

# INTRODUCTION

The United States District Court for the Eastern District of Tennessee provides in this brochure an overview of the court-sponsored Federal Mediation Program available to parties in civil cases pending in the Court. The Program was implemented for the purpose of enhancing communication, narrowing issues, structuring the discovery process, and encouraging the settlement of cases at a stage of litigation which offers financial and other incentives to all parties.

If cases cannot be settled at all or if cases cannot be settled until just before trial, substantial cost and delay may be incurred by the parties. Trial calendars of the district judges and magistrate judges are crowded. There is a substantial criminal docket which affects the Court's ability to try civil cases. In this environment, mediation offers many advantages, including the following:

- ! Broadening of options to resolve the case;
- ! Streamlined and less costly completion of the case;
- ! More effective case management;
- ! Confidentiality and privacy;
- ! Facilitation of early, direct communication and understanding among the parties of the essential issues on each side of the dispute;
- ! Preservation of ongoing party relations;
- ! Savings in trial expenses;

- ! A panel of approved mediators who have a broad range of federal court experience and expertise and who are chosen by the parties themselves, or, if the parties cannot agree on a mediator, by a fair, inexpensive and quick procedure which is described below;
- ! A mediation program operated under the supervision and control of the Court;
- ! Relatively low cost.

The Mediation Program offers a **confidential, non-binding** conference where the parties and their counsel meet with a trained, court-approved mediator for the purpose of exploring the possibility of settlement of the case. Mediators often are able to expand traditional settlement discussion and broaden resolution options by going beyond the legal issues in controversy.

Civil cases can be referred to mediation with or without consent of the parties. There is no penalty if the case is not settled. If the parties engage in the mediation process and cannot settle the case, no delay in getting to trial will normally be caused by the case having gone to mediation.

Even if the case does not settle in mediation, mediation conferences often result in settlements shortly thereafter, or, if the case is tried, the mediation conference will often result in defining and narrowing the issues so the case can be tried in less time and at less expense to the parties.

## WHAT IS A MEDIATION LIKE?

The parties and their attorneys will meet face-to-face at a time and place designated by the mediator for a mediation conference. Mediators have differing styles and therefore each mediator will likely do things a little differently than another might. Space is sometimes available in the federal courthouse. The mediator may check with the office of the Clerk of Court about space availability.

Basically, mediation provides the parties and their attorneys with an opportunity to meet and to discuss with one another their cases in the presence of a mediator who is trained **to facilitate communication and to offer suggestions as to how a dispute might be resolved**. Oftentimes, the mediator will be able to suggest alternatives that those caught up in the heat of a dispute have overlooked.

Mediators do not decide the facts or the law in the case. The mediator's role is to assist in negotiations, facilitate the flow of information, act as an intermediary, improve communications, help clarify issues, probe the strengths and weaknesses of each party's legal positions, explore the consequences of not settling and generate options for mutually agreeable resolution of the dispute. Mediation often helps people involved in a lawsuit identify their interests and needs which may or may not be related to their legal positions.

The mediator will likely talk to each side privately during the mediation. This is quite appropriate in mediation and is often very helpful to the parties in sizing up the

strengths and weaknesses of their cases. The mediator may request the parties to submit a brief summary of the facts and issues in the case before the mediation.

## HOW DO I GET MY CASE TO MEDIATION?

When a case is referred or to be referred to mediation, the parties select their mediator from the official list of mediators approved by the court. This list is maintained by the Clerk of the Court. Each mediator has a biographical profile on file with the clerk, and these are available for review by those wishing to select a mediator. The fee schedule for each mediator is listed in his or her profile. Prospective mediators may be contacted by telephone or in person before a selection is made.

In cases filed in the Knoxville, Greeneville and Winchester Divisions of the Court, the parties fill out and jointly mail or deliver an Application for Mediation (applications are available at the clerk's office) to the Mediation Coordinator in the clerk's office in Knoxville for Knoxville and Winchester cases and to the Mediation Coordinator in Greeneville for cases in the Greeneville Division. In cases filed in Chattanooga, the parties fill out and jointly submit a Mediation Information Sheet to the Mediation Coordinator in the clerk's office in Chattanooga. Blank Information Sheets can be obtained at that office.

An order will be entered, referring the case to mediation and requiring the parties, their representatives and/or the decision-makers to be present for the mediation.

The mediator will arrange for completion of a mediation contract between the mediator and the parties and schedule the mediation conference at a mutually agreeable date, time and place.

WHAT IF WE CANNOT DECIDE ON A MEDIATOR OR HIS OR HER COMPENSATION?

In the event the parties cannot agree on a mediator, the program Administrator will select three approved mediators and one additional approved mediator for each additional party over two. After receiving the Administrator's designation, the parties shall each strike one name from the court's designations. The remaining mediator shall be assigned to the case unless a timely objection is made to the Administrator and upheld. In that event, or in the event the mediator selected cannot serve, the process will be repeated.

In the event the parties cannot agree on the compensation of the mediator, the parties shall submit the dispute to the Administrator, who shall set the mediator's compensation.

At the request of a mediator, the cost of his or her services or any portion thereof may be taxed as court costs.

WHAT REQUIREMENTS MUST THE MEDIATORS MEET IN ORDER TO BE ON THE PANEL?

- ! All mediators must be lawyers who are licensed to practice in the state of Tennessee and admitted to practice in the United States District Court for the Eastern District of Tennessee;
- ! All mediators must have practiced law at least five years;
- ! All mediators approved before January 1, 1997, must have had at least twenty (20) hours of formal mediation training as approved by the court. The requirement was raised to forty (40) hours for mediators approved after January 1, 1997.
- ! Mediators who are members of the federal court panel are free to mediate any disputes they wish to mediate, but if they desire to mediate a case which is pending in the United States District Court for the Eastern District of Tennessee, they may mediate it only if it is referred to them under the court's program.
- ! Mediators must agree to conduct at least one free (pro bono) mediation per year for those who cannot afford to pay.
- ! Mediators must commit to at least one year of service on the Mediation Panel.
- ! Mediators must agree to participate in the reporting and research requirements of the

program. The reporting and research requirements do not require the mediator to divulge any confidential information.

- ! All mediators must agree to comply with Local Rule 16.4 of this Court and any Standing Order of the Court for purposes of implementing Local Rule 16.4.
- ! All Mediators must agree to provide to the Court such biographical and other information as the Court may require.

#### WHO APPROVES THE MEDIATORS?

The District Judges have final authority over approval of and continued service by panel mediators. A Standing Committee on Certification and Evaluation of Mediators makes recommendations to the Court regarding qualifications and certifications of mediators. The Chief Judge acts on the recommendations.

#### WHAT IF ONE OR MORE PARTIES CANNOT AFFORD THE MEDIATOR'S FEE?

Application in writing can be made to one of the Magistrate Judges for permission to proceed to mediation without payment of the mediator's fee. The party requesting

such relief must present the Magistrate Judge with an affidavit of indigency. The Clerk of the Court will provide blank affidavit of indigency forms upon request (AO Form 240). The fee can be waived only for natural persons who are parties.

The Magistrate Judges have the option of setting a reduced fee if the party can afford only part of the mediator's fee. If a mediator is assigned a case on a reduced fee basis, it is counted as his or her yearly pro bono case.

#### WHAT ABOUT CONFIDENTIALITY?

Confidentiality is a high priority in the mediation program. The trial judge and his staff will not be told anything about what occurs in the mediation process (other than whether or not (a) the case settled, (b) mediation is continuing, (c) the case did not settle or perhaps (d) a party failed to send an appropriate decision-maker to a mediation conference). Rule 408 of the Federal Rules of Evidence provides confidentiality protection for the process. Confidentiality concerns will be dealt with in the mediator's contract and under the Local Rules or Standing Orders of the Court.

Mediation proceedings are not public; they are held in private.

#### COMMENTS, CRITICISMS AND SUGGESTIONS

Comments, criticisms and suggestions concerning the Federal Mediation Program and the mediators should be submitted in writing directly to Magistrate Judge Shirley, the program Administrator, Howard H. Baker Jr. United States Courthouse, 800 Market Street, Knoxville, Tenn. 37902 or to any of the Mediation Coordinators.

#### WHAT ABOUT THE MEDIATORS' FEES?

The mediators are independent contractors. They set their own fees and draw up their own contracts. Their fee schedule will be published with their Mediator Profile, which is available to the public from the clerk. The parties and the mediator will enter into a contract before mediation begins and the contract will establish the fees payable to the mediator. Payment of these fees will be made directly to the mediator. As indicated above, any fee disputes with mediators will be resolved by the program Administrator.

#### FILING FEE

As of January 1, 1997, there is no longer a filing fee.

#### WHAT ABOUT THE PRESENCE OF PARTIES AND REPRESENTATIVES OF PARTIES AT MEDIATION CONFERENCES?

Once a case is referred to mediation, it is extremely important that key decision-makers be present for mediation conferences. If appropriate, the Court may require that a party or a party's representative be present or reasonably available by telephone at the mediation conference. Sometimes a key decision-maker will be an insurance claims manager. Failure to comply with the attendance or settlement authority requirements may subject a party to sanctions by the Court. It is not necessary for the parties to a lawsuit to have their witnesses attend the mediation session. No testimony will be taken.

#### WHAT DISCLOSURES MUST MEDIATORS MAKE TO THE PARTIES?

A mediator must disclose any current, past or expected future representation or consulting relationship with any party or attorney involved in the mediation. A mediator is required to disclose any offer made to the mediator before completion of the mediation process of future representation or consulting relationship by any party or attorney involved in the mediation process. Disclosure is also required of any pertinent pecuniary interest. All such disclosures are to be made as soon as practical after the mediator becomes aware of the interest or relationship. The mediators may ask the parties or their attorneys about any connection the parties, their relatives,

partners, etc., may have to the mediator or his or her law firm. This will help the mediator decide if he or she needs to make a disclosure. See Local Rule 16.4(g).

WHAT ABOUT OTHER QUESTIONS  
NOT ANSWERED HERE?

Additional questions should be addressed to the Mediation Coordinators in the Greeneville, Knoxville and Chattanooga clerk's offices.