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Complying with Rule 39.1 in Federal Court Mediations

A Rare Occurrence and a Potential Pitfall in a Case with the Wrong Federal Judge

By: John Cooper
WAMS Mediator/Arbitrator

Since I seem to do a number of "39.1 mediations" each month, I thought it might be useful for counsel involved in those proceedings to briefly review the technical requirements which differ greatly from mediations conducted under state court rules (which are very general and basically only require that a mediation or settlement conference occur). Some practical comments and suggestions will be provided to assist in complying with this rule.

Federal Court cases in the Western District of Washington are mediated pursuant to Rule 39.1 of the Local Civil Rules of that Court. That rule has specific requirements of counsel, as well as the mediator; frankly, these requirements are most probably not complied with in most cases on a consistent basis. As such, it strikes me that both counsel and mediators might be unfortunately lulled into a complacent posture in a given case, only to have the Federal judge potentially impose sanctions, as allowed by the rule, for non-compliance. This would not only be most unfortunate and embarrassing, but can be rather easily avoided if everyone simply remembers that 39.1 mediations have certain fundamental requirements that should, and easily are, met by all participants, counsel and mediator alike.

What is supposed to happen in a 39.1 mediation? The answer is fairly simple, but multi-faceted; the technical procedural requirements are as follows:

1. Upon selection of a mediator, plaintiff's counsel is to arrange for a conference call between the mediator and counsel for each party to "discuss procedural aspects of the mediation." 39.1(c)(4)

Comment/Practice Tip: *This primarily relates to scheduling and can probably best be handled by simply contacting WAMS to work with all counsel on scheduling a date; advise counsel that you are doing this.*

2. The parties shall provide the mediator with a copy of the Pretrial Order, or, if none exist, with copies of "relevant pleadings." 39.1(c)(4)(A)

Comment/Practice Tip: *Perhaps the one rule which may be ignored. Little to be gained and this information is typically provided in other submissions. Compliance, though, is fairly simply and self-explanatory.*

3. The mediator fixes a time and place for the mediation and gives everyone at least 14 days notice of the same. 39.1(c)(4)(B)

Comment/Practice Tip: *WAMS will provide this information.*

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Mediator Focus

Larry Levy

By: Penny Gans, WAMS Staff

2006 will mark Larry Levy's 20th year as a WAMS mediator. As Larry reflects, with the familiar twinkle in his eye, "It gets better every year."

Larry, along with fellow WAMS mediator Harry Goldman, was a member of the first WAMS mediator training class, conducted in 1986 by Seattle ADR pioneer Alan Alhadeff. Larry and Alan had been friends since UW years. Following law school and a four-year stint in the Navy as a JAG officer, Larry returned to his home town (Tacoma) and joined the Davies Pearson law firm as a litigator in the areas of personal injury, medical negligence, product liability, maritime, fire, property damage, environmental and toxic torts.

When Alan invited him to observe a mediation being conducted in the Tacoma office of Bill Rush, another future WAMS mediator, Larry's response was, "That's for labor lawyers! I'm not a labor lawyer!" However, seeing the mediation process in action was a revelation to Larry. "Show me another one," he said to Alan. After the second mediation conducted by Alan, Larry engaged a San Francisco mediator to help resolve a couple of cases in which Larry was counsel. The four mediated cases convinced Larry, "It works!" "Litigation is akin to gunslingers shooting at each other," Larry says. "In the courtroom, someone else does it to you. With mediation, you do it to yourself."

The first case Larry mediated after finishing the WAMS training program was a high-profile wrongful death case in Spokane. It took only two days for the parties to arrive at a seven-figure settlement. Since then, Larry has served as a neutral in more than four thousand mediations, ranging from personal injury cases to professional negligence, commercial transactions, insurance coverage issues, property damage, construction, environmental claims, employment and claims against government agencies. By 1991, ADR consumed Larry's entire law practice. In 1997 he became Of Counsel at Davies Pearson and devoted most of his time to mediation and arbitration. Larry primarily mediates along the I-5 corridor from Bellingham to Portland, and occasionally mediates in Eastern Washington and out of state.

Larry's ability to connect with both plaintiffs and defendants is one of the keys to his success. He notes that "Everyone has a story to tell, and it is important to each person to be able to tell that story. Consequences of injury consume and transform a person's life. I focus on the fact that every person is unique and his or her dispute is of paramount importance. In injury cases, or when someone's profession or service is at risk, it can never be 'just another case'".

In the early days of ADR, mediators used joint meetings to educate both clients and attorneys about the mediation process. Today, most of Larry's mediations are structured in the shuttle style, where the parties are seated in separate rooms and the mediator goes back and forth between them. Occasionally, however, when counsel agree, Larry will have the defendant's attorney and insurance representative meet informally with the plaintiff in order to get a first-hand impression of the plaintiff's likely ability to communicate his or her story to a jury. Larry's advice: "If it is clear the plaintiff makes a favorable impression, and if you empathize with his or her situation, so will the jury."

Larry has taken advantage of ongoing training opportunities offered by WAMS, USA&M, Pepperdine University, and the International Academy of Mediators. He has found that frequent exchanges with other mediators and instructors have taught him new techniques and have reinforced some of his own that have made him one of the most sought-after mediators on the WAMS panel. As Larry Levy approaches his 20-year anniversary as a WAMS mediator, his enthusiasm continues. "It gets better every year!"

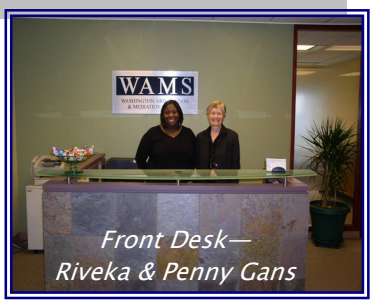
…WAMS Buzzz

By: Tamara Roberts, WAMS Staff

Thanks to you, we are growing! Next time you are at WAMS you may notice some changes.

The Seattle WAMS office has expanded and moved to the 9th floor of One Union Square. Our clients are important to us, so we now offer more conference room space as well as enhanced sound proofing and improved internet access.


Front—Hallway



Front Desk—
Riveka & Penny Gans


Conference room


Back—Hallway

Complying with Rule 39.1 (From Page 1)

4. (a) Each party is to provide a memorandum, not to exceed 10 pages, to the mediator and opposing counsel, addressing liability and damages; this is to be done at least 7 days prior to the mediation; AND (b) each party is to provide a confidential memorandum to the mediator only setting forth its current offer or demand. 39.1(c)(4)(C).

***Comment/Practice Tip**: This rule, in my experience, is virtually never complied with by parties in a 39.1 mediation. Typically the mediator is provided either with a memo that is served on everyone or with a confidential memo only. Obviously, neither strictly complies with the rule. I am not aware of this ever being reported to the court (at least I haven't) – see 39.1(c)(4)(F) discussed below. Complying with this rule does not appear to be burdensome. Typically, liability and damage issues are well-known by the time the mediation is scheduled. The confidential memo could also include other remarks that the party may wish to share privately with the mediator.*

5. Attendance by the parties and insurers is mandatory and may, in the exercise of his/her discretion, be excused by the mediator, "but only in exceptional cases." If attendance is excused, the party or representative must be available by telephone during the mediation conference. In addition, the insurance representative attending must have authority to settle the case AND have authority to "adjust pre-existing authority if necessary." 39.1(c)(4)(D) and (E).

***Comment/Practice Tip**: This is another rule that is frequently violated, particularly by defendants, who seem to assume that attendance by telephone is satisfactory if the insurer is located a fair distance away from the Seattle area. Most mediators will probably excuse attendance, but it should be raised preliminarily so that the mediator is not technically required to report it to the court. The phrase regarding an insurance rep having the authority to "adjust pre-existing settlement authority if necessary" creates some confusion. Obviously, the court cannot force anyone to settle, but this rather obviously suggests that the court is determined to see that every possibility at settlement is explored, which, in a given case, may require that settlement authority be adjusted. This is a ticklish situation for the mediator, but it would seem that a flagrant or defiant violation by the insurer should be reported to the Court and it can then do what it wants in terms of sanctions.*

6. Consequences: The mediator is required to report to the Court any "willful or negligent" failure to attend the mediation or any such similar failure to comply with 39.1 "or with the directions of the mediator." The Court will then make a determination as to whether sanctions will be imposed. 39.1(c)(4)(F).

Comment/Practice Tip: *This presents some potentially uncomfortable situations for the mediator in terms of just what is reported to the court. The easiest way to avoid the same is to simply make sure you are complying with the rules as outlined above. Obviously, non-attendance in any fashion affords the mediator no real option but to report the same. Attendance by phone but without first seeking permission is a technical violation, but probably won't be reported in most instances, unless it directly impacted the mediation process. For example, an east coast claims representative who cannot be reached after 2:00 p.m. because he/she is at home or attending a social function (which happens too frequently) has not complied since being available by phone is meant to mean the functional equivalent of personal attendance. The mediator should not be placed in this position. Again, the answer is obvious as to how to avoid this – first, seek permission to have the claims rep attend by phone and then make absolutely certain that he/she is constantly available, making it clear that the mediator will be required to report any failures in this regard to the Federal judge.*

WESTERN DISTRICT OF WASHINGTON FEDERAL DISTRICT COURT
LOCAL RULE 39.1 MEDIATION CHECKLIST

- ☐ If plaintiff, contact opposing counsel regarding scheduling; advise that you will be having WAMS do the necessary scheduling and giving of notice of mediation session. Contact WAMS.
- ☐ Provide mediator with copy of Pretrial Order or copies of relevant pleadings.
- ☐ *At least 7 days prior to the mediation*, provide memorandum to mediator, with copies to opposing counsel, regarding liability and damages. Provide a confidential memo to mediator only setting forth last demand or offer (if any), and anything else you might want to have the mediator know confidentially.
- ☐ Confirm attendance with client or claims representative. If personal attendance is not possible, seek permission from mediator to have client/rep attend by phone. Make sure that client/rep is continuously available and advise of consequences if not so available. Confirm with claim rep that he/she will have settlement authority and the ability to adjust pre-existing authority.

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