

# ALASKA

December 1, 2011

## Rule 16.2 Alternative Dispute Resolution

### (a) Policy Favoring Settlement by ADR Methods.

(1) *Mediation.* The court favors resolution of cases by negotiation to reduce litigation expense. To this end, the court promotes the use of mediation.

(2) *Other ADR Processes.*

[A] Other Alternative Dispute Resolution (ADR) processes may be used where agreed by the parties, including early neutral evaluation, arbitration, settlement conference, summary jury trial, and mini trial.

[B] The court will not make its personnel or facilities available for summary jury trials or mini trials and will not summon jurors to participate in those proceedings.

### (b) Use of ADR Processes.

(1) *Early Consideration of ADR Processes.* At an early stage in every case, the parties must actively consider mediation or other ADR processes to facilitate, less costly resolution of the litigation.

(2) *Coordination of ADR With Case Management Rules.* At the meeting of parties under Rule 26(f), Federal Rules of Civil Procedure, and any conference regarding case management under Rule 16, Federal Rules of Civil Procedure, litigants must discuss the advisability of using mediation or other ADR processes.

### (c) Adoption of ADR Process in a Particular Case.

(1) *Mediation.* The court may order mediation:

[A] upon request of the parties, or one of them; or

[B] on the court's own motion.

(2) *Other ADR Processes.* In addition to mediation, the parties may stipulate, subject to court approval (and, in the case of arbitration, 28 U.S.C. §§ 654-658), to use any appropriate ADR process.

(d) **Timing of Mediation.** Unless otherwise ordered, mediation ordered by the court must be conducted within ninety (90) days after the issuance of the initial case management order.

### (e) Conduct of Mediation.

(1) *Use of Agreed Upon Mediator; Order.* Where the parties agree to mediate and on the choice of mediator, the parties must lodge a proposed order setting forth:

[A] the name and address of the mediator;

[B] whether mediation statements—

- (i) are to be submitted to the mediator,
- (ii) are to be shared or confidential,
- (iii) any limitation in length, and
- (iv) when they are to be submitted;

[C] the mediator's fee schedule and required payment arrangements, including how the parties will allocate those costs;

[D] the time and place the mediation is to commence and time available; and

[E] the name and position of the principal who will attend, who will normally be someone with authority to approve a settlement or one with substantial influence in whether a settlement should be approved (in which case, someone with authority should be readily available to ratify a settlement).

*(2) Selection of Mediator by the Court; Order.*

[A] If the parties cannot agree upon the mediator, the court may order that they mediate before a United States district, bankruptcy or magistrate judge, including a senior judge or retired judge, who is not assigned to the case and who consents to serve.

[B] The judge will have the same duties, powers and rights as any other mediator under these rules, except as otherwise noted in this rule or as required by statute.

[C] Upon selection, the parties must meet with the mediating judge and lodge an order similar to that required under paragraph (e)(1), except the order will not provide for payment of compensation to the judge for acting as a mediator.

*(3) Mediator's Report of Results of Mediation.*

[A] Upon conclusion of the mediation, the mediator must promptly file a report indicating whether the case has settled in whole or in part, whether any follow up is scheduled, and any additional information that all parties have agreed in writing should be included in the report.

[B] The parties or their counsel must sign the mediator's report and any separate document setting forth their agreement, which, following an appropriate motion, the court may allow to be filed under seal.

*(4) Implementing a Settlement.*

[A] If the mediation results in settlement, the parties must lodge appropriate closing papers, or in the case of a partial settlement, papers appropriate to accomplish the partial settlement, within thirty (30) days from the filing of the mediator's report.

[B] Upon written request filed within thirty (30) days, the court may enlarge the time within which to file the appropriate closing papers.

**(f) Confidentiality of Mediation Communications.** This subsection applies to communications, during, preliminary to, or after all mediation sessions.

(1) *Communications by the Mediator.* No communication by a mediator may be disclosed by any person unless all parties to the mediation and the mediator consent.

(2) *Communications by Others.* A communication made by a person other than the mediator may be disclosed by a person other than the mediator only if all parties consent in writing.

(3) *Mediation Statements.* Mediation statements submitted to the mediator in confidence or shared with other mediation parties:

[A] may not be disclosed to anyone else without the parties' express consent; and

[B] are not admissible in evidence in any proceeding related to subject matter of the mediation.

(4) *Unprotected Communications.* Notwithstanding paragraphs (f)(1) and (f)(2), a communication is not protected to the extent that disclosure is required by state or federal law.

(5) *Court May Authorize Disclosure.* Notwithstanding paragraphs (f)(1) and (f)(2), a communication may be disclosed if the court, after a hearing, determines that:

[A] disclosure does not circumvent Rule 408, Federal Rules of Evidence and Rule 68, Federal Rules of Civil Procedure;

[B] disclosure is necessary in the particular case to prevent a manifest injustice; and,

[C] the necessity for disclosure is of sufficient magnitude to outweigh the importance of protecting the general requirement of confidentiality in mediation proceedings.

(6) *Application to Associates and Staff.*

[A] Disclosure of confidential information to the staff and associates of the parties, their counsel, or the mediator, may be necessary to accomplish the mediation.

[B] All staff and associates are subject to this confidentiality rule.

**(g) Conflicts of Interest.**

(1) *Definition.* A conflict of interest for a mediator is a dealing or relationship that might reasonably be thought to create an appearance of bias.

(2) *Disclosure; Further Proceedings.*

[A] The mediator has a responsibility to disclose all dealings and relationships defined in paragraph (g)(1).

[B] If all parties agree, in writing, to mediate after being informed of all actual, apparent, or potential conflicts of interest, the mediator may proceed with the mediation; otherwise the mediator must decline to proceed.

**(h) Immunity of Neutrals.**

(1) Any private person serving as a neutral under this rule is deemed to be performing a quasi-judicial function and is entitled to the immunities and protections that the law accords to persons serving in that capacity.

(2) United States district judges, bankruptcy judges, magistrate judges, senior judges, and retired judges are entitled to absolute judicial immunity while serving as neutrals.

**(i) Compensation.** Unless the parties agree or the court orders otherwise, the cost of mediation will be borne equally by the parties.

(1) The mediator will advise the parties of the mediator's fee schedule and required payment arrangements so the parties can include this information in the proposed order required by paragraph (e)(1).

(2) [A] If the expense of mediation or any matter regarding compensation creates issues that the parties, among themselves or with the mediator, cannot agree upon, the parties or the mediator may ask the court to resolve the matter.

[B] In doing so, the court will take into consideration the relative financial condition of the parties.

**(j) Administrator.** The chief judge of the district will designate an employee or judicial officer of the district to act as the Administrator of the court's mediation program.

(k) **Selection of Mediators and Other Neutrals; Roster of Neutrals.** The court recognizes that the parties have control over their own neutrals.

(1) The court expects any private person who agrees to serve as a neutral to have training or experience commensurate with the responsibility undertaken.

(2) In court-connected and other forms of mediation, it is desirable that the mediators selected by the parties have the requisite training and experience.

(3) The court does not:

[A] investigate and approve mediators and other neutrals; or

[B] create and maintain a roster of neutrals.

(l) **Definitions.** The term Alternative Dispute Resolution (ADR) refers to any method other than litigation for resolution of disputes. Definitions of some common ADR terms follow.

*Neutral* – The term "neutral" as used in these rules refers to an impartial person who facilitates discussions and dispute resolution between parties in mediation, case evaluation or early neutral evaluation, and arbitration, or who presides over a settlement conference, summary jury trial or mini trial.

*Mediation* – Mediation is a process in which a neutral facilitates settlement discussions between parties. The neutral has no authority to make a decision or impose a settlement upon the parties. The neutral attempts to focus the attention of the parties upon their needs and interests rather than upon rights and positions. Although in court-annexed or court-referred mediation programs the parties may be ordered to attend a mediation session, any settlement is entirely voluntary. In the absence of settlement, the parties do not lose the right to a jury trial.

*Arbitration* – Arbitration differs from mediation in that an arbitrator or panel of arbitrators renders a decision after hearing an abbreviated version of the evidence. In non-binding arbitration, either party may demand a trial within a specified period. The essential difference between mediation and arbitration is that arbitration is a form of adjudication, mediation is not.

*Case Evaluation or Early Neutral Evaluation* – Case evaluation or early neutral evaluation is a process in which a judicial officer or lawyer with expertise in the subject matter of the litigation acts as a neutral evaluator of the case. Each side presents a summary of its legal theories and evidence. The evaluator assesses the strength of each side's case and assists the parties in narrowing the legal and factual issues in the case. This conference occurs early in the discovery process and is designed to "streamline" discovery and other pretrial aspects of the case. The early neutral evaluation of the case may also provide a basis for settlement discussions.

*Summary Jury Trial* – The summary jury trial is a non-binding abbreviated trial by mock jurors. A neutral selected by the parties presides, acting in the fashion of a judge. Principals with authority to settle the case attend. The resulting advisory jury verdict is intended to facilitate settlement negotiations.

*Mini Trial* – The mini trial is similar to the summary jury trial in that it is an abbreviated trial presided over by a neutral. Attorneys present their best case to party representatives with authority to settle. Generally, no decision is announced by the neutral. After the hearing, the party representatives begin settlement negotiations, perhaps calling on the neutral for an opinion as to how a court might decide the case.