CR 39.1 ALTERNATIVE DISPUTE RESOLUTION

(a) Alternative Dispute Resolution Program.

(1) *Objective.* This rule constitutes the alternative dispute resolution program authorized by the court pursuant to the Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651 et seq. The rule encourages and promotes the early and inexpensive resolution of disputes through one or more alternative dispute resolution procedures, as defined below. The court finds that the use of alternative dispute resolution procedures promotes timely and affordable justice while reducing calendar congestion.

(2) *Rule Administration.* The alternative dispute resolution program shall be administered by the clerk of the court with the cooperation and assistance of the Alternative Dispute Resolution Committee (the "Alternative Dispute Resolution Committee") of the Federal Bar Association of the Western District of Washington. The clerk and the Alternative Dispute Resolution Committee shall compile and revise materials describing various ADR procedures available hereunder. The clerk shall make such materials available to the parties in civil cases as directed by the court.

(3) *Definition.* For purposes of this rule, an alternative dispute resolution procedure ("ADR procedure") includes any process or procedure, other than an adjudication by a presiding judge, in which one or more neutral third parties participate to assist in the resolution of issues in controversy. Such procedures include the procedures available under sections (c)--(e) of this rule, as well as such other alternative dispute resolution procedures as the court may approve under section (f) of this rule.

(4) *Actions Subject to Rule.* Unless otherwise ordered by the court in a specific case, this rule applies to all civil actions in this court, including adversary proceedings in bankruptcy, except prisoner petitions, suits involving entitlement to social security benefits, and suits to recover student loan defaults or deficiencies. The court may exempt specific cases from this rule if and to the extent the court finds that use of ADR procedures in the action would not be appropriate.

(5) *Consideration of Alternative Dispute Resolution.* Litigants in all civil cases subject to this rule shall consider the use of ADR procedures at all appropriate stages in the litigation, including the early stages of the litigation.

(6) *Confidentiality.* Except as otherwise required by law or agreed by the litigants, or otherwise provided by this rule, all ADR proceedings under this rule, including communications, statements, disclosures and representations made by any party, attorney or other participant in the course of such proceeding, shall, in all respects, be confidential, and shall not be reported, recorded, placed in evidence, disclosed to anyone not a party to the litigation, made known to the trial court or jury, or construed for any purpose as an admission or declaration against interest. No party shall be bound by anything done or said during such proceedings unless a settlement or other agreement is reached.

(7) *Immunities and Protections.* All persons serving as neutrals under this rule shall be accorded the immunities and protections that the law provides to persons serving in a quasi-judicial capacity.

(b) Attorney Neutrals.

(1) The clerk of the court, with the cooperation and assistance of the Alternative Dispute Resolution Committee, shall establish and maintain a register of qualified attorneys who have agreed to serve as neutrals under this rule. The attorneys so registered shall be approved by the court from lists of qualified attorneys at law, who are members of the bar of this court, and who are recommended by the Alternative Dispute Resolution Committee. The Alternative Dispute Resolution Committee shall request the county bar associations within the geographical boundaries of the district to cooperate with the Committee in obtaining well-qualified attorneys for the register.

(2) To qualify for service as a neutral under this rule, an attorney shall certify that he or she:

(A) Has been a member of the bar of a Federal district court for at least seven years or has had at least seven years of judicial experience;

(B) Is a member of the bar of the United States District Court for the Western District of Washington;

(C) Has devoted a substantial portion of his or her practice to litigation; and

(D) Has met such training requirement as the court may direct by general order.

(E) Agree to accept appointment to serve as a neutral on a pro bono basis when appropriate.

(3) If all parties so agree, the court may appoint a neutral who is not listed in the register.

(4) The Alternative Dispute Resolution Committee shall assist the court in determining that the register of qualified attorneys is duly maintained and that such attorneys have certified that they have necessary training and/or experience as required by the rule.

(5) Neutrals serving under this rule should disclose any interest or relationship likely to affect their impartiality or that might reasonably create an appearance that they are biased against one party or favorable to another. When parties, with knowledge of such disclosures, nevertheless desire a particular neutral to serve and affirmatively waive such disclosures, the neutral may serve; provided, however, that nothing in this provision shall affect the obligations of any District Judge or Magistrate Judge under 28 U.S.C. § 455.

(6) Neutrals serving under this rule shall be eligible to receive compensation for their

services and reimbursement for expenses incurred, within limits set by the court, subject to regulations approved by the Judicial Conference of the United States and/or the Administrative Office of the United States Courts. Notwithstanding the foregoing, the parties may agree in writing to provide additional compensation to neutrals.

(c) Mediation.

(1) *Designation and Scheduling.* The court may designate any civil case for mediation under this rule, and may schedule the required steps so as to maximize the prospects of early settlement. The parties may file a written stipulation for mediation under this rule at any time.

(2) *Settlement Conference.* In every civil action designated by the court for mediation under this rule, the attorneys for all parties to the action, except nominal parties and stakeholders, shall meet at least once, preferably in person, and engage in a good faith attempt to negotiate a settlement of the action. Unless the court sets a different date, such conference shall take place no later than 30 days prior to the mediation conference.

(3) *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. The mediator will serve without compensation unless the parties agree otherwise.

(4) *Mediation Procedure.* Promptly upon the designation of a mediator, the plaintiff shall arrange a conference call among the mediator and counsel for each party to discuss procedural aspects of the mediation. Except to the extent the mediator directs otherwise, the following procedures shall apply:

(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 relevant pleadings.

(B) Notice of 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. In giving notice the mediator may use a form provided by the court.

(C) Memoranda. Each party shall provide the mediator with a memorandum presenting in concise form its contentions relative to both liability and damages. This memorandum shall not exceed 10 pages in length. Copies of the memorandum shall be delivered to the mediator and served upon all other parties at least 7 days before the mediation conference. In addition, each party shall deliver to the mediator a confidential statement of its current offer or demand; this statement shall not be served on the other parties.

(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 or her client relative to settlement.

(E) Parties to Attend. In addition to counsel, parties and insurers having authority to settle, and to adjust pre-existing settlement authority if necessary, must attend the mediation in person. The mediator may in his or her discretion, but only in exceptional cases, excuse a party or insurer from personally attending a mediation conference. If a party or representative of an insurer is excused from personal attendance by the mediator, the party or representative shall be on call by telephone during the conference.

(F) Failure to Attend. Willful or negligent failure to attend the mediation conference, or to comply with this rule or with the directions of the mediator, shall be reported to the court by the mediator in writing and may result in the imposition of such sanctions as the court may find appropriate.

(5) *Notice to Clients of Mediator's Suggestions.* Counsel shall comply promptly with any request by the mediator that a party be advised of the mediator's suggestions as to settlement.

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 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 agreed to act as an impartial mediator in an attempt to help the parties reach agreement

and avoid the time, expense and uncertainty of trial.

(6) *Notice to Court.* The mediator shall provide the judge, the clerk's office, and the parties with a pleading stating (1) when the mediation occurred and (2) whether the case is resolved. The mediator also may submit a letter to the judge and the parties, not filed with the clerk, expressing the mediator's views as to whether the appointment of a settlement judge, or the use of other alternative dispute resolution procedures, would be advisable. In no event shall the mediator disclose any communication made between the mediator and the parties or their counsel.

(d) Arbitration.

(1) *Voluntary Submission to Arbitration.* Subject to the limitations of subsection (2) of this section, the parties to any civil action in this court, including an adversary proceeding in bankruptcy, may jointly request, or consent to, arbitration proceedings. All such proceedings shall be governed by the provisions of 28 U.S.C. §§ 651-658 relating to voluntary arbitration, for so long as those sections remain in effect and by this rule.

(2) *Eligible Cases.* The parties may consent to arbitration in any case, including an adversary proceeding in bankruptcy, except where:

(A) the case is based on an alleged violation of a right secured by the Constitution of the United States;

(B) jurisdiction is based in whole or in part on 28 U.S.C. § 1343, or

(C) the relief sought consists of monetary damages in an amount greater than $150,000.

For purposes of subsection (C) above, the court shall presume that damages are not greater than $150,000 unless counsel certifies that damages exceed that amount.

Notwithstanding the above, the court may decline to refer to arbitration any case in which the objectives of arbitration would not be realized:

(A) because the case involves complex or novel legal issues,

(B) because legal issues predominate over factual issues, or

(C) for other good cause.

(3) *Agreement and Order for Arbitration.* The parties may agree in writing to submit all or part of their claims to arbitration. Alternatively, the parties may prepare and submit their own form of agreement, and may thereby modify any of the provisions applicable to

arbitration under this rule, subject to the approval of the court. Any agreement shall include a certification that the parties have been provided access to materials describing the arbitration program, and agree to arbitration freely and knowingly. If the parties agree that the arbitration is to be final and conclusive, with trial de novo waived, the agreement shall specifically so provide. A case shall be referred to arbitration only upon entry of an order to that effect by the judge to whom the case is assigned.

(4) *No Prejudice for Refusal.* A case shall be considered by a judge for reference to arbitration under this rule only if a consent form executed without limitation or qualification on behalf of every party has been received by the clerk. The plaintiff shall be responsible for securing the execution of consent forms by the parties and for filing such forms with the clerk of court. No consent will be made available, nor will its contents be made known to any judge, unless all parties have consented to the reference to arbitration. No party or attorney shall be pressured to consent to arbitration, or prejudiced in any way for refusing consent.

(5) *Scheduling in Arbitration Cases.* Prior to the arbitration hearing, the court shall:

> (A) set a trial date, which shall be no later than if the case had not been submitted for arbitration;
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> (B) set a deadline for completion of all discovery. No discovery will be permitted during the period beginning ten days before the arbitration hearing and ending on the date the award is issued;
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> (C) set a deadline for the commencement of the arbitration hearing, consistent with 28 U.S.C. § 653(b); and
>
> (D) set a deadline for the filing of pre-arbitration motions.

(6) *Number of Arbitrators.* Cases shall be heard by a single arbitrator unless the court orders otherwise.

(7) *Selection of Arbitrators.* All arbitrators shall be drawn from the register of neutrals unless the court orders otherwise in a particular case. The parties may secure a current register from the clerk. Within 14 days after the court orders arbitration, the parties may notify the clerk that they agree to nominate a specific arbitrator, and that the nominee has advised the parties that he or she is willing to serve. In the absence of such a nomination, the clerk shall nominate the arbitrator. In either event, the judge shall make the final appointment, and shall notify the arbitrator and the parties.

(8) *Oath or Affirmation and Powers of Arbitrator.* The arbitrator shall take an oath or affirmation as prescribed by 28 U.S.C. § 453. The arbitrator shall have the power to conduct arbitration hearings, to administer oaths and affirmations, and to make awards.

(9) *Date and Place of Arbitration Hearing.* The arbitrator shall notify the parties of the date, time and place of the hearing. The hearing shall be scheduled in accordance with the deadline set by the court and for as early a date as possible, consistent with the parties' needs to complete their preparation.

(10) *Procedure at Arbitration Hearing.* The arbitrator shall provide directions to the parties as to the procedure at the hearing, including the length of time allotted to each side and whether pre-hearing memoranda are required. 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 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 imposition of sanctions as provided in Rule 37 of the Federal Rules of Civil Procedures and Local Rule GR 2 of this court.

(11) *Transcript or Recording.* A party may cause a transcript or recording to be made of the proceedings at its 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 the copy.

(12) *Filing of Arbitrator's Award.* The arbitrator shall file his or her award with the clerk promptly after the hearing. The clerk shall transmit copies of the award to all parties. 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.

(13) *Effect of Award.* If the parties' agreement to arbitrate did not waive trial de novo the award shall be entered as the judgment of the court after the time has expired for requesting a trial de novo. The judgment so entered shall be subject to the same provisions of law and shall have the same force and effect as a judgment of the court in a civil action, except that the judgment shall not be subject to review in any other court by appeal or otherwise. If the parties' agreement to arbitrate specified that trial de novo was waived, the filing of the award shall be treated as a motion to confirm the award under 9 U.S.C. § 9, which motion shall automatically be deemed granted unless a motion to vacate, modify or correct the award for any of the grounds specified in 9 U.S.C. §§ 10 and 11 is served and filed within the time for requesting a trial de novo.

(14) *Sealing of Award.* The contents of any arbitration award shall not be made known to any judge who might be assigned to the case:

> (A) except as necessary for the court to determine whether to assess costs of attorneys fees;

(B) until the district court has entered final judgment in the action or the action has been otherwise terminated; or

(C) except for purposes of preparing required reports.

(15) *Trial De Novo.*

(A) Time for Demand. Unless the agreement to arbitrate waived trial de novo, any party may, within 30 days of the filing of the award, serve and file a written demand for trial de novo. The case will then be treated for all purposes as if it had not been referred to arbitration.

(B) The trial de novo shall be conducted as though no arbitration proceeding had occurred. No reference shall be made to the arbitration award in any pleading, brief, or other written or oral statement to the trial court or jury either before or during the trial, nor, in a jury trial, shall the jury be informed that there has been an arbitration proceeding.

(C) Testimony given during the arbitration proceeding is admissible in subsequent proceedings by stipulation of the parties, or to the extent allowed by the Rules of Evidence, but the testimony shall not be identified as having been given in an arbitration proceeding.

(D) Costs and Attorney's Fees. Following the trial de novo, the court may assess costs, pursuant to 28 U.S.C. § 1920, and reasonable attorney fees against a party demanding the trial de novo if (i) that party fails to obtain a judgment more favorable to it than was the arbitration award and (ii) the court determines that the party's conduct in seeking a trial de novo was in bad faith.

(16) *Mediation Under Rule 39.1(c).* If the parties have participated in an arbitration hearing under this rule they will not be required to participate in mediation under Rule 39.1(c). They may choose to participate in such mediation, however.

(e) Judicial Settlement Conferences. In any case, the court may appoint a settlement judge who may conduct a settlement conference in such manner as that settlement judge may deem appropriate. Unless otherwise ordered by the court, a judicial settlement conference will only be held in a case where the parties have already participated in mediation, but have been unable to reach a settlement.

(f) Other Alternative Dispute Resolution Procedures. Upon application of the parties, the court may approve for use under this rule other ADR procedures if the court concludes that such procedures appear reasonably calculated to further the objectives of this rule. Such ADR procedures include, but are not limited to, the following:

(1) *Early Neutral Evaluation.* This is an ADR procedure whereby the parties shall select a

neutral from the register early in the case to provide an evaluation of the position of the parties regarding liability and damages. The early neutral evaluation shall be conducted according to procedures agreed to by the parties and determined by the neutral. The parties and their attorneys must attend such proceedings.

(2) *Summary Trial.* This is an ADR procedure whereby the parties make a presentation to a neutral, selected by them from the register, according to such procedures as may be agreed to by the parties and determined by the neutral. The parties and their attorneys must attend such proceedings. The summary trial may be with or without a jury. If a jury is used it is the responsibility of the parties to secure the availability of jurors to serve. After the trier of fact renders a decision in such summary trial proceeding, the attorneys and parties may conduct, under such terms as are determined by the neutral, interviews of the trier of fact and of the neutral. The summary trial may be followed, if the parties so agree, by another ADR procedure provided by this rule.

(3) *No Limitation on Use of ADR Alternatives.* Nothing herein is intended to prevent the parties from agreeing to use another dispute resolution alternative, subject to court approval as required by this rule. Nothing herein shall limit the ability of consent of parties to enter into arbitration agreements that are otherwise valid and enforceable under the Federal Arbitration Act, 9 U.S.C. § 1 et seq., RCW 7.04.010 et seq., or other comparable authority.

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