

The following represent guidelines for mediation and are intended to set out as simply as possible preconditions for a successful mediation. It is recommended that counsel share these guidelines with their participants in the mediation process in advance of the mediation session. These Guidelines offer headings for various topics which relate to various aspects of the mediation process. Feel free to review only the sections of these Guidelines you need to understand the process and the Mediator's intended approach to the process.

**Agreement to Mediate:** These guidelines are not intended to supplant the Agreement to Mediate which represents the binding agreement of the participants to mediation.

**Overall Mediation Process:** Most participants in mediation will experience "mediation" as a single day mediation session (discussed in more detail below) but the overall mediation process is comprised of pre-mediation calls, submission of position papers by parties, a mediation session, and, if necessary, post mediation submissions or discussions. Counsel for participants generally participate in the other portions of the overall mediation process, unless a participant is unrepresented. Though the other portions of the overall mediation process should not be diminished, the key feature of the process is the mediation session at which the Mediator will shuttle back and forth between the participants in an effort to find a solution to the matter which culminates in a written settlement of all or a portion of the matter.

**The Mediation Session:** The mediation session (a part of the overall mediation process) will generally be scheduled for a single business day and will likely begin informally around 9:00 am and will be convened to formally begin the process around 9:30 am. While the Mediator will operate with the goal of finishing the mediation session well before 5:00 pm, mediation sessions sometimes last into the evening if the participants and mediator desire to continue the effort to bring the matter to resolutions. In most cases, the mediation session will be conducted with the respective participants and their counsel in separate "caucus" or meeting rooms. During the mediation session, the Mediator will confer with the participants about their respective positions regarding the facts of the case, the legal issues affecting the case, and any other special issues that affect the participants' ability to resolve their dispute. This process is often followed by sharing selected information with the other "side" or participants and then an effort to negotiate a resolution to the dispute as the Mediator travels back and forth between the caucus rooms.

**Caucus Rooms:** The competing "sides" in mediation are generally broken out into separate rooms (or virtual "rooms" on Zoom) with their counsel, if represented, during the length of the mediation session. In these caucus rooms, participants are free to speak with their counsel and will work with the Mediator to attempt to reach a resolution of the matter. Participants can feel secure in the knowledge that what they share with their counsel will not be heard others and what they share with the Mediator will be confidential, except to the extent the Mediator is authorized to use the information during the mediation process.

**Seeing the Other "Side:"** Generally the participants to mediation, excluding their counsel, will not be asked to sit with or see participants from the other "side" without advance warning and a request from the Mediator. This may come in the form of a request to convene a joint session (described below). Restroom facilities are, however, communal and participants from one "side" may encounter the other or another "side" in that environment.

**Dress Code:** Everyone has their own opinions about what may be appropriate to wear to mediation. Some insist on a suit. Others are comfortable in casual clothing. With the understanding that a joint session may be called if deemed necessary, generally the participants will have no occasion to see one another. For this reason, participants and counsel are invited to be as comfortable as they need to be in order to meet the needs of a full-day mediation. Generally, then, business casual is appropriate for the mediation session.

**Joint Sessions:** On some occasions, mediations begin with a "joint session" in which the Mediator brings all of the participants and counsel together in a single room to discuss the plan for the mediation session or other items of importance. While starting mediations used to be the favored practice, the Mediator generally no longer does so unless there is a special reason to do so and all participants agree. During a joint session, all participants and counsel are encouraged – and, frankly expected, to act cordially to all other participants. During a joint session, the Mediator may call upon one or more participants or counsel to speak generally or on a limited subject. Unless a request is made by the Mediator to do so, participants are requested to refrain from confrontational behavior toward other participants.

**Food and Drink:** In mediation sessions scheduled for a full day, the Mediator will provide a meal around lunchtime and may provide snacks at various times during the mediation. Though the Mediator makes an effort to cater food from providers that cater to most dietary restrictions, participants with a severely limited diet are encouraged to bring their own meal. As a general rule, the consumption of alcohol during the negotiation process is a bad idea and participants are requested not to do so. In the case of mediation by Zoom, participants are on their own to make decisions for food but are generally requested to eat so that they can continue to participate in the mediation session effectively.

**Ad Hoc Caucuses:** During the course of the mediation session, the Mediator may sense that it is a good idea to bring together certain of

the participants or their counsel for a discussion. Often, this comes in the form of a discussion between counsel for the respective participants in an effort to bridge a gap in knowledge or position between the participants without requiring the participants to see one another. Participants should not feel left out of these discussions, their counsel will be free to update participants upon return. In rare circumstances, the Mediator may prevail upon participants directly to convene a caucus with other participants. No participant will be forced to do so, and counsel will be permitted to attend any such caucus.

**Attention to Process:** Because the mediation process involves the Mediator moving back and forth between caucus rooms, there may be periods of down time without direct interaction with the Mediator. During these periods, participants are free to consult with counsel, visit the restroom, read a book, or work on other business. When the Mediator is in the room, however, participants are asked to silence cell phones, close computers, and focus solely on the mediation process. The mediation session is of limited duration, and the Mediator must use the time to greatest possible effect to determine if agreement between the competing sides is possible.

**Participant Authority:** The objective of the mediation process, and particularly the mediation session, is to explore all available solutions to resolve the matter and enter into a written agreement (if only a placeholder agreement) that is binding on the parties. For this reason, it is essential that the participants have full authority to resolve the matter on any reasonable terms. Participants for each "side" are therefore expected to attend mediation with full authority to enter into any agreement reached by the parties to resolve the matter.

**Participant Safety:** Participants cannot effectively participate in the mediation process unless they feel they are safe in the mediation session. For this reason, participants may not engage in any physically aggressive behavior toward any other participant or counsel at any time during the mediation session. In the event of such behavior the participant and a refusal to curb such behavior, the participant will be asked to leave the mediation session without refund of the mediation fee. This restriction includes a prohibition on bringing any firearm or other weapon to the mediation session. Without commentary or consideration of any participant's rights to carry a firearm or weapon on their own time, such behavior is counterproductive to the mediation process. Finally, maintaining participant safety means participants can participate in the process free of concern that they may be served with some form of legal process or papers at the mediation session. For this reason, participants are prohibited from serving any participant within 100 yards of the location at which the mediation session is conducted.

**Mediation Fee:** The Mediator's fee schedule is posted on the Mediator's website and is based upon the size of the case as roughly approximated by the dollars at stake. The fee for the mediation process is due not less than seven days prior to mediation and the mediation session will be cancelled if the fee is not received by that deadline. Unlike counsel who have other cases they can turn to when a mediation is cancelled, the Mediator loses a day of income. This is also why cancellations after payment and within the seven-day window will result in the charge of  $\frac{1}{2}$  of the mediation fee (unless the Mediator is able to fill the slot and refund the charge).

**Confidentiality:** Confidentiality is one of the cornerstones of a successful mediation. The participants to mediation cannot openly participate in the mediation process if they are unable to confidentially share aspects of their case in the presence of the Mediator. For this reason, all participants must recognize and agree that the Mediator cannot be compelled to share anything that happens in mediation in a court or other tribunal outside of the mediation. Additionally, the participants are entitled to designate things they share with the Mediator as off-limits to share with the other participants to the mediation session. For the sake of clarity, however, the Mediator will rely on the parties to particularly designate things they do not wish shared with other participants as off-limits during the mediation session.

**No Recordings:** As a corollary to the protection of the participant's confidentiality, it is a requirement that no participant or counsel for a participant may record by any means (video, audio or stenographic) the mediation session.

**Side Agreements:** Not every mediation process is by and among two parties opposed to one another. In some cases, there are multiple parties represented individually or by multiple counsel. In the event of a multi-party mediation, all participants must consider the possibility that one or more of the other participants are attempting to reach an independent agreement to resolve the matter between them while leaving a portion of the dispute for the remaining participants to resolve. When this situation arises, all participants must understand that the Mediator may be asked not to share such negotiations or discussions with one or more other participants. Respecting the confidentiality of all participants to the mediation, the Mediator will be bound by such a request. Participants in a multi-party mediation should recognize the possibility of such side agreements, that the Mediator cannot share such agreement negotiations, and anticipate the possible consequences of such arrangements without any warning from the Mediator.

**Mediator Neutrality:** As much as confidentiality is a cornerstone of the mediation process, Mediator neutrality represents another corner upon which a successful mediation is built. The participants must have confidence that the mediator is unbiased in the mediation process. And while this might suggest to participants or counsel that the mediator will simply carry offers and information between caucus rooms, that is only one part of the Mediator's role. The Mediator does not give up neutrality by questioning the participants' strategies and pressing upon them to test their theories in the dispute. The Mediator's objective is to help people evaluate all their options, consider the strengths and weaknesses of their position and the positions of others in the dispute. As long as the Mediator has not taken an advocacy position with

respect to a particular point of view with respect to the matter, the Mediator may be an equal-opportunity challenger to the positions of any participant. Through all of this, the participants should rest assured that the Mediator has not put the interests of any participant above those of another.

**Mediator is Not Counsel:** If the Mediator is neutral to the positions of the participants in the case, it goes almost without saying that the Mediator is not counsel for any participant in the mediation process. Because the participants in the mediation process are often not lawyers, however, it is important to make clear that the Mediator is not, and cannot be, counsel for any party or provide legal advice to any participant. While the Mediator is a lawyer with the experience and capabilities to step into the shoes of the counsel for the parties, the Mediator must use this knowledge for the benefit of all participants in an effort to bring about a resolution to the matter rather than advocate for a particular participant or give a participant legal advice about their position in with respect to the matter.

**Mediator Role:** Mediators have different philosophies about the mediation process and their role within it. Participants and counsel have different philosophies about what the mediation process should be and how it should work to bring about the desired effect. The Mediator's role is to take into consideration the needs of each dispute on its own merits, the participants where the Mediator finds them, and counsel in light of their view of the Mediator's role. With this information, the Mediator must do the best the Mediator can to help the parties make an intelligent decision about whether continued litigation is a better choice than resolving the matter for the solution proffered on that day.

**Zoom:** With onslaught of COVID, mediators, participants and counsel were forced to find new ways to attempt to facilitate the mediation process without being in the same space. The result was mediation by Zoom and, even with the decline of concern for COVID, many parties to disputes have opted to participate in the mediation process by Zoom. In mediation by Zoom, the caucus room become virtual and the Mediator facilitates the process with participants in diverse locations. Some believe mediation by Zoom is better. Others believe it is less successful. Overall, Mediators will tell you that Zoom mediation can be successful, just as mediation in person. The key is simply that the parties do everything they would if they were in person – this means remaining focused on the process and avoiding the outside distractions that affect all people when operating in their own personal environment.