

SECTION 6: MEDIATION PROCEEDINGS

A civil action in which, by stipulation or order, mediation has been designated as the method of alternative dispute resolution to be employed, will proceed as follows:

(a) Selection of Mediator. The participating parties may (i) select by stipulation a mediator from the roster maintained by the clerk of court, or (ii) request the appointment of a member pro tem as provided in Section 2(b) of this plan. In the event that the parties cannot agree, the mediator will be selected as provided in Section 4(b) of this plan.

(b) Scheduling the Mediation Conference. Within twenty (20) days following selection and after consultation with the participating parties or their counsel, the mediator will schedule the place, date, and time of the mediation conference, notice of which will be sent by the clerk of court to all participating parties. Unless otherwise agreed by the participating parties and approved by the mediator, the mediation conference will be held at the Frank E. Moss United States Courthouse, 350 South Main Street, Salt Lake City, Utah. The mediator may reschedule the mediation conference at the request of one or more parties or on the mediator's own motion, provided the conference will commence within thirty (30) days of the original scheduled date.

(c) Pre-conference Memoranda; Agenda. Unless the parties otherwise agree, each participating party will provide to the mediator a concise memorandum describing that party's position concerning the issue(s) to be resolved through the mediation. This memorandum must be provided at least ten (10) days before the scheduled date of the mediation conference. The mediator may direct that the memoranda be exchanged between participating parties. The mediator may prepare and circulate an agenda for the mediation conference.

(d) Mediation Conference. The mediation conference will commence at the place, date, and time set forth in the notice. All participating parties and their counsel must be present and prepared to discuss all relevant issues in the case. The mediator will conduct the mediation conference, determine the length and timing of sessions and recesses, specify the order and manner in which issues and parties' positions are to be addressed, etc. The mediation conference should proceed in a fashion that promotes the goals of the mediation process, preserves confidentiality, and encourages candor. The mediator should serve as a neutral facilitator, assisting the parties in defining and narrowing the issues, and encouraging each party to examine the dispute from various perspectives, without undertaking to decide any issue, make findings of fact, or impose any agreement.

(e) Separate Consultation with Parties During the Conference. During the conference, the mediator may meet or consult separately with one or more participating parties, or may divide the conference into groups of fewer than all parties. Information disclosed to the mediator on a confidential basis during separate consultation must not be disclosed to other parties without the consulting party's consent.

(f) Absent Parties. On written recommendation by the mediator, or motion by a participating party, the court may order absent parties to show cause why they failed to attend the mediation conference and, if appropriate, why sanctions should not be imposed.

(g) Termination of the Mediation Conference. If the mediator determines that the conference is making no substantive progress towards settlement, the mediator may adjourn the mediation conference and report that adjournment in writing to the clerk of court. By stipulation of at least two adverse participating parties, the mediator may schedule and conduct a second conference. Absent

unusual circumstances, such second conferences should be conducted within thirty (30) days of the original mediation conference. If no such stipulation is made, or if no substantive progress is being made at the second conference, the mediator will terminate the mediation conference and report that termination in writing to the clerk of court. Upon receipt of such report, the case will be withdrawn from the ADR Program.

(h) Settlement. In the event that a settlement as to all issues is reached during the mediation conference, the participating parties should prepare and execute a written settlement agreement and promptly file with the clerk of court a stipulation and order for dismissal of the civil action. In the event that a resolution of fewer than all the issues is reached, the parties should prepare and execute a stipulation concerning those issues which were resolved and identifying those issues which remain in dispute. On filing of the stipulation with the clerk, the case will be withdrawn from the ADR Program.

(i) Confidentiality; Non-admissibility of Proceedings.

(1) Disclosure Constraints. All proceedings in any mediation conference conducted under this plan, including any communication made by any party, attorney, representative, or any other person attending the mediation, are conclusively deemed to be made in compromise negotiations within the meaning of Fed. R.Evid. 408. In addition, absent exception under paragraph (2) below, such communications shall not be:

(A) disclosed to anyone not involved in the litigation;

(B) disclosed to the assigned district or magistrate judge; or,

(C) used for any purpose, including impeachment, in any pending or future proceedings in this court.

(2) Limited Exceptions to Confidentiality. This subsection does not prohibit:

(A) disclosures as may be stipulated by all parties and the mediator;

(B) disclosures from mediation proceedings that were open to the public based on stipulation by all parties;

(C) a report to or inquiry by the ADR judge or the clerk of court pursuant to DUCivR 16-2(j) regarding a possible violation of this rule or the court's ADR Plan;

(D) any participant or the mediator from responding to an appropriate request for information duly made by persons authorized by the court to monitor or evaluate the court's ADR program;

(E) sharing of mediation experience by mediators for purposes of training or education, provided the identity of the persons and parties involved in the mediation remains confidential; or

(F) disclosures otherwise required by law.

(3)Prohibition on Reproduction or Dissemination of Proceedings. Mediation conferences may not be recorded, transcribed, or published in paper, electronic, digital, audio, or video format without the prior written consent of the parties and the mediator.

(j)Attendance at Mediation Conference Required. Counsel and all parties are required to attend the mediation conference(s) in person unless otherwise excused by the mediator upon showing good cause.

(1)Corporation or Other Entity. If a party is not a natural person, a duly authorized representative or agent of the entity, in addition to outside counsel, must attend the mediation conference(s) unless excused by the mediator under paragraph four(4) below. The representative must have settlement authority and knowledge about the facts of the case.

(2)Government Entity. If a party is a unit or agency of government, a duly authorized representative or agent of the entity must attend the mediation conference(s) unless excused by the mediator under paragraph (4) below. The government representative must have, to the greatest extent feasible, (i) authority to settle and knowledge about the facts of the case, (ii) the government entity's position, and (iii) the procedures and policies under which that entity determines whether to accept proposed settlements. If the action is brought by the government on behalf of one or more individuals, at least one such individual also must attend.

(3)Insurers. If an insurance carrier is directly or indirectly involved in the outcome of a case, a duly authorized representative of the carrier with knowledge about the facts of the case and settlement authority must attend the mediation conference(s)unless excused by the mediator under paragraph four (4) below.

(4)Request to be Excused. A party, representative, attorney, or insurance carrier may be excused by the mediator from attending the mediation conference(s) only after a showing that personal attendance would impose an extraordinary and unnecessary hardship. A person excused from appearing in person at a mediation conference must be available to participate by telephone and must notify in writing, at least forty-eight (48) hours in advance of the mediation conference, all parties in the case and the clerk of court about the appearance by telephone.