



BASKINRICHARDS

## Mediation – the “Superior Opportunity”

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Among the manuscripts of Abraham Lincoln collected after his death is a fragment identified as his Notes for a Law Lecture and dated by Lincoln’s White House secretaries as July 1, 1850. In his notes Lincoln offered the following advice:

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.

Lincoln’s recommendation aptly summarizes what experienced practitioners some 165 years later still recognize – that even settlements that seem only partly successful can benefit clients far more than their subjecting themselves to the drain of money, waste of emotional capital, cost of distraction, and risk of ultimate dissatisfaction that could accompany taking a dispute through trial.

So, accepting that compromise and settlement offer real value, the question becomes how to achieve a lasting compromise. Anyone who has observed children fighting over a prized toy, or former business partners fighting over corporate assets, knows that the path from full-fledged dispute to compromise is often difficult to map and treacherous to navigate. Facilitating settlement discussions can feel to the mediator like groping around in night-darkened jungle vines, knowing that in many directions lie box canyons with no exit, and that even

successfully negotiating a path that will release the parties from their dispute will require slashing and hacking at difficult, sometimes seemingly impenetrable obstacles, the exact nature and depth of which are well obscured.

Moreover, because settlement requires voluntary relinquishment by every side of other options they have to continue the dispute, mediated settlement requires the willing cooperation of multiple parties. Commitment to such voluntary action requires a large degree of trust by the settling parties – in others' assessments of the risks of not settling, in the other side's commitment to holding up their end of the bargain, etc. The mediator almost never earns that type of trust quickly, and even in protracted negotiations will rarely obtain the type of trust a party more frequently places in their own counsel. Therefore, the success of the settlement process often depends as much on the skill and efforts of the parties' counsel as it does the skill and effort of the mediator. The process is truly "holistic" as that term is defined by the Oxford Dictionary: "Characterized by comprehension of the parts of something as intimately interconnected and explicable only by reference to the whole." <http://www.oxforddictionaries.com/us/definition/american-english/holistic>.

Given the foregoing, it is helpful to break down mediation into its component processes and the roles of its participants, and to assess how each may be deployed to assure maximum effectiveness in achieving a settlement. Yet, it is equally important to realize that the reliance of each participant on the actions of every other participant means that the relative importance of each individual factor or process in obtaining a settlement varies depending on how aggressively other counter or supportive factors or processes are also deployed. By way of example, the ability of a mediator to "reframe" positions of opposing parties to remove emotional connotations and triggers may be generally helpful in all cases. Where the party at which such reframing is aimed is also guided by counsel who encourages the reframing, the reframing exercise may become a critical tool in achieving compromise. On the other hand, though a mediator may be skilled at giving a party an opportunity and safe environment in which to "vent" their anger at the opponent, if that party's counsel encourages them to vent with great vigor, and shares in the venting, the willingness and ability of the mediator to encourage venting may actually backfire and reinforce inhibiting emotional barriers.

The real key to successful mediation, then, likely lies in assuring that all participants understand how their approach and actions may positively or negatively influence a compromised resolution, and then further assuring that each attempts to use their skills and actions synergistically with the other participants. The objective of the following remarks, then, is to provide effective suggestions for mediators and counsel alike that can allow them all to contribute positively toward achieving the settlement goal.

## I. The Mediation Process

Appropriately addressing the many critical questions whose answers will guide the mediation process - including issues like when to mediate, what mediation process(es) to use, and who to use as a mediator - requires one to understand the key dynamics of mediation. One must grasp what factors improve the likelihood of mediation success and which serve as impediments. It takes little imagination to recognize an endless variety of factors that may provide a positive or negative force in mediation. Trying to catalogue all those minute aspects is likely an interminable exercise. Instead, those wanting a workable understanding of mediation dynamics should focus on some of the most common and most powerful motivating and de-motivating factors they are likely to encounter.

Of course, one of the most common *and* most powerful factors in any dispute is the emotional investment of the parties. Rarely does a dispute arise from some dispassionate, academic difference over a matter in which neither side is personally invested. Rather, one or both sides often perceive themselves as victims of unfair, illicit, or even evil or malicious conduct by the other. They often feel a deep and personal sense of material loss, are frustrated by perceptions that they have lost control of important aspects of their lives, and may feel disrespected, harassed, or publicly humiliated. In almost every case the parties will fear greater losses and harms in the future if they are not vindicated in the dispute. All of this combines to create an incredibly powerful emotional force that will color perceptions of what “victory” or “success” looks like, imbue opponents’ positions or moves with negative motives, and often fill the party with a longing to not only see themselves made whole, but to have their opponent brought low or punished.

Related to the deeper psychological factors that will influence a party’s thinking are perhaps less complex but nonetheless highly personalized motivations like materialism, fear, and desire for power – the desire to possess things or to

wield influence over events or people. In many cases, parties will mask these more motivations, rationalizing their objectives as justified by the need to be made “whole” or to “see justice done.”

Of no less importance are the parties’ fundamental systems of beliefs and core values. Take for example a business dissolution dispute pitting two former partners, one of whom comes from blue-blooded stock and a privileged upbringing that offered the finest education and social connections available, and another who grew up in poverty, sharing what little they had with extended family, and rising to a position of responsibility through simple hard work, initiative and savings. The former partner may possess values of entitlement based on pedigree and believe that the most valuable contributions to any venture come from the initial investment of “capital”. The latter may have central values that elevate the sharing of resources as morally and socially required and believe that “sweat equity” is the core of business success. These competing values and belief systems will obviously help construct what each party views as a “fair” or “appropriate” outcome in their division of business assets. And, such core values or fundamental beliefs are strongly held and difficult to turn, meaning parties with disparate values may have great difficulty finding any common ground for settlement.

Given the foregoing, perhaps the most important recognition for everyone involved in mediation is that few disputes can be solved as simple business propositions. Though the legal industry is constantly finding ways to rate, or categorize, or assess the value of various sorts of claims, resolving a dispute is rarely as easy as executing a purely economic transaction. It is not a matter of just assessing the likely cost of continuing to fight against the likely cost of losing that fight. Nor is it like buying a car, where one party who desires a particular outcome – ownership or sale of the car – will consummate the deal if the price is right. Instead, it is sometimes more like trying to negotiate the sale of a car with someone the car buyer believes stole their last car and deserves to be punished for it. Many factors outside pure business or economic considerations come into play.

The mediator, and the counsel representing mediating parties, are therefore subjecting themselves to an unstable, frequently unpredictable environment. While it is not uncommon for the parties entering mediation to be sufficiently worn down by the emotional and financial toll of their dispute, especially if it involves protracted litigation, that their emotional and core value investment has been

diluted, those can still prove to be highly stubborn factors. Also, though emotional issues may appear to be dying embers, they remain capable of being fanned to flames through the confrontation of issues required in a mediation. Careful mediators and careful counsel know this, and they both plan and operate in ways that attempt to dampen or check such issues so that the techniques that may make compromise possible can be effectively employed.

**A. When to Mediate.**

As mediation is inherently a voluntary process, parties generally have considerable discretion in deciding *when* to mediate. Varying perspectives exist on what point in the life cycle of a dispute offers the most factors conducive to settlement. Also, the precise mix of factors that will make settlement more likely than not vary widely from case to case and depend on many diverse elements.

Consider for a moment just the potential for disparate settlement motivations between a party who is individually responsible for paying all the attorneys' fees required in their representation versus the party whose counsel is working on a contingent fee. Then consider the differences between those parties and one whose fees are being paid by an insurance company. Then, reflect on the different motivations that may exist between a small business owner sued for wrongful termination who must pay any judgment out of their annual business income and the motivation of a government decision-maker whose term ends in 3 months and whose agency has been sued for agency-wide policy choices.

Layer on top of the foregoing examples the incredible variety of individual party psychological factors that influence decision-making, like risk-aversion, personality disorders (antisocial instincts, paranoia, passive-aggressiveness), feelings of victimization, peer or social group pressure, etc., and two conclusions become clear. First, the complexity of the factors that can either motivate or demotivate a party toward settlement means there is no uniform *best* time to initiate mediation. Second, the time at which one party is most inclined toward considering compromise may be very different from the time at which any other party is similarly inclined. The former conclusion should inspire parties to consider mediation at junctures that are not typically selected for mediation – for example, immediately after filing of a complaint, or even in the middle of an evidentiary hearing or trial. The latter conclusion counsels that deciding when to mediate

requires a party to examine their own current preparedness and inclination for mediation, but to also work hard to predict their opponents' inclinations.

Perhaps ironically, assessing one's own inclination toward a mediated resolution may not be simple. Instead, it may require a careful, multi-factor analysis. Identifying what qualifies as a "win", "victory" or even "success" is a good starting point. After all, there are some degrees or types of "success" that are difficult or even virtually impossible to obtain through a negotiated settlement. For instance, a party who has been maligned by their opponent through multiple malicious, public, false accusations creating long-term potential for injury to business reputation may be satisfied with little short of a formal judicial determination based on an objective weighing of the facts that they are not guilty of the malfeasance alleged by their opponent. Similarly, a party bent on obtaining punitive damages will often find it very difficult to work any such relief into a negotiated solution. If the party is genuinely committed to obtaining some form of relief that is unrealistic to expect through settlement, engaging in mediation may result in emotionally charged, negative reactions when such options are quickly rejected out-of-hand. They risk generating hard feelings that may unreasonably forestall even later attempts to settle.

Counsel must also assess how much trust he or she has developed with their client, and how responsive the client is likely to be when receiving "bad news" from the mediator and their own attorney about the weaknesses in their case or the likely outcomes if the matter proceeds. A client who has little trust for their attorney is often a poor candidate for mediation, as reaching settlement often requires counsel to explain why a particular settlement outcome that appears to be far less than the client wants is actually attractive and beneficial. Also, the client who must compromise sincerely held values or release highly charged emotions will rarely do so without the encouragement of someone else that they genuinely trust to have their best interest at heart. The attorney who has had little advance contact with the client and has not cultivated the mutual respect that comes through showing genuine interest in and commitment to the client will likely not have the personal leverage necessary to help move the client sufficiently beyond their pre-existing positions.

The foregoing demonstrates why sending a client to mediation with a "pinch hitter" attorney is often a recipe for disaster. It also shows why it often makes little

sense for an attorney who has developed any type of antagonistic relationship with the client (i.e., for non-payment of bills, because the client has been complaining about the service provided or even threatening some sort of malpractice claim) to adopt a strategy of just “hanging in” long enough to take the client through mediation. Though it may seem like a completed mediated settlement will “right the ship”, get the attorney paid, and end the attorney-client relationship on a high note, the pre-mediation relational meltdown should make the attorney sufficiently pessimistic about being able to achieve a settlement. It should also cause them to realize that continued representation through an unsuccessful mediation process will probably just exacerbate whatever attorney-client relationship problem(s) exist.

The bottom line is that a client is best prepared to mediate when they: 1) trust their attorney and respect their attorney’s recommendations; 2) have a realistic perception of the strength of their and their opponent’s cases; 3) have a complete and objective understanding of what relief is, and is not, likely to be available if they should ultimately prevail through litigation; and 4) are prepared to adjust their emotional investments and overlook core values and beliefs that might otherwise conflict with the types of settlement options they are likely to be presented.

*NOTE FOR COUNSEL* – All of the foregoing discussion demonstrates just how critical active representation and counseling of clients is to mediation success. An ill-prepare client will not be prepared to shed their emotional motivations, overcome their anxieties about accepting less than they perceive they deserve or giving up more than they ought to, or consider creative alternative solutions to be relevant and worthy. There is perhaps no greater benefactor for the mediation process than an attorney who works diligently to prime clients to exhibit the types of flexibility and compromise needed to reach a settlement and to manage client expectations of what a negotiated solution might actually look like. And there is perhaps no greater impediment to settlement than the attorney who feeds client rage or angst by mirroring it, set unreasonably high settlement expectations, and portrays the mediator to the client as one whose motives can be questioned. Attorneys who fail to prepare their clients adequately for the settlement process only succeed in achieving favorable settlement *despite* themselves, and that happens rarely.

Assessing the opponents' inclination toward a mediated solution is more complex and offers far less certain conclusions. Among the factors that might be considered are: 1) the perceived "bottom line" outcome that the opponent may be expected to demand; 2) the degree of emotional investment the opponent has in the case; 3) the extent to which the opponent's core value and belief system conflicts with a negotiated resolution at this stage; and 4) the amount of resources the opponent has already invested in the dispute, and the amount they likely believe they must invest to continue it. The analysis starts with guessing at the opponent's outcome expectations. As you already know what you are willing to give or concede, if the prediction of the opponent's potential maximum demands or concessions are sufficiently different, mediation at the present time may have low chances of succeeding.

Consideration of opponent emotional factors are critical because the greater the opponent is accurately perceived as being driven by emotional considerations, the less likely mediation is to work. The same goes for the strength of the opponent's key core values and beliefs. If an appropriate negotiated solution conflicts too much with those values and beliefs, then mediation may be a lost cause. Assessing each of these factors, however, requires one to "get into the head" of the opponent – which can be very difficult. After all, litigation opponents often have little personal familiarity or history, meaning their assessments of each other's psychological make-up may be, at best, ill-informed speculation. Even when the opposing parties have a long history of interpersonal interactions, the heightened emotional context of a dispute may dramatically reduce the predictability of an opponent's attitudes.

Finally, the degree of financial investment an opponent has made is a double-edged sword. Often a party who has ventured little investment in the case does not fear ongoing costs or realistically assess their cost if they do not prevail. On the other hand, a party deeply invested financially in the case has created impediments to settle through their desire to offset that investment with a financially successful outcome. Opposing parties will often claim a substantial investment, even where their actual investment may not yet be significant. Trying to estimate which direction the financial investment factor actually cuts for any particular opponent can be exceedingly difficult.

Of course, the most simplistic, but perhaps most accurate, way to gauge an opponent's true willingness to mediate is to simply ask them. A party who expresses a willingness to enter into mediation may be taken, at least somewhat, at their word. Unless the party is inadequately prepared by counsel to understand the realistic range of outcomes a mediation could offer, expressing a desire to mediate can often be accurately read as a legitimate, and helpful, willingness to get some sort of deal done. The take-away here is, any party considering mediation should ask the opposing party about their interest in attempting a mediation soon. Even the little insight that can be offered by the opponent's answer may be far more reliable than all the other guesses made about the opponent's motivation to mediate.

## **B. Who to Use as a Mediator.**

Mediators, like the disputes they work on, come in all shapes and sizes. There are private attorney mediators, former judge mediators, private non-attorney mediators, industry dispute specialists, government or court officials assigned as mediators, and even current trial court or appellate court judges, all of whom may be available to the disputing parties. Sometimes the choice of background/licensing/training of the mediator is less important than the skills and experience the individual has in resolving similar types of disputes. And, sometimes, the "pedigree" of the mediator makes all the difference in the world. What follows is a brief summary of some mediator options and the pros and cons of each.

### **1. Private Attorneys.**

Many private attorneys, particularly those with significant litigation experience, provide mediation services. For some, it is a principal or even exclusive practice – for others it is merely a minor aspect of their practice. The advantages of hiring an attorney mediator include: 1) an attorney's ability to process relevant facts and law and make credible predictions of outcomes in the case if settlement is not reached; 2) the credibility that a law license and practice experience imbue the mediator with for the disputing parties; 3) an experienced attorney's ability to draw from his or her own clients' settlements to craft creative or unique solutions to difficult disputes; and 4) the attorney-mediator's ability to call out overly aggressive attorneys and possibly moderate a more reasonable attitude on behalf of their clients. The disadvantage of attorney mediators includes the fact that many

are not specialists in resolving particular types of disputes – but more generalists. They may therefore miss certain “pressure points” or key perspectives or considerations that lead to or impede settlement in particular dispute types. Also, an attorney mediator may not carry as much credibility with the parties as a current or former judge.

## **2. Former Judges**

Many former judges have established well regarded, busy mediation practices. Particularly for less sophisticated parties, the fact of a former judicial position alone may encourage perceptions of credibility that can help overcome other prejudices against settlement. Also, experienced judges tend to have an advantage over attorney mediators because they have acted as a “neutral” on a regular basis and have developed thereby instincts into inter-party dynamics that may be more keen than those developed by someone who principally acts as an advocate for one side or the other.

## **3. Non-attorney Dispute Resolution Specialists**

Formally licensed law practitioners have not cornered the mediation market, and there are certainly fine non-attorney dispute resolution specialists who serve as mediators. The advantages of using a non-attorney may include the fact that non-attorney mediators do not suffer the occupational hazard of first assessing disputes on the respective legal merits of the opposing like an attorney. A “fresh look” that focuses on party psychological makeup, party objectives, and inter-party dynamics may more quickly assess viable options for settlement.

Also, as a non-attorney mediator is free to claim ignorance on the respective strengths of the legal positions each party brings into the dispute, they can more easily dispense with questions the parties have about such issues and employ a purely resolution-focused strategy from the outset. In fact, such mediators need to be very careful to avoid the unauthorized practice of law, see Rules 75-80, R.Ariz.Sup.Ct., which can particularly be triggered if they should opine on specific legal positions during the settlement process, and especially if they seek to

undertake documentation of the settlement for the parties in ways that offer legal advice.

Of course, the lack of deep legal analytical skills can also prove a real detriment. Obtaining an educated, third-party analysis of the strength or weakness of a party's position is often what parties want to help them make the critical decisions required in mediation. Parties selecting non-attorney mediators should be confident that neither side requires any predictions of legal outcomes to create pathways to settlement.

#### **4. Non-attorney, Industry-Specific Dispute Resolution Specialists**

Non-attorney mediators sometimes focus on particular types of disputes or, more specifically, disputes arising in particular industries. Thus, for example, a non-attorney mediator may offer services only for disputes involving employment claims, or, even more specifically, only for customer-broker disputes in the securities industry. Other common areas for non-attorney specialist involvement may include disputes involving highly technical questions or fields – such as engineering disputes, medical questions, or computer code development issues.

The advantages of such a specialized mediator are obvious. Understanding certain disputes may require the knowledge of an industry specialist. The vernacular, reasonable business practices, and technical details relevant to resolving certain disputes may require someone with specialized knowledge or experience. Also, someone with a great deal of experience resolving particular types of disputes may have a far better instinct for what proposals may produce positive responses in a new case.

#### **5. Current Judges**

Though the proliferation of private mediation options in the past two decades has made the use of sitting judges as mediators or settlement conference facilitators somewhat less frequent, it is not uncommon for sitting judges to serve in a mediation role. This may be most common in federal court, where magistrate judges may still play critical settlement facilitation roles. The most apparent advantage to using a sitting judge is the likelihood that their opinions/suggestions

about possible outcomes for the dispute may most accurately reflect how the assigned trial judge is likely to rule or guide the decision of the case.

Of course, if accuracy in prediction for case outcomes is the objective, it makes most sense to use the actual judge assigned to the case for mediation. This is possible, though many judges may be reluctant to undertake that role, and even those that participate will likely proceed very carefully. After all, there is likely to be information exchanged with a mediator that would not likely be provided to the assigned trial judge – like the plaintiff’s bottom-line settlement position, for instance. Also, many parties may themselves be reluctant to share information with an assigned trial judge that they would, and should, share with a mediator. For example, a defendant who thinks summary judgment may still be possible will often be extremely reluctant to share its acknowledgement that there does exist some legitimate possibility it will not obtain summary judgment and a willingness to settle for real money. That defendant would fear that tipping its hat on settlement will guarantee the judge will have an adverse disposition toward any later summary judgment motion.

And, of course, using the assigned trial judge raises ethical and professional responsibility implications for all parties to the mediation/settlement process. After all, counsel owes a duty of candor to the tribunal. See Rule 42, ER 3.3(a), R.Ariz.Sup.Ct. ER 3.3(a) provides, in relevant part:

(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
- (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer

comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

It is well-known that settlement negotiation often involves posturing, “puffing” about settlement positions, and even statements of client intent and objectives that may be overstated, incomplete and even misleading. Imagine, for example, the lawyer who states that “my client has already incurred \$25,000 in fees and won’t accept less than \$35,000 in settlement” when he knows that the client will actually accept as little as \$27,000 and that he will likely reduce the client’s bill to facilitate settlement. As discussed in more detail below, the ethical standards of truthfulness and candor imposed in dealing with others, *see* Rule 42, ER 4.1, R.Ariz.Sup.Ct., have special implications in negotiation procedures that will allow some misrepresentations regarding opinion or intent. However, questions exist whether the extra duties of candor to the tribunal can be tailored in similar ways, particularly when the mediator is the judge who is also responsible for all substantive judicial rulings in the case.

Imagine, for instance, the attorney who has a summary judgment motion pending against her client, but receives indications from the judge during that suggests the judge believes he client is relatively safe from losing that motion. It also becomes apparent, however, that the judge has the holding in a recent decision of the Arizona Court of Appeals on the summary judgment issue reversed. The implications of ER 3.3(a) create questions about whether the attorney can either avoid clearing things up for the judge or, even more questionably, suggest agreement with the judge’s misinterpretation in an effort to push things toward a favorable settlement.

The assigned judge is not without his or her own ethical concerns. The judicial canons in Arizona provide specific obligations for conducting judicial office with impartiality. Rule 81, Code of Judicial Conduct, Rule 1.2 (“A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”); *id.*, Rule 2.2 (“A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.”) It may be

difficult for a judge to appear to all parties to mediation proceedings to be truly impartial. After all, a mediator often relies on pointing out the weaknesses of a party's case. Vested parties may take such commentary as evidence the trial judge is impartial – that the judge is unfairly taking the other party's side in the dispute. Though this may be far from the truth, the appearance of impartiality may be tough to maintain for the assigned trial judge.

Thus, while using an assigned trial judge often offers substantial advantages, it may also so complicate matters with subtle ethical issues that it promotes little of the sometimes brutal honesty and disclosures that are required for settlement progress. Parties, and the trial judge, should think very carefully about whether using the assigned trial judge to facilitate negotiations really offers the most effective mediation process possible.

## **6. Multi-Mediator Panels**

Modern arbitration practice commonly employs multiple arbitrators. While multi-mediator alternative dispute resolution processes are far less common, they may nonetheless offer significant advantages. Though they are likely to be more costly, and perhaps the presence of more than one mediator promises delays not necessary in single mediator processes, the participation of more than one mediator can enhance the credibility of all joint mediator comments and can encourage creativity in problem solving not possible with a single mediator. Just the application of more than one capable, creative brain to the problems posed in the mediation can generate a broader range of settlement proposals. And, multiple mediators are likely to help one another pick up on subtle party cues that might not be caught by a single mediator. Plus, where party-mediator trust is crucial, a multi-mediator panel may offer more personality options to the parties, creating a greater likelihood that they will find attributes among one or more mediators that really appeal to the parties.

### **C. What Mediation Procedures to Use.**

As noted, mediation is a fluid, dynamic and creative process. It need not take any particular form or follow any particular formula. Rather, participants should choose from among the many alternative approaches available to select the procedures most likely to lead to a settlement in their case. The following are some

of the more common classes of mediation processes used by Arizona practitioners and some of the advantages or disadvantages to each.

### **1. Traditional “Shuttle Diplomacy” Mediation**

The form of mediation most familiar to most practitioners will involve the parties and their counsel, if represented, meeting in a common area with the mediator shuttling between the parties to hear party position statements, discuss settlement attitudes, and to deliver proposals and counter-proposals.

This process usually assumes that the mediation process will be completed in a specified period within a single day – most often a half-day or eight hour day. There is some real benefit to setting a time limit on the process; it creates a sense of immediacy and threat of lost opportunity that can be essential to counter the emotional pull of a party’s pre-mediation emotions and principals. Still, there may be many disputes that are sufficiently complex that they realistically cannot be solved in a single session. Artificially limiting the process to one day or session can result in unhelpful perceptions among the parties that their dispute cannot be solved at all, not just that it cannot be solved in one sitting. Careful mediators and counsel will therefore identify in advance where meaningful mediation may require more time – for evaluation of the financial impact of sophisticated compromise proposals, for example – and create early expectations that the parties are committed to take as long as the process reasonably requires for a fair airing and consideration of settlement options.

While the traditional mediation process can begin with a meeting of all parties and the mediator at which the mediator can lay out expectations for the mediation process and the parties may be allowed to present their respective positions to one another, conventional wisdom cautions fairly strongly against such practices. After all, by the time the parties reach mediation they will understand each other’s positions in some detail. Moreover, the emotional and value-driven aspects that can prove so devastating to mediation success will most often be reinforced if a party is required to sit through their opponent espousing how lousy their claim or defense is. Thus, such preliminary events often make the mediation process more difficult.

## **2. Face-to-Face Decision Maker Meetings**

Though the circumstances conducive to such meetings may be somewhat rare, there exist examples where mediation may best be conducted by requiring the relevant party decision-makers to sit down, face-to-face with mediator help to address their problems. An example of where this type of process may sow positive results is a dispute between a truly dispassionate government party and a government contractor who desires to maintain a long-term, mutually beneficial relationship with the government agency. While the parties may have reached impasse at this time, neither one takes it personally and both are open to the possibility of reconciling and continuing a longer-term relationship. In that case, it is often very helpful to put the relevant decision makers on both sides in a room together and facilitate the discussions they need to have to overcome their current dispute. Of course, the savvy mediator will constantly monitor the parties' emotional temperature to make sure that emotional factors have not surfaced. But, such cooperative ventures are often a great way to solve disputes and confirm the trust and mutual respect necessary to facilitate the ongoing party relationship.

## **3. Government Conciliation Programs.**

Various government statutory schemes that grant private parties, or the government, statutory rights enforcement alternatives will also mandate that the parties consider or participate in some form of conciliation event or efforts. Depending on the sophistication and history of the relevant agency, the procedures may be well established and formal, or may allow for involvement of private mediation personnel. In either case, the advantage of such scenarios is that they are often preceded by detailed government investigation and fact-finding. All of this can arm the mediator with significant evidence to reflect on when advising the parties of their likelihood of litigation success. And, it allows the mediator to understand the circumstances that placed the parties in dispute in the first place. This gives the mediator a better understanding of how such circumstances might be untangled to allow compromise.

## **4. Mediator's Proposals**

While more traditional methods of mediation encourage the parties to make their own proposals for settlement, and to offer counter-proposals to keep the negotiations moving, various factors may discourage parties from making serious

proposals themselves. For example, it is not uncommon for the mediation to be handed a case in which one party made an opening offer before mediation that appears fairly reasonable, only to have been met by silence or an insulting counter, followed by aggressive litigation. In that case, the party making the initial offer may have little stomach for making another offer until they see their opponent has become reasonable and is actually willing to propose things in good faith.

Also, there are many times during a mediation where the parties have both made good faith counter-proposals, but they remain too far apart in their own estimations of a reasonable settlement to bridge the gap between them. In either of these cases, sometimes the most effective approach is for the mediator to advise both parties of a mediator's proposal. The mediator's proposal will be framed as settlement terms that appear to the mediator to be a fair and appropriate compromise given all the facts and circumstances in the case.

The mediator's proposal can be offered with a deadline for acceptance, and with certain assurances of confidentiality of each party's response to the proposal in the event mutual agreement is not offered. The mediator may tell the parties that if both parties do not agree to the proposal, the mediator will simply inform them they have no agreement. That way, a party who has rejected the proposal will not know whether their opponent was willing to accept such terms.

Of course, for a mediator's proposal to dislodge things, the mediator must be confident that they are offering a fair solution, and one that reasonable parties should be willing to strongly consider. That will often require the mediator to first spend considerable time getting to know the parties and their respective positions. And, success in this arena requires that the parties all see the mediator as impartial and trustworthy. They must see the mediator's proposal as a true good faith solution. Again, developing this sort of rapport and confidence will often require the mediator to have spent quality time with the parties.

## **5. Arizona Court of Appeals' Settlement Program.**

For disputes pending on appeal before the Arizona Court of Appeals, the Court of Appeals has established the Arizona Appellate Settlement Conference

Program. The general rules of the program are contained at Rules 30 and 31, Ariz.R.Civ.App.P. According to Rule 30, Ariz.R.Civ.App.P., the objectives of the program are to provide parties to an appeal an opportunity to:

- (1) Realistically explore settlement of the entire case or issues in the case;
- (2) Limit and simplify issues on appeal; and
- (3) Aid the speedy and just resolution of the appeal.

As a general matter, all appeals except the following are eligible for the program: criminal appeals; habeas corpus petitions; appeals in which a party is incarcerated; appeals from juvenile court; appeals from the Arizona Department of Economic Security Appeals Board; direct appeals from the Corporation Commission; and special actions. Rule 30(a), Ariz.R.Civ.App.P. The program is available at no additional court cost to the parties.

Though each division of the Court of Appeals is empowered to establish its own policy for implementation of the program, they “must provide that:

- (1) All proceedings in this program are confidential, are not discoverable, and are inadmissible in evidence in any judicial proceeding. A party to an appeal selected for the program likewise may not communicate to a third person any information that he or she discusses or learns of in the course of the program, except to the extent required by law or compelled by process.
- (2) Appellate mediators, settlement conference attorneys and all other court employees involved in the program are absolutely immune from suit for all conduct in the course of their official duties.
- (3) Any person who participates as an appellate mediator must not later participate in any way in the consideration or disposition of the appeal.

The latter rule helps the Court of Appeals avoid the tricky issues involving compliance with the Code of Judicial Conduct rules implicated when an assigned judge also serves as mediator.

Program policies for each division are to be published on the division's website, and must also be available at the office of the appellate clerk. A copy of the policies established by the two divisions are attached as Appendix A and Appendix B to this outline.

#### **D. Common Mediation Techniques**

Recognizing that the normal mediation pits emotionally charged parties, often having developed some or perhaps a great deal of animosity and distrust toward one another, in a process all sides will commonly view as demanding they give up something that is rightfully theirs, mediators will often need to employ an array of coping and persuasive strategies.

##### **1. “Priming” the Parties**

One technique that might help make all parties more open to settlement, and might be particularly helpful when one party is unrepresented, or perhaps represented by counsel who is unlikely to properly prepare them for mediation, is “priming” the parties to accept that they are expected to be flexible, creative and willing to compromise. “Priming” is a psychological phenomenon recognized as potentially helpful to mediation processes in “The Psychology of Mediation”, Cardoza Journal of Conflict Resolution, Vol. 14:759, 762-763. A conscientious mediator may start the “priming” process by sending the parties a formal list of expectations, and even by requiring the parties to provide the mediator an advance position statement that expresses how the party intends to demonstrate its commitment to flexibility, creativity and compromise. The mediator may also send pre-mediation messages about how he expects the mediation process to be successful, about how often mediations are successful, or about how the types of disputes at issue in each instance often can be resolved through compromise. These efforts can help alter party expectations of the process in favor of compromise before the real work of mediation negotiation even begins.

## **2. Managing Expectations**

Along with priming the parties to expect success and anticipate being flexible at mediation, an effective mediator (and effective counsel for that matter) often preps the ground by managing party expectations from the get-go. A truly experienced mediator may access settlement databases or even anecdotal examples of settlements in similar cases to alert the parties in advance of what other parties in similar situations have viewed as reasonable settlement outcomes. There is perhaps little more persuasive to a high-flying, overly optimistic plaintiff than seeing that in 90% of similar cases the settlement amounts were far, far less than he has been demanding and that not a single one has contained a payment as high as his demand.

The process works similarly in the other direction. Even if the settlement values in other similar cases are small, at least knowing that amounts are regularly paid on such claims may adjust the perspective of a novice defendant who thinks that they may negotiate a “walk-away” deal in which no money changes hands.

Of course, as noted above, the most effective use of this technique comes when employed by both the mediator and the parties’ own attorneys. The double-whammy dose of reality offered by mediator and counsel can have real and lasting effects in avoiding unreasonable insistence on untenable positions.

## **3. “Reframing” or “Reformulating” Activities**

A mediator faced with highly sensitized, emotional parties may engage in “reframing” or “reformulating” techniques. The mediator will identify areas of particular sensitivity to one party in connection with statements or positions taken by the other party, then attempt to “reframe” the statement or position as something more benign or less malicious than the first party currently perceives it to be. For instance, a party may view their former business partner’s demand to terminate the partnership’s web page as a malicious intent to make the public believe the first party went out of business. The mediator may, through conversations with the second party, understand that web page issue is actually more a helpful tool in ensuring that the split of the former partnership’s customer list will be a lasting split – as former customers will not be encouraged to “wander into” the opposing partner’s business by following contact directions on the web page. Reframing this issue as far from malicious, but instead a reasonable adjunct

provision to ensure that the split of clients both parties are willing to agree to is actually implemented, may significantly ease the emotional reaction that otherwise makes such compromises impossible to achieve.

Another category of beliefs a mediator may try to “reframe” are the basic stories and feelings of victimization each party brings into the mediation. The parties’ versions of events are often incomplete, and involve selective memory designed to support a feeling of victimization. The mediator may try to “reframe” these stories by pointing out to the party how they do suffer from some missing facts, and that perceptions of what happened and why may be as much the product of misunderstanding, inadequate fact gathering, or overlooking key items as they are reflections of true evil motives and malicious desires of the opposing party.

#### **4. Reality Checks/Verifications**

To establish credibility with a party and overcome their prejudices against their opponent’s positions, a creative mediator may need to employ techniques that force the party to check the accuracy of their perceptions of reality. For instance, where a party contends that their business partner “cooked” the books and misstated company expenses to drive down profits, the mediator may obtain permission of the parties to employ an independent accountant to check the corporate books. Such independent analysis may encourage the suspicious partner to reevaluate whether their perception of how badly the books were “cooked” is accurate and reliable.

The same thing might be done just by forcing the party to acknowledge key facts gathered by the mediator that rebut the “story” the party tells about their case. Imagine, for example, a defendant in a defamation case who contends that the plaintiff was not harmed by the defendant’s malicious website postings. The mediator may obtain from the plaintiff examples of before and after business results that show the plaintiff’s customer contacts dropped 52% within two weeks after the defendant posted her derogatory comments. The mediator may confront the defendant with that and ask whether the defendant has an alternative explanation for the business drop-off that really holds water.

The promise of future verifications may also be used to entice compromise. For example, even a party who is unwilling to accept that their current perception of the facts is flawed may be willing to take certain risks that the facts may pan out

differently in the future if they know that the other party's behavior and compliance is subject to monitoring and verification. Thus, often times testing how a party would behave if they knew they could get long-term, objective monitoring put into their settlement may overcome rigid adherence to questionable current perceptions.

## **E. Common Ethical Challenges in Mediation**

An attorney advocating for a client in mediation will routinely confront ethical issues. For instance, attorneys may confront how to convey a client offer that only represents the second best proposal the client has expressed willingness to make while honoring the client's demand that counsel not give away her fall-back position? Or, they may need to address how to express the client's confidence in a legal position the lawyer knows has failed for other clients of hers in the past? And, what about telling the case story to the mediator? Is it okay to shade or ignore troubling facts? Is expressing confidence that the other side will be unable to prove facts you know are probably true mere "puffery" or advocacy, or is it a lie and unethical behavior?

### **1. Candor Issues**

The mediation/negotiation process, by its very nature, creates potential conflicts with the many duties of candor imposed on counsel by the rules of professional conduct. For instance, Rule 42, ER 4.1, R.Ariz.Sup.Ct. establishes a duty of candor from counsel to all third parties. It states:

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person;  
or
- (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by ER 1.6.

This rule complements the rule prohibiting a lawyer from assisting the lawyer's client in engaging in fraudulent conduct. See Rule 42, ER 1.2(d). R.Ariz.Sup.Ct. ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the

lawyer knows is criminal or fraudulent . . .”). The questions remains, however, what do these standards mean for conduct in mediation?

An answer is, in part, provided through guidance available through the American Bar Association. For instance, the ABA Section of Litigation has published in the past a guidebook entitled “Ethical Guidelines for Settlement Negotiations” (August 2002) (“ABA Guidelines”). There, the guidance explores the obligation to avoid making false statements of material fact or law, and to avoid non-disclosures that have a similar impact.

The ABA guidance first notes: “Unethical false statements of fact or law may occur in at least three ways: (1) a lawyer knowingly and affirmatively stating a falsehood or making a partially true but misleading statement that is equivalent to an affirmative false statement; (2) a lawyer incorporating or affirming the statement of another that the lawyer knows to be false; and (3) in certain limited circumstances, a lawyer remaining silent or failing to disclose a material fact to a third person.” ABA Guidelines, at 35. In the case of the first two examples, the ABA Guidelines note:

The prohibition against making false statements of material fact or law is intended to cover only representations of fact, and not statements of opinion or those that merely reflect the speaker’s state of mind. Whether a statement should be considered one of fact, as opposed to opinion, depends on the circumstances.

*Id.* The Guidelines then quote Model Rule 4.1, comment 2, providing that:

[u]nder generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category. . . .

*Id.* at 35-36. “Whether a misstatement should be so characterized depends on whether it is reasonably apparent that the person to whom the statement is addressed would regard the statement as one of fact or based on the speaker’s knowledge of facts reasonably implied by the statement or as merely an expression

of the speaker's state of mind.'" *Id.* at 36 (quoting Restatement, § 98, comment c). "Factors to be considered include the past relationship among the negotiating persons, their apparent sophistication, the plausibility of the statement on its face, the phrasing of the statement (for example, whether the statement is presented as a statement of fact), related communications, the known negotiating practices of the community in which both are negotiating and similar circumstances." *Id.* (citing Restatement, § 98, comment c).

Finally, the ABA Guidelines warn that "[i]n making any such statements during negotiation, a lawyer should consider the effect on his/her credibility and the possibility that misstatements in negotiation can lead not only to discipline under ethical rules, but also to vacatur of settlements and civil and criminal liability for fraud." *Id.* at 36. Thus, the ABA guidance attempts to draw some workable lines that allow counsel some flexibility to effectively advocate in negotiations, while nevertheless emphasizing the very serious consequences for crossing those lines.

Counsel should note that, as to misrepresentations by non-disclosure, the ethical rules at ER 4.1 contain an important exception. They express that the lawyer's duty of candor to third parties is, essentially, trumped where it conflicts with the lawyer's duty of confidentiality under ER 1.6. Keep in mind, however, that the duty of confidentiality itself is trumped by duties of candor to the tribunal. *See* ABA Guidelines, at 37-38. So, particularly in situations involving use of assigned trial judges as mediators, even material non-disclosure regarding relevant facts that are confidential as to the client could constitute an ethical violation.

Moreover, the ethical obligation of confidentiality regarding client information is not absolute. So, relevant guidance indicates that a lawyer must disclose things like the death of a client during negotiations to settle a personal injury claim. *See* ABA Formal Op. 95-397 (1995) (lawyer for personal injury client who died before accepting a pending settlement offer was required to inform court and opposing counsel of the client's death); *Kentucky Bar Ass'n v. Geisler*, 938 S.W. 2d 578 (Ky. 1997) (holding that lawyer settlement of personal injury case without disclosing that her client died violated the state's ethical rule because failure to disclose equaled an affirmative misrepresentation of material fact). Similarly, counsel may be required to notify an opposing counsel or party about an advantageous scrivener's error in a document. ABA Guidelines, at 38 (citing ABA

Informal Op. 86-1518 (1986)). Similar standards may prevent counsel from exploiting an opposing party's mistake during settlement negotiations.

The bottom line is that while advocacy in negotiations may require some posturing about client intentions and the opinions of the attorney and their client, counsel must take great care to avoid actual factual misrepresentations, either affirmatively made or expressed via non-disclosure.

## **2. Attorney Versus Client Authority**

For anyone having studied the rules of professional responsibility, it is somewhat axiomatic that the authority to decide whether or not to settle, and on what terms, rests exclusively with the client. Rule 42, ER 1.2, R.Ariz.Sup.Ct. ("A lawyer shall abide by a client's decision whether to settle a matter.") However, counsel must recognize that other ethical responsibilities may, at times, create conflicts with allowing the client to pursue certain types of settlement, or pursue negotiations in certain ways.

For instance, the duties of candor discussed above will prevent the attorney from participating in a settlement that rests on fraudulent premises or works a fraud on the opposing party or anyone else.

Similarly, Rule 42, ER 1.2(d), R.Ariz.Sup.Ct. prohibits an attorney from counseling a client to engage in, or assisting the client to engage in, any conduct the lawyer knows is criminal or fraudulent. Therefore, settlements that might be structured to hide assets or income from taxing authorities, or to assist a party in avoiding liability to other parties by acquiring questionable testimony or declarations from a settling party, must be approached with extreme caution and cleared of potential criminal or fraud implications. Likewise, a settlement that otherwise violates public policy – say, for example, by encouraging wrongful discrimination against a protected group – may present substantial ethical challenges.

The bottom line to the foregoing is that the "bottom line" is not the only consideration in settlement negotiations. Just because the parties reach a resolution of their dispute does not automatically "green light" the attorney's participation in achieving, documenting and executing that resolution if to do so would otherwise require counseling or participation in other improper conduct.

# APPENDIX A

## **Arizona Court of Appeals Division One Settlement Conference Policy**

### **I. Introduction**

The Court has established a Settlement Conference Program through which, in appropriate cases, a Court of Appeals judge is assigned to work cooperatively with the parties and their counsel to attempt to resolve their dispute. The Court offers this service at no cost because it may help to conclude matters quickly and efficiently and may provide a more satisfactory result than can be achieved through continued litigation.

### **II. How the Court Selects Cases for the Program**

Almost all civil cases are eligible for the Settlement Conference Program.

The Court selects cases for inclusion in the program by reviewing the trial court record and the Case Management Statement that Arizona Rule of Civil Appellate Procedure 12(d) requires an appellant to file with the Court. The Court also will solicit the parties' views concerning whether the issues on appeal or the underlying dispute might be amenable to settlement.

Alternatively, a party may ask that an appeal be included in the program by sending a request to [SettlementProgram@appeals.az.gov](mailto:SettlementProgram@appeals.az.gov). If requested, the Court will keep this communication confidential from the other parties to the appeal.

If the Court includes a case in the Settlement Conference Program, the Court will issue an order assigning the case to the program and staying the appeal until further order. The Court will not stay the payment of filing fees, posting of bonds, or filing notices of cross-appeal.

### **III. The Settlement Conference Process**

Participation in the Settlement Conference Program typically will involve a two-step process: a telephonic assessment conference and, if appropriate, an in-person settlement conference.

#### **A. Telephonic Assessment Conference**

Once the Court places a case in the Settlement Conference Program, it will order counsel to participate in a telephonic assessment conference with a judge to exchange information about the case, discuss settlement conference options, and decide whether to move forward with an in-person settlement conference. The initial assessment conference typically lasts between 30 to 60 minutes and includes a discussion of the case's litigation and settlement history.

Generally, the telephonic assessment conference will include only counsel, not parties, and the attorney with the most direct relationship with the client is expected to participate. Depending on the case, parties may participate in subsequent telephone conferences. Parties will always be required to attend in-person sessions.

Many factors are relevant to determining whether a particular case is appropriate for an in-person settlement conference, including:

- the parties' interest in participation;
- the certainty, or the possibility, that an appellate decision will not end the dispute;
- a desire by one or both parties to make or avoid legal precedent;
- the existence of other appeals that raise the same legal issue;
- the parties' desire to preserve a business or personal relationship;
- the existence of non-monetary issues;
- the possibility that a creative resolution might provide better relief than a court could fashion;
- a history of strong feelings by or between the parties that may have prevented effective negotiations;
- the possibility that one or all parties could benefit from a fresh look at the dispute;
- a desire to open and improve communication between the parties.

Additional telephone conferences may be necessary before a consensus is reached about whether to proceed with an in-person settlement conference. Once there is a consensus, the Court will issue an order setting the date and time for the settlement conference.

If the Court determines it will not hold an in-person settlement conference, it will lift the stay and return the appeal to the regular court docket.

## **B. In-Person Settlement Conference**

If all counsel and the assigned settlement conference judge agree to move forward in the process, the judge will schedule an in-person settlement conference to be held at the court. The parties and the attorney with the most direct relationship with the client will be required to participate.

The judge usually will order the parties to submit a settlement conference statement prior to the in-person conference. Typically, one portion of the statement is exchanged with the other party and sets forth a brief description of the factual and legal issues; a second, confidential, portion is submitted only to the settlement conference judge and contains information about each party's goals at the settlement conference.

Working with the settlement conference judge, the parties will determine what issues will be discussed at the in-person settlement conference and how those discussions will proceed. In some cases, the focus will be on the legal issues and possible outcomes of the appellate process. In other cases, it may be on rebuilding relationships or joint problem-solving. Sometimes the settlement conference judge will facilitate direct discussions

between the parties; other times he or she will act as an intermediary, shuttling back and forth between them. The settlement conference judge will try to resolve these various process issues in a manner that best serves the interests of the participants.

The settlement conference judge will facilitate negotiations among the parties to help them devise a mutually acceptable resolution. The judge will ask questions, reframe problems, facilitate communication, assist the parties to understand each other, and help identify creative solutions. The settlement conference judge will not take sides, render decisions, offer legal advice, or reveal confidences.

Depending on the outcome of the in-person settlement conference, the settlement conference judge may order an additional conference, order the parties to file a stipulation to dismiss the appeal, or direct that the case be returned to the regular court docket.

#### **IV. Confidentiality**

All settlement conference proceedings are confidential, and not discoverable, and are inadmissible in evidence in any judicial proceeding. A party to an appeal selected for the program may not communicate to a third person any information that he or she learns in the course of the program, except to the extent required by law or compelled by legal process.

Documents, e-mails, and other correspondence sent only to the Settlement Conference Program will be maintained separately from the Court's electronic filing and case management system and will not be made part of the public docket.

Any person who participates as a settlement conference judge will not later participate in any way in the consideration or disposition of the appeal.

Settlement conference judges, attorneys, and all other court employees involved in the program are absolutely immune from suit for all conduct in the course of their official duties.

## APPENDIX B

## **Policies for the Arizona Appellate Settlement Conference Program, Arizona Court of Appeals, Division Two<sup>1</sup>**

**(a) Goals.** The Arizona Appellate Settlement Conference Program (Program) is established to provide an alternative means for resolving certain civil appeals and to enhance public confidence in the appellate court system. The Program is intended to provide parties to an appeal a procedure to realistically explore settlement of the entire case or issues in the case; limit and simplify issues on appeal; and aid the speedy and just resolution of the appeal. The Program shall be provided at no additional court cost to the parties beyond the normal appellate filing fees.

**(b) Definitions.** (1) *Court.* "Court" means the Arizona Court of Appeals, Division Two. (2) *Appellate Mediator.* "Appellate Mediator" means a retired or active appellate judge. (3) *Settlement Conference Attorney.* "Settlement Conference Attorney" means an employee of the Court designated by the Chief Judge to assist the Court in implementing the Program.

**(c) Applicability.** All appeals filed in the Arizona Court of Appeals are eligible for the Program except: criminal appeals; appeals involving habeas corpus petitions; appeals in which a party is incarcerated; appeals from juvenile court; appeals from the Arizona Department of Economic Security Appeals Board; direct appeals from the Corporation Commission; special actions; and, any other appeal that the Court determines to be inappropriate for the Program.

**(d) Order of Assignment.** Except as provided in paragraph (f) of this rule, the Court shall select those cases for assignment to the Program which it deems most likely to benefit from alternative dispute resolution. Within seven days after the appellant has filed the Notice of Appeal, the Court may enter an order notifying the parties to a selected case that the case has been assigned to the Program. The order shall stay the normal appellate briefing schedule pending completion of the settlement process, and shall also stay ordering certified transcripts, filing any notice of cross-appeal, and the transmittal of the index of record on appeal. The assignment order shall also notify the appellant that the filing fee shall be paid within ten days.

**(e) Objection to Assignment.** A party may object to assignment to the Program by submitting a written objection no later than five calendar days after the date of the order of assignment. The objection shall not be filed in the Court, shall be confidential, shall not be placed in the appellate case file, and need not be served upon opposing counsel. To ensure confidentiality, the party shall send the objection in an envelope marked "confidential" to the Settlement Conference Attorney. The Settlement Conference Attorney shall not disclose the contents of the objection to an opposing party without the consent of the objecting party. The Court, in its discretion, shall enter an order vacating the conference, continuing the conference or denying the objection.

**(f) Mandatory Participation.** Participation is mandatory for all parties to appeals assigned to the Program unless the Court grants an objection to assignment as provided in paragraph (e).

**(g) Settlement Statement.** Upon appellant's payment of the filing fee, the Court shall notify the parties of the date of the settlement conference, instruct the parties to submit within ten calendar days a confidential settlement statement in a form prescribed by the Court and give notice that appellee's filing fee shall be paid within the same period. If the tenth day falls on a weekend or holiday, the statement is due on the following business day. To ensure confidentiality, the parties shall send their statements in an envelope marked "confidential" to the Appellate Mediator in care of the Settlement Conference Attorney. The statements shall not

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<sup>1</sup> See Ariz. R. Civ. App. P. 30.

be filed with the Court, shall be confidential, shall not be placed in the appellate case file, and shall not be served upon opposing parties. In no event shall the Appellate Mediator or the Settlement Conference Attorney disclose the statement or its contents to opposing parties without the consent of the party submitting the statement.

**(h) Selection of Appellate Mediator.** Upon assignment of a case to the Program, the Settlement Conference Attorney shall select an Appellate Mediator. The parties will not be charged for the services of the Appellate Mediator.

**(i) Authority of Appellate Mediator.** The role of the Appellate Mediator is to facilitate the voluntary resolution of cases by assisting the parties and their counsel to come to an agreement. The Appellate Mediator shall have no duty to make a recommendation for settlement of the appeal. The Settlement Conference Attorney is authorized to order conferences and request the parties to provide the Appellate Mediator with additional information. The Appellate Mediator has the authority to terminate the settlement process if the Appellate Mediator believes the process is unproductive or that any party is not proceeding in good faith.

**(j) Orders.** After the initial conference, the Settlement Conference Attorney shall either enter an order setting another settlement conference in accordance with these policies, or enter a disposition order as provided in paragraph (l)(5).

**(k) Termination of Stay.** Unless earlier terminated, all stays issued as part of the Program shall automatically terminate upon entry of an order returning the case to the appellate docket. Upon entry of the order returning the case to the appellate docket, the parties shall resume the normal appellate process.

**(l) Settlement Conference.**

(1) *Scheduling of the Conference.* The Court shall schedule a conference to be held within thirty days after the due date for submitting settlement statements.

(2) *Location of the Conference.* Unless otherwise ordered by the Court, all conferences shall be held in Tucson at Division Two of the Arizona Court of Appeals.

(3) *Attendance at the Conference.* The parties and their attorneys shall attend the settlement conference in person unless the Court finds good cause to permit a party to participate by telephone. In the case of a corporation, partnership, association, governmental body or other organization, both a representative having settlement authority for that party and the party's attorney shall attend. In the case of an official named as a nominal party, the Court shall ordinarily exempt such party from attendance.

(4) *Nature of the Conference.* The conference shall be an informal confidential meeting presided over by the Appellate Mediator. The Appellate Mediator shall have discretion to set the agenda and sequence of presentations and may deliver an agenda to the parties in advance of the conference. The discussions at the settlement conference shall not be recorded.

(5) *Disposition Order.* Upon completion of the settlement process, the Court shall either enter an order dismissing the appeal, returning the case to the normal appellate process, or enter an order indicating that the parties will file a stipulated motion to dismiss within a specified number of days from the date of the order. If the stipulation is not timely filed, the Court will return the case to the normal appellate process.

**(m) Confidentiality.**

(1) *Communication between the Court, the Appellate Mediator and the Parties.* The parties to a case selected for the Program, the Appellate Mediator and any court employee who becomes

involved in the Program in a particular case shall not communicate to anyone any matters or information discussed or learned either during the conference or from the settlement statements except to the extent required by law or compelled by process. Such information shall be confidential, not discoverable and shall be inadmissible in evidence in any judicial proceedings.

(2) *Documents.* Documents prepared by the parties and received by the Appellate Mediator or the Settlement Conference Attorney as part of the Program shall not be filed as part of the appellate case file with the Court, shall not be served upon opposing parties and shall not be disclosed to any person or party without the consent of the party who prepared the documents. Upon termination of the settlement process, the documents shall either be returned to the parties or destroyed by the Court. These documents shall not be discoverable and shall be inadmissible in evidence in any judicial proceedings.

**(n) Immunity.** Appellate Mediators, the Settlement Conference Attorney and all other Court employees involved in the Program shall be absolutely immune from suit for all conduct in the course of their official duties.

**(o) Disqualification of Appellate Mediator or Settlement Conference Attorney.** Any person who participates as an Appellate Mediator or Settlement Conference Attorney shall not thereafter participate in any way in the consideration or disposition of the appeal on its merits.

**(p) Time.** In computing any period of time related to the Program or any order entered pursuant to the Program, the provisions of Rule 6(a), Ariz. R. Civ. P., or Rule 4(A), Ariz. Rules Fam. L. Proc., shall apply unless Rule 30, Ariz. R. Civ. App. P., or an order expressly states otherwise.

**CONFIDENTIAL SETTLEMENT STATEMENT**

2 CA-IC \_\_\_\_\_-S      CASE NAME: \_\_\_\_\_

CONFERENCE DATE & TIME: \_\_\_\_\_

ADMINISTRATIVE LAW JUDGE: The Honorable \_\_\_\_\_

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This document is **strictly confidential**. Return the original directly to the Settlement Conference Attorney at the Arizona Court of Appeals, Division 2, 400 West Congress, Suite 200, Tucson, AZ 85701, in an envelope marked "Confidential." The completed settlement statement shall not be served on the opposing party(-ies) nor filed with the Clerk of the Court of Appeals. At the conclusion of these settlement proceedings, the document will be destroyed or returned to you. No reference to the contents of the settlement statement shall be made in any motions, briefs, or other documents filed in this case; the document and its contents shall be inadmissible in any judicial proceeding. *Note: You can request that this form be sent to you by email or you can obtain it on our website at <http://www.apltwo.ct.state.az.us/settlement.ic.doc>*

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NAME OF ATTORNEY SUBMITTING STATEMENT (or PARTY, if unrepresented):

\_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

Telephone: \_\_\_\_\_

FAX (optional): \_\_\_\_\_

E-mail (optional): \_\_\_\_\_

STATEMENT SUBMITTED BY: (Check all applicable)

Petitioner(s) \_\_\_\_\_ Employer \_\_\_\_\_ Carrier \_\_\_\_\_

Respondent(s) \_\_\_\_\_ Employee \_\_\_\_\_ ICA \_\_\_\_\_

Name of party or parties *with full settlement authority* who will attend settlement conference:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

If the consent of any additional person or persons is required to authorize a full settlement of this case, the name, address, and telephone number of all such persons:

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Brief description of the facts:

\*Brief description of the nature of the action and the result below:

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**\*PLEASE PROVIDE A COPY OF THE ALJ'S RULING WITH THIS STATEMENT.**

Issues to be raised on appeal:

Describe any prior settlement discussions, offers, or demands. Be sure to advise the Settlement Conference Attorney in writing of any settlement discussions that occur after this statement has been submitted. Before attending the settlement conference, if applicable, please discuss with your client the range of monetary compensation that will be acceptable to resolve this matter.

Describe the strengths of your case:

Describe the weaknesses of your case:

How would it benefit the parties if this dispute could be fully resolved at the upcoming settlement conference?

Are there any potential disadvantages to a mediated settlement of this dispute? If so, please explain:

Any other information that you believe would be helpful to the appellate mediator:

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Any documents you believe the appellate mediator should review before the conference should be appended to this confidential settlement statement. Unless otherwise requested, all such documents will be destroyed or returned to you after the conclusion of the settlement process.

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DATED this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

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Signature of counsel or unrepresented party

**CONFIDENTIAL SETTLEMENT STATEMENT**

2 CA-CV \_\_\_\_\_ -S CASE NAME: \_\_\_\_\_

CONFERENCE DATE & TIME: \_\_\_\_\_

TRIAL JUDGE: The Honorable \_\_\_\_\_ COUNTY: \_\_\_\_\_

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This document is **strictly confidential**. Return the original directly to the Settlement Conference Attorney at the Arizona Court of Appeals, Division 2, 400 West Congress, Suite 200, Tucson, AZ 85701, in an envelope marked "Confidential." The completed settlement statement shall not be served on the opposing party(-ies) nor filed with the Clerk of the Court of Appeals. At the conclusion of these settlement proceedings, the document will be destroyed or returned to you. No reference to the contents of the settlement statement shall be made in any motions, briefs, or other documents filed in this case; the document and its contents shall be inadmissible in any judicial proceeding. *Note: You may request that this form be sent to you by e-mail or you may obtain it on our website at <http://www.apltwo.ct.state.az.us/settlement.doc>*

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NAME OF ATTORNEY SUBMITTING STATEMENT (or PARTY, if unrepresented):

Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Telephone: \_\_\_\_\_

FAX (optional): \_\_\_\_\_

E-mail (optional): \_\_\_\_\_

STATEMENT SUBMITTED BY: (Check all applicable)

Appellant(s) \_\_\_\_\_ Plaintiff(s) \_\_\_\_\_ Petitioner \_\_\_\_\_ Intervenor(s) \_\_\_\_\_

Appellee(s) \_\_\_\_\_ Defendant(s) \_\_\_\_\_ Respondent \_\_\_\_\_

Name and title of party or parties **with full settlement authority** who will attend settlement conference:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

If the consent of any additional person or persons is required to authorize a full settlement of this case, the name, title, address, and telephone number of all such persons:

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Brief description of the facts:

Brief description of the nature of the action and the result below:

\*Does the judgment dispose of all claims and all parties? Yes \_\_\_\_\_ No \_\_\_\_\_ If not, explain why parties are not included in this appeal and/or what specific claims remain pending in the superior court.

**\*If this is a domestic relations matter, please attach a copy of the decree and any additional order appealed from.**

Issues to be raised on appeal and appellate standard of review:

Describe any prior settlement discussions, offers, or demands. Be sure to advise the Settlement Conference Attorney in writing of any settlement discussions that occur after this statement has been submitted. Before attending the settlement conference, if applicable, please discuss with your client the range of monetary compensation that will be acceptable to resolve this matter.

Describe the strengths of your case:

Describe the weaknesses of your case:

How would it benefit the parties if this dispute could be fully resolved at the upcoming settlement conference?

Are there any potential disadvantages to a mediated settlement of this dispute? If so, please explain:

In addition to economic interests, what other outcome do you hope to achieve as a result of this litigation?

Any other information that you believe would be helpful to the appellate mediator:

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Any documents, including the judgment, pleadings, motions and orders, which you believe the appellate mediator should review before the conference should be appended to this confidential settlement statement. Unless otherwise requested, all such documents will be returned to you or destroyed after the conclusion of the settlement process.

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DATED this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Signature of counsel or unrepresented party