How?

When it was first adopted, Local Civil Rule 39.1 did not specify the time at which a case should be referred to mediation. Experience has shown that two to three months before the entry of the pretrial order seems to be ideal, assuming discovery has been completed by that time. The bar association has recently recommended that Local Civil Rule 16 be amended to require that discovery be completed seventy-five days before the day for the entry of the pretrial order. It is contemplated that a case will be referred to mediation promptly upon the completion of discovery.

The practice of referring cases to mediation by letter has produced no difficulties. A formal order seems unnecessary. The letter should be recorded in the form of a minute entry in the clerk's office.

Recruiting Volunteer Mediators

Any mediation program must include a plan for securing the services of local attorneys to serve as mediators. A substantial list of well-known, highly qualified mediators gives mediation the status and prestige necessary to gain the confidence of attorneys and clients whose cases may be subject to the procedure. The practice of having mediators recruited by the bar association rather than by the court has been very successful. Aggressive efforts by bar leadership are necessary, but the results in the Seattle-Tacoma area have shown that such efforts will be rewarded. One of the most effective techniques was to present a program of continuing legal education designed to arouse interest among bar members

and to offer training to those who had already volunteered. It is unnecessary to compensate the mediators.

When it was first adopted, rule 39.1 required a mediator to have a substantial practice in federal court. Experience has shown that this requirement was too restrictive, and the rule was later amended to require only that a mediator have a substantial practice in the area of litigation.

Experience in the Western District of Washington has also shown that it may be desirable for the court to monitor the assignment of mediators to avoid assigning an inordinate number of cases to one mediator.

Individual or Central Administration?

A major decision in the establishment of any mediation program is whether a single person or office should refer cases to mediation and monitor compliance with the rule on behalf of the entire court, or whether each judge should administer the program with respect to his or her cases.

Local Civil Rule 39.1 is implemented by individual administration. The judges seem satisfied with this approach. One judge said that individual administration was essential because each judge has his or her own procedures for managing a caseload, and that mediation had to be coordinated with the other procedures. On the other hand, a senior staff member said that individual administration contributed to underutilization of the procedure. He said that a judge's staff usually regards mediation as an unusual procedure—an interruption in the day-to-day routine that may cause more problems than it solves. He said the procedure would be used far more often if it were invoked and monitored by a single person or office on behalf of the entire court.

The Western District of Washington has no plans at the present time to abandon its system of individual administration, except perhaps to require the clerk to monitor the number of cases assigned to each mediator.

APPENDIX A
Local Civil Rule 39.1
United States District Court for the Western District of Washington

CR 39.1

EMERGENCY PROCEDURES TO ALLEVIATE CIVIL COURT CALENDAR CONGESTION

(a) Objective

The Court finds that at the time this Rule is adopted a long-standing shortage of Judges in this District, together with sharply increased filings of criminal and civil cases and the imposition of Congressional requirements for the priority scheduling of criminal trials, have caused a chronic and serious backlog of civil cases to develop in the District. As a result, civil litigants have experienced and are experiencing severe delay and difficulty in obtaining adjudications of their rights and responsibilities. The objective of the Court and of the Federal Rules of Civil Procedure to secure the just, speedy, and inexpensive determination of every action cannot be achieved unless the civil case backlog is eliminated or greately reduced. An emergency therefore exists in the administration or civil justice in the District. This Rule is accordingly adopted for the purpose of alleviating congestion in the civil calendar while preserving to all parties their rights in full.

(b) Register of Volunteer Attorneys

(1) The Judges of the District shall establish and maintain a register of qualified attorneys who have volunteered to serve, without compensation, as Mediators, Special Masters and Arbitrators in civil cases in this Court in order to reduce its backlog of civil actions. The attorneys so registered shall be selected by the Judges of the District from lists of qualified attorneys at law, who are members of the bar of this Court, and who are recommended to the Judges by the Federal Bar Association of the Western District of Washington. The Federal Bar Association shall request the county bar associations within the geographical boundaries of the District to cooperate with the association in obtaining well-qualified volunteers for the register.

(2) Minimum Qualifications.

In order to qualify for service as a Mediator, Special Master or Arbitrator under this Rule, an attorney shall have the following minimum qualifications:

(a) Have been a member of the bar of a Federal district court for at least 7 years; and

(b) Be a member of the bar of the United States District Court for the Western District of Washington; and

(c) A substantial portion of his or her practice has been, or is, in ~~Federal court~~. litigation.*

(c) Settlement Conference

In every civil action designated by the Court as a "CR 39.1" case, the attorneys for all parties to the action, except nominal parties and stakeholders, shall meet at least once and engage in a good faith attempt to negotiate a settlement of the action. Such conference shall take place within two months after the parties are notified by the Clerk of the Court that the action has been designated as a CR 39.1 case.

(d) Mediation

(1) Selection of Mediator.

If, after meeting, the parties are unable to agree upon a settlement, they shall attempt to agree upon the selection of a single Mediator for settlement purposes from the register of attorneys. If they agree upon a selection, they shall file notice of their selection with the Clerk of the Court and shall send a copy of that notice to the selected attorney, who will thereupon be the Mediator for that action unless he or she is unwilling or unable to so act. If the parties cannot agree upon the selection of a Mediator, the attorney for the plaintiff shall promptly apply to the Court for the designation of a Mediator. The Court shall thereupon promptly designate a Mediator from the register and shall send notice of that designation to the Mediator and to all attorneys of record in the action.

(2) Mediation Procedure.

(A) Copy of Pretrial Order or Pleadings.

Upon selection of a Mediator the parties shall provide the Mediator with a copy of the Pretrial Order, if one has been lodged in the cause. If a Pretrial Order has not been lodged, they shall provide the Mediator with copies of their then effective pleadings.

(B) Time and Place.

The Mediator shall fix a time and place for the mediation conference, and all adjourned sessions, that is reasonably convenient for the parties and shall give them at least 14 days' written notice of the initial conference.

(C) Memoranda.

Each party shall provide the Mediator with a memorandum presenting in concise form his contentions relative to both liability and damages. This memorandum shall not exceed 10 pages in length. Copies of this memorandum shall be served upon all other parties at least 7 days before the mediation conference.

*amended 5/15/84

(D) Attendance and Preparation Required.

The attorney who is primarily responsible for each party's case shall personally attend the mediation conference and any adjourned sessions of that conference. The attorney for each party shall come prepared to discuss the following matters in detail and in good faith:

1. All liability issues.
2. All damage issues.
3. The position of his client relative to settlement.

(E) Parties to be Available.

The clients shall, in all cases, be available. The Mediator shall decide if they are to be present in the conference room. Parties whose defense is provided by a liability insurance company need not personally attend said mediation conference, but a representative of the insurer of said parties, if such a representative is available in this district, shall attend and shall be empowered to bind the insurer to a settlement if a settlement can be reached within the limits set by that insurer. The Mediator may in his discretion excuse a client from attending a mediation conference.

(F) Failure to Attend.

Willful failure to attend the mediation conference shall be reported to the Court by the Mediator and may result in the imposition of such sanctions as the Court may find appropriate.

(3) Proceedings Privileged.

All proceedings of the mediation conference, including any statement made by any party, attorney or other participant, shall, in all respects, be privileged and not reported, recorded, placed in evidence, made known to the trial court or jury, or construed for any purpose as an admission against interest. No party shall be bound by anything done or said at the conference unless a settlement is reached, in which event the agreement upon a settlement shall be reduced to writing and shall be binding upon all parties to that agreement.

(4) Notice to Clients of Mediator's Suggestions.

If the Mediator makes any oral or written suggestion as to the advisability of a change in any party's position with respect to settlement, the attorney for that party shall

promptly transmit that suggestion to his client.

The Mediator shall have no obligation to make any written comments or recommendations but may in his discretion provide the attorneys for the parties with a written settlement recommendation memorandum. No copy of any such memorandum shall be filed with the Clerk or made available in whole or in part, directly or indirectly, either to the Court or to the jury.

The attorneys for the parties shall forward copies of any such memorandum to their clients and shall advise them of the fact that the Mediator is a qualified attorney who has volunteered to act as an impartial mediator without compensation in any attempt to help the parties reach agreement and avoid the time, expense and uncertainty of trial.

(5) Consideration of Special Master or Arbitration.

If the Mediator is unable to mediate a settlement, he shall explore with counsel the desirability of the appointment of a Special Master or an Arbitrator under this Rule and whether such an appointment might lead to the resolution of all or any of the matters in controversy. With the consent of counsel the Mediator shall convey in writing to the Judge to whom the matter has been assigned, the conclusions of counsel and of the Mediator relative to the possible narrowing of issues and relative to the appointment of a Special Master or an Arbitrator.

(6) Notice of Compliance.

If no settlement results from the private negotiations or from the mediation, the plaintiff shall promptly file with the Clerk a certificate showing that there has been compliance with the settlement and mediation requirements of this Rule but that no settlement has been reached.

(e) Procedure Upon Failure of Mediation

After the filing of the certificate specified in (d) (6) of this Rule, the Court shall as promptly as possible convene a conference of counsel in order to consider the appointment of a Special Master or of an Arbitrator pursuant to the following sections of this Rule.

(f) Special Master

(1) Appointment of Special Master.

If all of the parties to an action stipulate in writing to the reference of the action to a Special Master and agree upon a particular attorney from the register as Special Master, and if the Special Master and the Court consent to the assignment, an order of reference shall be entered. If the parties cannot agree upon the selection of a Special Master but stipulate in writing that there be a reference to a Special Master, the Court shall promptly designate a Special Master from the register and shall send notice of that designation to the Special Master and to all attorneys of record in the action.

(2) Powers and Duties.

The powers and duties of the Special Master and the effect of his report shall be as set forth in Rule 53 of the Federal Rules of Civil Procedure, except as the same may be modified or limited by agreement of the parties and incorporated in the order of reference.

(3) Time and Place.

The Special Master shall fix a time and place for hearing, and all adjourned hearings, which is reasonably convenient for the parties and shall give them at least 14 days' written notice of the initial hearing.

(4) Discovery.

If discovery has not been completed, it may continue during the pendency of the matter before the Special Master, unless the Special Master concludes that the matters before him required no further discovery and discovery would impede the exercise of his powers and duties, in which event he may order a stay of discovery.

(5) Other Special Master Appointments.

This Rule shall not limit the authority of the Court to appoint compensated Special Masters to supervise discovery or for other purposes, under the provisions of Rule 53 of the Federal Rules of Civil Procedure.

(g) Arbitration

(1) Agreement for Arbitration.

If all parties agree to submit the action to arbitration under this Rule, they shall reduce their agreement to writing

and file the same with the Court. This Agreement to Arbitrate shall state whether or not the arbitration award is to be final and conclusive with trial de novo waived, or whether a party dissatisfied with the award may obtain a trial de novo upon timely application to the Court.

(2) Appointment of Arbitrator and Order Directing Arbitration.

The parties may agree on the appointment of a particular attorney from the register as Arbitrator, and if that attorney and the Court consent to the assignment, an order directing arbitration and appointing that Arbitrator shall be entered. The parties may stipulate to arbitration under this Rule without agreeing upon an Arbitrator, in which event the Court shall designate an Arbitrator from the register and shall send notice of that designation to the parties, together with its order directing arbitration. The order to arbitrate shall incorporate the terms set forth in the Agreement to Arbitrate.

(3) Oath or Affirmation.

The Arbitrator shall take the oath or affirmation prescribed by 28 U.S.C. § 453.

(4) Pleading and Discovery.

The arbitration shall be conducted on the basis of the order to arbitrate, the pleadings before the Court (or the Pretrial Order if theretofore filed) and the pretrial discovery had before the Court. Further proceedings before the Court shall be stayed during the pendency of the arbitration; provided, however, that the Arbitrator may authorize additional discovery and may order hearing briefs and memoranda filed with him.

(5) Time and Place of Hearing.

The Arbitrator shall designate a place and time for hearing the case on its merits as early as possible consistent with the parties' needs to complete their preparation for the hearing.

(6) Conduct of Hearing.

All testimony shall be given under oath or affirmation administered by the Arbitrator. In receiving evidence, the Arbitrator shall apply the Federal Rules of Evidence. Attendance of witnesses and production of documents may be compelled in accordance with Rule 45, Federal Rules of Civil

Procedure. The Arbitrator may make reasonable rules and issue orders necessary for the fair and effecient conduct of the hearing and pre-hearing proceedings. Failure, without good cause, to comply with the Arbitrator's rules and orders shall be reported to the Court for its imposition of sanctions as provided in Rule 37 of the Federal Rules of Civil Procedure and Local Rule GR 2 of this Court.

(7) Transcript or Recording.

A party may cause a transcript or recording to be made of the proceedings at his expense but shall, at the request of the opposing party, make a copy available to any other party upon the payment by that party of the cost of this copy. In the absence of agreement of the parties, no transcript of the proceedings shall be admissible in evidence at any subsequent de novo trial except for purposes of impeachment.

(8) Ex Parte Communication.

There shall be no ex parte communication between the Arbitrator and any counsel or party on any matter touching the action except for purposes of scheduling or continuing the hearing.

(9) Filing of Award.

The Arbitrator shall file his award with the Clerk's Office with reasonable promptness following the closing of the hearing. The Clerk shall transmit copies of the award to all parties.

(10) Form of Award.

The award shall state clearly and concisely the name or names of the prevailing party or parties and the party or parties against which it is rendered, and the precise amount of money and other relief, if any, which is awarded. Unless otherwise required by the Agreement to Arbitrate, the award need not disclose the facts or reasons in support of the award. The award shall be in writing and signed by the Arbitrator.

(11) Vacation, Modification or Correction of Award.

(A) Within 30 days of the filing of the award, any party may move the Court to vacate and set aside the award on one or more of the grounds set forth in 9 U.S.C. § 10, or may move to modify or correct the award on one or more of the grounds set forth in 9 U.S.C. § 11. Thereafter, the Court shall hear and determine the issues raised therein, and enter order in conformity therewith.

(B) After said 30-day period, and any extended time required for hearing and determining the issues presented by motion filed under (11)(A) above, the Court may direct the entry of judgment on the award in accordance with Rule 58, Federal Rules of Civil Procedure. The judgment shall thereupon have the same force and effect as that of any other judgment of the Court in a civil action.

(12) Trial De Novo.

(A) Time for Demand.

Notwithstanding any other provisions of this Rule, if the parties in the Agreement to Arbitrate did not agree to waive trial de novo, either party may, within 30 days of the filing of the award, serve and file a written demand for trial de novo and thereafter the action shall proceed as a trial de novo before the Judge to whom the case has been assigned.

(B) Limitation of Evidence.

At a trial de novo, unless the parties have otherwise stipulated, no evidence of or concerning the arbitration may be received into evidence except that statements made by a witness at the arbitration hearing may be used for impeachment only.

(C) Costs and Attorney's Fees.

If trial de novo is not had, costs and attorney's fees will not be assessed against any party unless authorized by contract or specific statute and itemized and included in the arbitration award. If trial de novo is had, costs and attorney's fees may be assessed as in any other proceeding before the Court; provided, however, that if the party who requested the trial de novo fails to obtain a judgment which is more favorable to that party than was the arbitration award, a reasonable attorney's fee may be assessed against that party by the Court.

(13) Other Agreements for Arbitration.

Notwithstanding the provisions of this Rule, the parties to any action or proceeding may stipulate to its referral to arbitration upon such terms as they may agree to, subject to approval of the Court. In the event of such referral, the applicable provisions of state and federal law governing voluntary arbitration shall control.

(h) Criteria for Designations

In designating a Mediator, a Special Master or an Arbitrator, the Judge shall take into consideration the nature of the action and the nature of the practice of the attorneys on the register. When feasible, the Judge shall designate an attorney who has had substantial experience in the type of action in which he is to act as Mediator, Special Master or Arbitrator.

APPENDIX B
Sample Letters Designating Cases for Mediation

WALTER T. McGOVERN
CHIEF JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE, WASHINGTON 98104

February 16, 1984

Michael D. Helgren, Esq.
27th Floor, One Union Square
Seattle, WA 98101

Ms. Anastasia Dritshulas
Assistant U. S. Attorney
36th Floor, Seafirst Fith Ave.
Seattle, WA 98104

Dear Counsel:

Re: James Main, et ux v. United States,
C83-285M.

The above-captioned cause is hereby certified for proceedings under Local Civil Rule 39.1. As you are aware, CR 39.1 was adopted on December 31, 1979 for the purpose of alleviating congestion in the civil calendars of the courts of this district.

I have previously placed 40 cases in 39.1 status. Of that number, settlements have been reached in 29 cases. That remarkable result is a tribute to the federal practicing bar.

CR 39.1 was originally conceived by members of the Federal Bar Association. Approximately 100 attorneys have volunteered to serve without compensation as mediators, special masters and arbitrators pursuant to the rule. Counsel and their clients, I believe, have made a special effort to respond to the Court's appeal for cooperation in the present emergency.

I enclose herewith a copy of CR 39.1 and the roster of attorneys who have volunteered to act as mediators, arbitrators and special masters. The provisions of the Rule are to be complied with, without further order of the Court.

I am confident that with your continued assistance, the backlog in our civil calendars can be resolved.

Very truly yours,

Walter T. McGovern

WALTER T. McGOVERN
Chief United States District Judge

Encl.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
UNITED STATES COURTHOUSE
SEATTLE, WASHINGTON 98104

DONALD S. VOORHEES
JUDGE

Re:

Gentlemen:

In an effort to dispose of the backlog of civil cases the judges in this district have adopted Local Civil Rule 39.1 providing for a compulsory settlement conference, compulsory mediation and the possibility of arbitration or reference to a special master.

By this letter I am designating the subject action as being one appropriate for handling under Local Civil Rule 39.1. A copy of the rule and a current roster of the attorneys who have volunteered to act as mediators, arbitrators or special masters may be inspected in the Clerk's office. The provisions of the rule are to be complied with, without further order of this Court.

Please note that the rule requires:

1. That a good faith settlement conference be held within two months of the date of this notification.

2. That a certificate of the parties' selection of a Mediator be filed with the Clerk. (Please have a copy of that certificate served upon this office.)

3. That if settlement and mediation efforts fail, the parties shall promptly file with the Clerk a certificate to that effect. (Please have a copy of that certificate served upon this office.)

The rule contemplates that the mediation procedure shall be initiated without delay if the settlement conference fails to dispose of this matter.

I am hopeful that the procedures prescribed by this rule will lead to an early disposition of this matter. I am sure that you and your clients share that hope.

Very truly yours,

Donald S. Voorhees
United States District Judge

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Federal Judicial Center
Dolley Madison House
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END