WASHINGTON – EASTERN

July 25, 2011

LR 16.2

ALTERNATIVE DISPUTE RESOLUTION

(a) **Preliminary**
Through the passage of the "Alternative Dispute Resolution Act of 1998", 28 U.S.C. §§ 651, *et seq.*, Congress has encouraged federal courts to review and strengthen their alternative dispute resolution (ADR) programs. Such programs may provide greater satisfaction to the parties, provide innovative methods of resolving disputes and increase the efficiency in achieving settlements. Moreover, the adoption of Congressional requirements for the priority scheduling of criminal trials, have placed substantially greater pressures on litigants, counsel, and the Court. The parties in civil actions shall consider alternative dispute resolution and be prepared to discuss ADR at the time of the first scheduling conference. Forms of ADR include but are not limited to mediation, summary jury trials, early neutral evaluation, arbitration and mini trials. The parties may plan to privately select and reimburse third party neutrals or request a court-annexed program.
(See LR 16.2(c) below.)

(b) **Settlement Negotiations**
The Court encourages the attorneys for all parties to the action, except nominal parties and stakeholders, to meet at least once and engage in a good faith attempt to negotiate a settlement of the action.

(c) **Court-Annexed Programs**
In selected cases, the Court may refer matters to magistrate judges or volunteer third party neutrals.

(1) Matters referred for mediation/settlement conferences by the District Court judges to the magistrate judges in this district shall be governed by the directives in the magistrate judge's scheduling order.

(2) Matters referred to mediators, special masters, or arbitrators shall be governed by this rule.

(a) Register of Third Party Neutrals

(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. Under appropriate circumstances, it may be necessary for the parties to provide payment, at usual and customary levels as determined by the Court, for the services of an attorney designated under this rule. 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 Eastern and Western Districts 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*

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 admitted to practice in a state court for at least 5 years; and

(b) Be a member of the bar of the United States District Court for the Eastern or Western District of Washington.

(3) *Disqualification*

No person may serve as a neutral in an ADR proceeding under this rule in violation of the standards set forth in 28 U.S.C. § 455 or any applicable standard of professional responsibility or rule of professional conduct. Within 7 days of designation as a neutral under this rule, the designee and parties shall thoroughly assess whether a conflict of interest or other basis for disqualification exists. If recusal is deemed appropriate, the neutral shall submit *in camera* a letter to the parties and court stating the fact of recusal, and another neutral will be selected.

(4) *Immunity of Neutrals*

All persons serving as neutrals under this local rule are deemed to be performing quasi-judicial functions and are entitled to the immunities and protections that the law accords to persons serving in such capacity.

(5) *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 the attorney is to act as mediator, special master or arbitrator.

(b) Mediation

(1) *Definition*

Mediation is a process whereby an impartial third party (the *mediator*) facilitates communication between negotiating parties attempting to reach an agreed settlement of their dispute. When appropriate the mediator may also offer an evaluation of the case and/or recommend a settlement. Whether a settlement results from a mediation is within the sole control of the parties.

(2) *Selection of Mediator*

The Court may consult with the parties and shall designate a mediator from the register, or if necessary, within the discretion of the Court, from outside the register and shall send notice of that designation to the mediator and to all attorneys of record in the action.

(3) *Mediation Procedure*

A. *Copy of Pretrial Order or Pleadings*

Upon selection of a mediator the parties shall forthwith 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. The conference shall be set to begin as soon as practicable after submission of the papers referenced in the preceding paragraph, but in no event more than two months after the mediator has been notified of his/her selection.

C. *Memoranda*

(1) Each party shall provide the mediator with a memorandum presenting in concise form his/her 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.

(2) In addition, each party, at least 7 days before the mediation conference, shall submit, to the mediator only, an additional memorandum on a confidential basis, and not served on the other parties, indicating strengths and weaknesses in that party's case and the range in which that party proposes settlement. Memoranda so submitted shall be treated with confidentiality by the mediator, and shall be labeled "Confidential".

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/her client relative to settlement.

E. *Parties to be in Attendance*

Unless previously excused by the mediator for good cause, the parties shall personally attend. The mediator shall decide when the parties 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, if previously excused by the mediator, but a representative of the insurer of said parties 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.

F. *Failure to Attend*

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

G. *Time Requirements*

Any of the time requirements of this rule may be waived or extended by the Court, upon application, and a showing of good cause.

(4) *Proceedings Confidential*

All proceedings of the mediation conference, including any statement made by any party, attorney or other participant, shall, in all respects, be confidential and may 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, or otherwise placed on the record, and shall be binding upon all parties to that agreement.

(5) *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 or her discretion provide the attorneys for the parties with a written settlement recommendation memorandum. No copy of 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 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, if that is the case, in an attempt to help the parties reach agreement and avoid the time, expense and uncertainty of trial. The mediator shall have the duty and authority to establish the time schedule for mediation activities, including a schedule for the parties to act upon the mediator's recommendation having in mind that the purpose of this order is prompt dispute resolution.

(6) *Consideration of Special Master or Arbitrator*

If the mediator is unable to mediate a settlement, the mediator 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 incontroversy. 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.

(7) *Notice of Compliance*

If no settlement results from the mediation, the mediator shall promptly file with the Clerk a certificate showing that there has been compliance with the mediation requirements of this rule but that no settlement has been reached.

(c) Special Mediation Master

(1) *Appointment of Special Mediation Master*

If all of the parties to an action stipulate in writing to the reference of the action to a special mediation master and agree upon a particular attorney as special mediation 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 mediation master but stipulate in writing that there be a reference to a special mediation master, the Court shall promptly designate a special mediation master from the register, or as otherwise determined by the Court, and shall send notice of that designation to the special mediation 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/her report shall be as set forth in FED. R. CIV. P.53 except as the same may be modified or limited by agreement of the parties and incorporated in the order of reference.

(3) *Confidentiality of Proceedings*

The Court, in the order of reference, shall specify the extent to which the proceeding shall be confidential.

(4) *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.

(5) *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 require no further discovery and discovery would impede the exercise of the powers and duties under this rule, in which event he or she may request an order from the Court to stay discovery.

(6) *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 FED. R. CIV. P. 53.

(d) Arbitration

(1) *Definition*

Arbitration is a process whereby an impartial third party (the *arbitrator*) hears and considers the evidence and testimony of the disputants and others with relevant knowledge and issues a decision on the merits of the dispute. The arbitrator makes an *award* on the issue(s) presented for decision. The arbitrator's award is binding or non-binding as the parties may agree in writing.

(2) *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. Pursuant to the ADR Act of 1998, 28 U.S.C. § 654(a), the Court may not refer to arbitration any action based on a violation of constitutional rights, where jurisdiction is based in whole or part on 28U.S.C. § 1343, or where relief sought consists of money damages in an amount greater than $150,000. The agreement to arbitrate shall state a) whether the decision to arbitrate is freely and knowingly made, b) the extent to which the proceedings shall be confidential and c) whether 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. No party may be prejudiced for refusing to agree to arbitration.

(3) *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, or as otherwise determined by the Court, and shall send notice of that designation to the parties, together with its order directing arbitration. The order to arbitrate shall incorporate the term set forth in the agreement to arbitrate.

(4) *Oath or Affirmation*

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

(5) *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 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/her.

(6) *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.

(7) *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 under FED. R. CIV. P. 45. The arbitrator may make reasonable rules and issue orders necessary for the fair and efficient conduct of the hearing and prehearing proceedings. Failure, without good cause, to comply with the arbitrator's rules and orders shall be reported to the Court for its consideration of imposition of sanctions.

(8) *Transcript or Recording*

A party may cause a transcript or recording to be made of the proceedings at the party's 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, or applicable rule of law, no transcript of the proceedings shall be admissible in evidence at a later de novo trial except for purposes of impeachment.

(9) *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.

(10) *Filing of Award*

The arbitrator shall file the award with the Clerk's Office with reasonable promptness following the closing of the hearing. Pursuant to 28 U.S.C. § 657(b), the award shall not be made known to any judge who may be assigned to the case for a trial de novo, until the time to request a trial de novo has passed. The Clerk shall transmit copies of the award to all parties.

(11) *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.

(12) *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, and enter an order in conformity.

B. After said 30-day period, and any extended time required for hearing and determining the issues presented by motion filed under (12)(A) above, the Court may direct the entry of judgment on the award under FED. R. CIV. P. 58. The judgment shall have the same force and effect as that of any other judgment of the Court in a civil action.

(13) *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 for the arbitration proceeding 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 for the trial de novo may be assessed against that party by the Court.

(14) *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 andfederal law governing voluntary arbitration shall control.