

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI**

**I
INTRODUCTION AND FREQUENTLY ASKED
QUESTIONS FOR MEDIATION**

A. INTRODUCTION

1. **THE LOCAL RULES:** This Commentary is a reference source for guiding participants in mediation. It is not a substitute for reviewing Local Rule (LR) 6.01-6.05.
2. The local rules regarding mediation use the terms neutral and mediator interchangeably. This Commentary focuses exclusively on mediation in the Court's Alternative Dispute Resolution (ADR) Program. There is a separate Commentary for early neutral evaluation.

B. FREQUENTLY ASKED QUESTIONS

1. **WHAT IS MEDIATION?** Court-defined mediation is an informal non-binding dispute resolution process in which an impartial mediator facilitates negotiations among the parties in litigation to help them reach a settlement. Mediation can extend beyond traditional settlement discussion to broaden the range of resolution options, often by exploring litigants' needs and interests that may be independent of the legal issues in controversy. Parties to mediation design their own dispute resolution and determine the outcome, which includes the option of agreeing to settlement. See LR 6.01(A).
2. **WHEN MAY MEDIATION BE REQUESTED?** A mediation may be requested at any time and is used at every stage of litigation. Usually, the first mediation is held shortly after the Rule 16 conference.
3. **WHAT IF A CASE DOES NOT SETTLE THROUGH MEDIATION?** If a case does not settle during mediation, it will proceed through the court system as if there were no mediation.
4. **HOW LONG DOES MEDIATION TAKE?** Mediation proceedings before a mediator typically take five or more hours, although the mediator may call off the sessions if no progress is being made.
5. **WHAT ARE THE STAGES OF MEDIATION?** The mediation process consists of: (1) initial discussion; (2) Judge issues Order; (3) parties select a mediator or the Court or Clerk's Office appoints one; (4) lead counsel contacts the mediator, opposing counsel and all parties submit written statements and other required information; (5) initial joint or separate session with mediator discussing process and

parties discussing their position; (6) additional separate and joint sessions; and (7) closure or continue: If the matter settles, counsel will prepare and execute a written settlement agreement. If claim does not settle, additional sessions may be agreed to and/or the case proceeds towards trial.

6. **HOW IS A MEDIATOR APPOINTED?** The parties should agree on a mediator, which they select from the Clerk's Court-Certified Neutral list as maintained by the Clerk of Court. If the parties do not agree on a person to serve as a mediator, the Court or Clerk of Court may appoint a mediator for the ADR session. The list of Court-Certified neutrals is available online at www.moed.uscourts.gov/neutrals LR 6.03(A)
7. **WHO CONTACTS THE MEDIATOR?** Lead counsel contacts the mediator and opposing counsel, usually after the Rule 16 conference, to set the date, time, and location for the initial conference. At this time written statements, which include a written summary of the disputed facts and position relative to liability and damages, are submitted to the mediator according to the date set in the Order. The summary may or may not be given to the other side and must not be filed with the Court. Per LR 6.02(C) (3,4), Memoranda and Disclosure of Participants will be provided to the mediator.
8. **WHAT IS THE INITIAL MEDIATION SESSION?** There may or may not be an initial joint session. The mediator may explain the mediation process with both sides together or individually and may hear a brief case presentation from each party.
9. **WHAT HAPPENS DURING THE INITIAL SEPARATE SESSIONS?** The mediator probes individual priorities, explores underlying interests and concerns, meaningfully considers the private positions of parties to the action, all in a confidential setting. He or she helps the parties look at different ways to resolve each parties' claims and presents to each side whatever proposals have been made by the opposing party.
10. **WHAT HAPPENS DURING THE ADDITIONAL SEPARATE AND JOINT SESSIONS?** The mediator helps the parties develop and evaluate options and alternative proposals that may result in a mutually acceptable solution.
11. **SHOULD I CONDUCT DISCOVERY BEFORE ADR?** Conducting full-blown discovery before a mediation session may negate potential cost savings. If using mediation for settlement purposes, counsel/parties should know enough about the case to assess its value and identify its major strengths and weaknesses.
12. **SHOULD I TRY TO PRESERVE MY TRIAL STRATEGY?** Most civil cases are resolved without a trial. If counsel/parties do not raise their best arguments in settlement discussions, they risk failing to achieve the best results. Although it is

not necessary to reveal sensitive information related to trial strategy, it may be useful to raise it in a confidential separate session with the mediator. Counsel/parties will learn the mediator's views of the significance of the information and his/her opinion as to whether or when sharing it with the other side may be of benefit in the negotiations.

13. **WILL MEDIATION ADD ANOTHER LAYER TO THE ALREADY COMPLEX LEGAL SYSTEM?** No. The mediation program is built into the Court's Differentiated Case Management System. The mediation component of a civil case is designed to work in conjunction with the Court's case management plan.
14. **WILL MEDIATION SAVE THE PARTIES MONEY?** Mediation may save substantial time and money if the parties actively explore settlement early in the pre-trial period. ADR may result in the efficient use of private resources and may avoid extensive and expensive pretrial preparation.
15. **HOW DO I CONTACT THE CLERK'S OFFICE?** Interested parties are encouraged to contact the Clerk's Office at the following address and telephone number:

**Office of the Clerk of the Court
United States District Court
Eastern District of Missouri
111 South 10th Street
Room 3.300
Saint Louis, Missouri 63102
314-244-7900**

II
GOALS, STAGES AND TYPES OF CASES
APPROPRIATE FOR MEDIATION

- A. WHAT ARE THE GOALS OF ALTERNATIVE DISPUTE RESOLUTION (ADR) PROGRAM IN THE EASTERN DISTRICT OF MISSOURI AS THEY RELATE TO MEDIATION?** The mediation process as used in the Alternative Dispute Resolution (ADR) program in the Eastern District of Missouri is designed to achieve the following objectives: 1) Provide a simple and confidential structure for voluntary disposition of civil cases; 2) Improve time to disposition of cases referred to ADR; 3) Reduce litigation costs for parties to civil suits; 4) Enable parties to fashion wider range of remedies; and 5) Increase party participation in the litigation process to enhance client satisfaction.
- B. WHAT CIRCUMSTANCES AND WHICH CASES ARE APPROPRIATE FOR MEDIATION?** Mediation provides creative or business-driven solutions to a variety of problems that might prevent speedy resolution during litigation. When communication between the parties is a major barrier, or the interests of the parties are obscured by rigid legal positions, mediation may help resolve the issues involved. When equitable relief is sought, mediation may aid parties in coming to an agreement on the terms of an injunction or consent decree. Mediation works well for personal injury cases, product liability cases, routine diversity cases, employment cases, and cases involving business relationships, class actions, and a wide range of commercial litigation.
- C. WHICH CASES ARE INAPPROPRIATE FOR MEDIATION?** Cases where ADR cannot be used are: appeals from rulings of administrative agencies, habeas corpus and extraordinary writs, bankruptcy appeals, and social security cases. Also, cases sometimes considered unsuitable for ADR include substantial issues of public policy. See LR 6.01(A)(1-4).

**III
RESPONSIBILITIES OF THE COURT
AND CLERK OF COURT**

A. WHAT IS THE ROLE OF THE CLERK?

1. **GENERAL:** The District Court's mediation program is administered by the Office of the Clerk of the Court. The Clerk's Office is responsible for maintaining lists of certified mediators, providing parties and assigned mediators with proper notification of significant events in the mediation process, generally overseeing a smooth-running program. The Clerk's Office will also monitor the progress of cases and collect pertinent statistical information. Assistance is available to parties who want to schedule mediation conferences in meeting rooms in the United States Courthouse. There is no charge for the use of the meeting rooms. LR 6.03(A)(1)

2. **APPOINTING AND MAINTAINING LIST OF MEDIATORS** After January 31st of each odd-numbered year, the Clerk of Court examines the list of certified mediators to determine which mediators did not receive appointments during the previous two years. The Clerk notifies those mediators that the Court's record does not show any appointments for those years and solicits their interest in continuing to be carried on the Court's list of certified mediators. If the mediator desires to remain on the list, the mediator is to submit, by March 1, information demonstrating mediation experience and/ or training during the previous two years. If such information is not provided, the mediator will be removed from the list. If the parties fail to notify the Clerk in writing of the parties' choice of a mediator within the time prescribed by the Order Referring the Case to Alternative Dispute Resolution, the Clerk will select a mediator from the list and notify the parties. The Clerk will send a Notice of Appointment of Mediator to the parties and to the individual designated by the parties, after lead counsel has confirmed that individual's availability. Upon receipt of the Notice of Appointment, lead counsel will send to the mediator a copy of the Order referring the case to Alternative Dispute Resolution. See LR 6.03(A)(6).

B. WHAT ARE THE RESPONSIBILITIES OF THE COURT IN INITIATING MEDIATION?

1. **GENERAL:** On its own motion or on the motion of any party, the Court may enter an Order Referring Case to Mediation. The Order includes the information of whether the case is referred to mediation or any other mutually agreed-upon ADR process, the lead counsel who is responsible for coordinating the mediation, and along with other additional obligations of counsel and parties regarding the mediation. The Order includes the information of a specific date on which the mediation referral will terminate. Absent good cause, this date will not be extended. Unless otherwise ordered, referral to mediation does not abate or suspend the action, and no scheduled dates shall be delayed or deferred, including the date of trial. See LR 6.01, 6.02(A) (1, 2). The mediator may extend the referral period an additional 14 days LR 6.02(A)(2).

2. **WHAT IS THE ROLE OF THE COURT IN CERTIFYING MEDIATORS?** The Court may certify those persons who are eligible to serve as mediators in such numbers as the Court deems appropriate. The Court shall have the authority to establish qualifications of mediators, monitor the performance of mediators, and withdraw the certification of any mediator. The Court maintains a list of the certified mediators, which shall be made available to counsel, litigants, and the public for inspection and copying upon request. The certified list of mediators is also available on the court's website at www.moed.uscourts.gov/neutrals. See LR 6.03(A)(1, 2, 7).

3. **WHAT IS THE ROLE OF THE COURT IN APPOINTING MEDIATORS?** The Judge may appoint a mediator who has special subject matter expertise germane to a particular case, whether or not such individual is on the list of certified Mediators. See LR 6.03(B)(2).

4. **CERTIFICATION AND WITHDRAWAL OF CERTIFICATION.** The Court may certify and withdraw certification pursuant to LR 6.03(A)(1, 6, 7).

IV
RESPONSIBILITIES OF THE PARTIES,
VACATING AN ORDER OF REFERRAL

- A. WHAT ARE THE RESPONSIBILITIES OF THE PARTIES IN MEDIATION?** Not later than ten (10) days prior to the initial Mediation conference, each party must provide the mediator with a memorandum presenting a summary of disputed facts and a narrative discussion of its position relative to both liability and damages. Also, not later than ten (10) days prior to the mediation conference, each party must provide to the opposing party, and to the mediator, a list of all persons who will participate in the mediation conference on behalf of the party making the disclosure. This list must state the names of the individuals attending and their general job titles. See LR 6.02(C)(3, 4).
- B. .WHAT IF THE PARTIES BELIEVE THERE IS NO REASONABLE CHANCE THE MEDIATION WILL WORK?** If the parties agree that the referral to mediation has no reasonable chance of being productive, the parties may jointly move the court for an order vacating the mediation referral. See LR 6.02(B)

V
**ROLES, RESPONSIBILITIES AND QUALIFICATIONS
OF THE MEDIATOR**

- A. **MAY A MEDIATOR SERVE AS COUNSEL?** Any member of the bar of this Court who is certified as a mediator will not for that reason be disqualified from appearing as counsel in any other case pending before the Court. See LR 6.03(A)(5).
- B. **WHAT IS THE ROLE OF THE MEDIATOR?** The mediator presents a broad range of resolution options to the parties by exploring the litigants' needs and interests that may be independent of the legal issues in controversy. The mediator helps parties engage in productive dialogue, helps each party understand the other side's views and interests, and communicates views or proposals in more palpable terms. The mediator also gauges the receptiveness of proposals, helps parties realistically assess their alternatives, and helps generate creative solutions.
- C. **WHAT FALLS OUTSIDE THE ROLE OF THE MEDIATOR?** The mediator may or may not give an overall evaluation of the case. The mediator has no power to impose settlement or coerce a party to accept proposed terms. The mediator does not make a decision for the parties L.R. 6.01(A)
- D. **WHAT ARE THE QUALIFICATIONS FOR A MEDIATOR?** The following requirements and qualifications must be met to be a Mediator on the Court's panel: file an application for certification on a form provided by the Clerk; be admitted to practice law in the highest court of any state or the District of Columbia for at least five years and be a member in good standing in each jurisdiction where admitted to practice law at the time of application; have completed at least 32 hours of approved professional training in mediation and complete 4 hours of accredited continuing legal education in alternative dispute resolution on or before January 31 of each odd-numbered year; agree to serve for reduced or no compensation from a party who has qualified pursuant to LR 6.03(C)(2) for appointment of a pro bono mediator; observe at least two mediations conducted by a mediator who has completed at least 25 mediations and is either certified under this rule or qualified under Missouri Supreme Court Rule 17; and after completing 25 mediations as a certified mediator, agree to be observed for two mediations each year by interested individuals who would otherwise be qualified for certification under the rules of this Court. See LR 6.03(A)(2-4)
- E. **WHAT IS THE MEDIATOR'S ROLE IN REPORTING GOOD FAITH PARTICIPATION?** The mediator will report to the judge any willful or negligent failure to attend any mediation conference, to substantially comply with the Order Referring Case to Mediation, or otherwise participate in the mediation process in good faith. See LR 6.05(A).
- F. **WHAT IS THE LENGTH OF A MEDIATOR'S APPOINTMENT?** The term of appointment of a mediator will be identified in the Court's Order. See LR 6.02(A)(2).

- G. CAN A MEDIATOR BE DISQUALIFIED?** A mediator may be disqualified for bias or prejudice pursuant to 28 U.S.C. §144 and will be disqualified in any case in which a justice, judge, or magistrate judge would be disqualified pursuant to 28 U.S.C. §455. Any party who believes that an assigned mediator has a conflict of interest must file a motion for disqualification of the mediator at the earliest opportunity or waive the objection. See LR 6.03(D)(1-5).
- H. WHAT HAPPENS IF A MEDIATOR CANNOT SERVE DURING THE PERIOD OF REFERRAL?** A mediator who cannot serve within the period of referral must notify lead counsel who will arrange for selection of a different mediator by agreement of the parties or by the Clerk. See LR 6.03(E).
- I. WHAT IS THE RESPONSIBILITY OF THE MEDIATOR IN FILING A COMPLIANCE REPORT?** Within 14 days after the mediator referral is concluded, the mediator will file with the Court an Alternative Dispute Resolution Compliance Report on a form provided by the Clerk. See LR 6.05(B).

VI

COSTS AND FEES OF ALTERNATIVE DISPUTE RESOLUTION (ADR)

A. HOW ARE COSTS OF THE MEDIATOR DISTRIBUTED?

Unless otherwise agreed to by all parties or ordered by the Court, one-half of the cost of the mediator's services must be paid by the plaintiff(s) and one-half by the defendant(s), at the rate contained in the mediator's fee schedule filed with the Court. In a case with third-party defendants, costs must be divided into three equal shares. See LR 6.03(C)(1)

B. WHAT ARE THE MEDIATOR'S FEES? The mediator usually has a set fee, although the issue of payment may be part of settlement negotiations. The Court may review the reasonableness of the fee and enter any order modifying the fee. A mediator will not charge or accept in connection with a particular case a fee or thing of value from any source other than the parties. See LR 6.03(C)(1).

C. HOW SHALL THE FEES BE PAID? Compensation must be paid directly to the mediator by the parties upon the conclusion of the mediation process. See LR 6.03(C)(1).

D. WHAT HAPPENS IF A PARTY CANNOT PAY THE FEE? If a party does not inform the Court of their inability to pay, and defaults on a payment, failure to pay the mediator must be brought to the Court's attention. A fee may be waived when a party requests the Court to appoint a mediator who has agreed to serve pro bono. That party must demonstrate a financial inability to pay all or part of their pro rata share. If the party demonstrates a valid inability to pay, the Court may waive all or part of a party's pro rata share of the mediator's fee. A mediator appointed to serve pro bono may apply to the Court for payment of that share of the mediator's fee waived for an indigent party, consistent with regulations approved by the Court. When so ordered by a judge, payment to the mediator will be made by the Clerk from the Attorney Admission Fee Non-Appropriated Fund. Other parties to the case who are able to pay the fee will bear their pro rata portions of the fee. See LR 6.03(C)(1, 2).

VII
DUTIES OF LEAD COUNSEL, ATTENDANCE REQUIREMENTS, AND CONTESTING ATTENDANCE AT MEDIATION

A. WHAT ARE THE RESPONSIBILITIES OF THE LEAD COUNSEL? Lead counsel will be designated by the Court in the referral order and will be responsible for coordinating the mediation process with the parties and the neutral. Lead counsel must notify the Clerk in writing, within the time prescribed by the Order Referring Case to mediation, of the parties' choice of the mediator along with specifics of the initial conference. After selection of the mediator, lead counsel must send a copy of the referral to the mediator and inform counsel and the parties of additional obligations regarding the mediation. See LR 6.02(A)(1).

B. WHAT ARE THE ATTENDANCE REQUIREMENTS OF MEDIATION GENERALLY? All named parties and their counsel must: (1) participate in good faith; (2) be knowledgeable of the case facts; and (3) possess the requisite settlement authority and understand the procedures and policies under which settlements may be accepted. The attendance requirement is satisfied by appearing in person or by video unless attendance in person is ordered by the Court or required by the mediator. When appearing in person or by video conference, persons must be visibly present in front of their camera with audio and visual interactions so that audio and visual interaction may occur. The judge may sanction parties for not participating in good faith. See LR 6.02(C)(1)(b), 6.03(C)(2)(a-c), 6.05(A).

- 1. WHAT ARE THE ATTENDANCE REQUIREMENTS OF CORPORATIONS OR ASSOCIATIONS?** A party other than a natural person (e.g., a corporation or association) satisfies the requirement to attend the mediation conference if they are represented by a person (other than the outside counsel) who has the authority to settle and who is knowledgeable about the facts. See LR 6.02(C)(2)(a).
- 2. WHAT ARE THE ATTENDANCE RESPONSIBILITIES OF GOVERNMENT AGENCIES?** A unit or agency of government satisfies the requirement to attend the mediation conference if they are represented by a person who has authority to settle, who is knowledgeable about the facts of the case, the government's position, and the procedures and policies under which the governmental unit decides whether to accept proposed settlements. If the action is brought by the government on behalf of one or more individuals, at least one such individual also shall attend. If the appearing individual lacks full authority because of government regulations, the entity must disclose this fact no less than 14 days before the mediation conference or risk sanctions for failure to attend. See LR 6.02(C)(2)(b).
- 3. WHAT ARE THE ATTENDANCE RESPONSIBILITIES OF INSURERS?** Insurer representatives are required to attend, unless excused, if their agreement is necessary to achieve a settlement. An insurer satisfies this requirement if represented by a person, other than outside counsel, who has authority to settle and who is knowledgeable of the facts of the case. See LR 6.02(C)(2)(d).

4. **WHAT ARE THE ATTENDANCE RESPONSIBILITIES OF COUNSEL?** At the mediation conference, each party must be accompanied by the lawyer who will be primarily responsible for handling the trial of the matter. See LR 6.02(C)(2)(c).
- C. **CAN A PARTY BE EXCUSED FROM MEDIATION?** All named parties and their counsel are required to attend the mediation in person or by video conference unless excused by the mediator after consideration of the position of the adverse party, unless that party's agreement would be necessary in any way to achieve a settlement. LR 6.02(C)(1)(b).
- D. **DISCLOSURE AND MANNER OF ATTENDANCE.** Each party is obligated to provide in writing to the mediator and all other parties not less than fourteen (14) days prior to the mediation a list of: (1) All persons who will participate in the mediation; and (2) The names, job titles, and whether each person is attending in person or by video. See LR 6.02(C)(1)(b).
- E. **CONTESTING ATTENDANCE.** A party may contest the manner or lack of attendance of another party's disclosure who is necessary in any way to achieve settlement and must inform the mediator and all parties in writing not less than ten (10) days before the date of the mediation. The mediator may attempt to resolve the dispute, but must make a final determination, in writing, to all parties not less than seven (7) days prior to the mediation. The mediator may allow attendance in person, by video, or excuse attendance. Any party contesting the attendance determination by the mediation may file a motion with the Court, not less than four (4) days prior to mediation, stating: (1) The reasons for the objection the mediator's determination and providing alternative for attendance requirements and (2) The Court may allow attendance in person, by video, or excuse attendance. The Court may enter any other appropriate Order necessary for the attendance of the parties. On its own authority, the Court may alter any deadlines. See LR 6.02(C)(1)(c).

VIII
CONFIDENTIALITY OF MEDIATION

- A. **ARE MEDIATION PROCEEDINGS CONFIDENTIAL?** Mediation proceedings are private and confidential. A mediator may exclude anyone other than the named parties and their counsel from mediation conferences. Other individuals may participate with the consent of the mediator, provided they agree to the rules pertaining to confidentiality. The mediator will not testify regarding matters disclosed during the mediation proceedings See LR 6.04(A).
- B. **ARE DOCUMENTS SUBMITTED DURING THE ADR PROCESS CONFIDENTIAL?** All written and oral communications made or disclosed to the mediator are confidential and may not be disclosed by the mediator, any party, or other participant unless the parties otherwise agree in writing. Documents created by the parties for use by the mediator will not be filed with the Court. This rule does not prohibit or limit the enforcement of agreements or the collection of non-identifying information for Court-approved research and evaluation purposes, or the filing of the ADR compliance report.
- C. **PRE-MEDIATION COMMUNICATION** The mediator designated in a case may communicate privately and ex parte with counsel and unrepresented parties prior to the commencement of the formal dispute resolution process. The mediator may also caucus privately with each party. See LR 6.04(A, B).

IX
POST MEDIATION:
RIGHT TO TRIAL, SETTLED CLAIMS,
SCHEDULING AGREEMENTS

- A. **DO THE PARTIES RETAIN THEIR RIGHT TO TRIAL?** Unless otherwise agreed in writing, all mediation proceedings are non-binding, so that if the parties fail to resolve the dispute, they retain their full rights to trial. Unless otherwise ordered, referral to mediation does not abate or suspend the action, and no scheduled dates will be delayed or deferred, including the date of trial. See LR 6.02(A)(2).
- B. **WHAT HAPPENS IF THE PARTIES SETTLE A CLAIM DURING ADR?** If the parties settle any claim during the mediation referral, they file a Report of Settlement which may include a written settlement agreement, a stipulation for dismissal, a motion for leave to voluntarily dismiss, or a proposed consent judgment. The proposed consent judgment must be signed by all parties and counsel and must be filed with the Court no later than thirty (30) days after the last mediation conference or as ordered by the Court. See LR 6.05(C).
- C. **WHAT HAPPENS IF THE PARTIES AGREE ON SCHEDULES AND CASE MANAGEMENT MATTERS?** If an ADR referral results in decisions or agreements regarding scheduling or other case management matters, the parties must file a Proposed Litigation Plan which includes a proposed litigation plan or motion to amend an existing Case Management Order. The Order must be filed with the Court no later than fourteen (14) days after the last Mediation conference. See LR 6.04(D).

X
GOOD FAITH IN MEDIATION

Pursuant to LR 6.05(A), the “neutral must report to the judge any willful or negligent failure to attend any ADR conference, to substantially comply with the Order Referring Case to Alternative Dispute Resolution, or otherwise participate in the process in good faith. The judge may impose any sanctions deemed appropriate as a result of this failure.”

Most cases referred to mediation in this District have met the requirement of good faith negotiation. There have been exceptions that have resulted in sanctions imposed by the court for failure to meet the objective standards imposed by this rule.

Procedural compliance is an inherent part of good faith participation including timely filing of required documentation including: attendance at the mediation, position paper to the mediator, advance identification of parties attending and titles, participation by required parties, and appropriate request to be excused.

The Reader’s attention is directed to *Montoya v. Sloan, et al*, 4:20CV01108 AGF, ECF No. 68 (September 3, 2021), which provides an important history of situations that this Court has found lacking in good faith.

Effective March 1, 2023.