

UNITED STATES DISTRICT COURT DISTRICT OF UTAH

PRIMER FOR PARTIES AND ATTORNEYS PARTICIPATING IN THE DISTRICT OF UTAH'S MEDIATION PROGRAM

As a prerequisite to participating in a mediation conference, the Court requests that attorneys review this primer and discuss it with their clients. It is designed to familiarize the parties with the process and to review what they should do to prepare for it.

MECHANICS AND PROCEDURES

WHAT IS MEDIATION? Mediation is a private, voluntary process in which an impartial third person, the mediator who is appointed by the Court, assists the parties to settle their dispute. Mediators have no authority to rule on issues or determine a settlement. Their function is to facilitate a productive exchange of issues and views with the goal of reaching settlement. An effective mediator acts as a settlement catalyst by asking questions, defining the issues, encouraging communication, and assisting the parties to propose and evaluate alternative settlement proposals or solutions. In a successful mediation, all parties participate in forging a settlement agreement. In essence, the parties -- rather than a judge or jury -- are in charge and control the results.

DO WE GO TO COURT? Mediation conferences are held at the U.S. Courthouse, but no judge is present. The mediator opens the conference, then provides each party -- or party's attorney -- time to present its position with a statement of relevant facts and points of law. Because mediation is an assisted negotiation and not a trial, opening statements are addressed to the other party. After the opening session, each party is assigned a private room in which to meet to caucus. During these caucuses, the mediator typically circulates among the parties, meeting separately with each one in an attempt to facilitate settlement. If the parties reach agreement, they reconvene and, with the assistance of the mediator, discuss the details of the agreement. If the parties cannot reach a settlement, they can agree to (i) continue to work on a settlement agreement, (ii) schedule another mediation conference after exploring additional options, or (iii) return the dispute to litigation.

ATTENDING THE CONFERENCE

WHO IS REQUIRED TO ATTEND AND FOR HOW LONG? Under the Court's program, all parties and their attorneys are required to participate in the entire mediation conference. A typical mediation conference will run anywhere from four to eight hours. Parties must remain at the mediation conference until it is completed. Moreover, the Court expects all parties and their attorneys to participate in the process in good faith. Achieving success depends on the parties' willingness to engage in settlement negotiations in a spirit of cooperation, open-mindedness, and flexibility.

SHOULD SOMEONE WITH AUTHORITY TO SETTLE BE PRESENT? The Court's program requires that every party participating in the mediation conference must have present a representative who has the authority to approve any settlement agreement that is reached. For the defendant, settlement authority means a representative who is authorized to make an offer, financial or other, to the plaintiff. Settlement authority for the plaintiff means a representative who is authorized to accept an offer, financial or other, from the defendant.

PREPARING FOR THE CONFERENCE

DO WE NEED TO PREPARE ANYTHING IN WRITING? Under the Court's program, each party is required to provide the mediator with a written pre-conference memorandum at least ten days before the mediation conference. The memorandum should (i) assess the party's position, including strengths and weaknesses; (ii) summarize the relevant facts and evidence; (iii) list the party's needs and interests by priority; and (iv) describe and assess some desirable outcomes that could resolve the dispute. These memoranda need not be exchanged between the parties unless the mediator so requires. In addition, some court-appointed mediators may ask you to draft your memorandum according to their own format. If you have any questions, ask the mediator about the information the mediator needs you to provide.

HOW SHOULD WE EVALUATE OUR POSITION? Each party, ideally with the assistance of its attorney, should carefully review and realistically assess the relative strengths and weaknesses of its case. Based on this assessment, each party should make a preliminary determination of how flexible it can be in forging a settlement agreement. Each party should also evaluate what resources they possess and/or need to accomplish a desirable outcome to the dispute. Where the dispute involves damages, each party should specify and calculate in advance what those damages are. When a party asks for time to return to the office to review financial statements, prepare spreadsheets, or otherwise regroup, the momentum of the process is lost. The length of a mediation conference frequently is inversely proportional to the amount of time the parties have spent preparing for it. Moreover, where one party is well prepared but the other poorly prepared, the mediation process is inappropriately drawn out and, in some cases, stifled. Parties and their attorneys should bear in mind that preparing for a mediation conference is as important as preparing to appear before a judge.

COURT-APPOINTED MEDIATORS

WHO ARE THE COURT-APPOINTED MEDIATORS? All members of the Court's ADR Panel are highly experienced and qualified attorneys who have agreed to serve as mediators in the Court's program at a reduced cost or voluntary basis. Because the time they devote to serve as mediators is valuable, the Court asks that all parties and their attorneys make every effort to be cooperative throughout the mediation process and to take the time to carefully prepare for the mediation conference.

WHO PAYS THE MEDIATORS? The court authorizes mediators to collect fees for their services at an hourly rate set by the mediator. The parties should discuss payment arrangements with the mediator before the mediation conference. Unless the parties agree otherwise, the compensation fee for the mediator is split evenly between the parties. Parties who are unable to pay their portion of the mediator's fee may motion the court to waive their portion of the fee.

QUESTIONS OR ADDITIONAL INFORMATION

If you have questions about the mediation process or would like more information about it, please call Elizabeth Toscano at 801/524-6196.