OAC Mediation Overview

I. OAC MEDIATION PROGRAM

The Office of Administrative Courts has maintained an active program of alternative dispute resolution for many years. In alternative dispute resolution (often called "ADR") a trained individual from the Office of Administrative Courts assists parties in reaching an agreed resolution of a dispute. The form of ADR most commonly used at the Office of Administrative Courts is mediation.

The Office of Administrative Courts has many judges and legal assistants who are trained and experienced as mediators and who are available to assist parties in settlement discussions. Since 1995 the Office has worked with the parties in nearly 600 mediations. Over 80 per cent of those cases have resulted in an agreed settlement.

Mediation is generally voluntary, although on occasion a judge will order parties to engage in ADR. Our mediators can facilitate an ADR process in any type of dispute, even if the disagreement involves a case that is not pending at the Office of Administrative Courts. All the parties need to do to arrange for a mediation is give us a request to mediate form or send us a letter or call us and let us know that the parties want to set up a mediation (our address is 633 17th Street, Suite 1300, Denver, CO 80202 and our phone number is 303-866-2000).

Mediation is a confidential, collaborative process. Office of Administrative Courts' mediators facilitate communication, clarify issues, and help the parties assess their options, but the mediators do not tell the parties how to resolve the dispute; it is up to the parties to create their own resolution. Successful mediations require creativity and flexibility from all participants. Therefore, participants should come to the mediation knowing the strengths and weaknesses of their respective cases and willing to think creatively about options for settling the dispute. In our experience, mediations are most productive when party representatives who hold the ultimate settlement authority attend and participate in the mediation.

Before a mediation the mediator will become acquainted with the facts and issues in dispute based upon a review of the file and any other information provided by the parties. Parties should be prepared for the mediation to continue as long as necessary, up to a full day, unless prior arrangements have been made for a different time frame.

Following is some additional information about mediation that may be helpful as you decide whether to use the ADR services of the Office of Administrative Courts or as you prepare for a scheduled mediation:

1. Take advantage.

A mediation may be your best, and perhaps your last, opportunity to resolve your own dispute. When a dispute is before an administrative law judge or an administrative agency for a formal

hearing the parties no longer control the outcome. Frequently, no one is wholly satisfied with the resolution imposed after litigation. In addition, the resources required to prepare and present a contested case, and pursue it through available appeals, are considerable. For these reasons, we encourage you to actively and fully participate in this opportunity to reach agreement. Remember, parties have more flexibility to develop creative solutions than an administrative law judge in a formal court proceeding. In a formal hearing the judge will be bound by the statutes and regulations applicable to your case, while in a mediation you can create resolutions beyond what the statute and regulations allow.

2. You are in control.

The power to settle a dispute through mediation lies entirely with the participants. The mediator cannot issue orders or force the parties to reach agreement. The mediator's role is to be neutral, to guide the process, and to facilitate communications. The parties' role is to seek, in good faith, a resolution to their dispute that will satisfy their most important needs. If the parties' most important needs cannot be met through a mediated agreement, parties still have the opportunity for a contested case hearing.

3. The process.

The mediation will usually begin with a joint meeting. The mediator will explain the process, each individual will be given an opportunity to make a short statement, and clarifying questions may be asked. Then, quite often, the mediator will meet with each side separately, in a meeting called a "caucus". In these caucuses, any confidential information you give the mediator will be kept confidential unless you specifically authorize the mediator to relay it to the other side. These meetings sometimes continue with offers and counteroffers carried back-and-forth by the mediator. Additional joint meetings may be held. If the parties reach an agreement, it is reduced to writing and signed by the parties. Because a government agency is involved, any written agreement may be a public document.

4. Mediations are Confidential.

Communications in a mediation are confidential. This includes any offers and counteroffers made by the participants. If the parties do not settle and instead proceed to a hearing, the mediator will not communicate about the mediation with the administrative law judge who will preside over the hearing (other than to report that a mediation took place on a certain date and whether it was successful). Under Colorado law a mediator cannot be compelled to testify about anything that occurred during the mediation. If partial agreements are reached, such as a list of stipulated facts, they will be reported to the judge assigned to the case on the merits in writing, as approved by the parties, and filed in the case. Comments made by the mediator during the process are also confidential. On the other hand, information shared in a mediation that is otherwise subject to discovery is not made confidential simply because it is shared in the mediation.

5. Mediation is not simply positional bargaining.

When people negotiate over something they usually stake out a position, argue for it, and make concessions to reach a compromise. Remember the last time you bought a car? There was a listed price, you offered something less, the salesman countered by coming off the listed price a

fraction. You may have gone through this exercise more than once. But there were no clear principles guiding the participants as they moved from one position to another except to try to get the best deal possible, probably meeting somewhere in the middle. Did you feel confident that you got a good deal?

Mediation guides parties to focus on the interests that lie behind each party's position: Why do they take that position? What concerns, public policies, and private needs cause them to take that position? If these interests can be openly identified, parties are more likely to craft creative solutions that satisfy everyone's interests. For example, an agency prosecuting a disciplinary case against a professional licensee is usually concerned with protecting the public and deterring future bad acts. The licensee is usually interested in protecting his or her livelihood. Sometimes it is possible to agree to a solution that fulfills both of these interests.

6. Know the case.

Mediations are most successful when parties are knowledgeable about all issues in dispute. What evidence do you have to prove your case? How objective is it? If your case turns on the credibility of witnesses, it is usually harder to predict the outcome. If you have documentary evidence, case law, or other authority that supports your position, bring copies to the mediation. Analyze the other side's case. Know both their strong and weak points. A thorough analysis enables you to realistically assess your options.

7. Think "outside the box".

Be creative. Think about what you really need to accomplish to resolve the case. Carefully consider the interests of the various parties and try to formulate multiple options that will meet those needs. In disciplinary cases against professional licenses, for example, many agencies originally had only one enforcement tool: revocation of the license to practice. Now those agencies generally have flexibility as to the kinds of sanctions they impose. They can assess administrative penalties and/or place licensees on probation with conditions, as well as revoke licenses.

8. Bring authority to settle.

It is very important to have full settlement authority in the room. If absolutely necessary, you may confer with others by telephone (If you have to communicate with another person by telephone, the mediator may need to talk to that person with you. You will, of course, also be able to discuss matters with that person privately.) There are, however, distinct disadvantages to engaging in a mediation when the participants in the mediation conference do not have settlement authority. A party or attorney who comes in thinking he or she has full authority to settle often concludes that some creative offer requires consultation with someone outside the room. Problems can then arise because persons outside the mediation have not experienced the dynamics of the conversation in the room. Without the benefit of the experience of being in the room and hearing the entire discussion, they may find it easier to overestimate the strength of their case and underestimate the persuasiveness of the other party's arguments. This may result in an impasse in the mediation after many hours of effort in which the parties' representatives have worked diligently to forge an agreement acceptable to everyone in the room.

9. Facilitative compared to evaluative mediation styles.

Mediation at the Office of Administrative Courts is generally a collaborative process. We facilitate communication and clarify issues, help parties assess their options, and assist the parties to write up any agreements reached. However, in private meetings, mediators sometimes provide information to help parties analyze the strengths and weaknesses of their cases. If the mediator evaluates some aspect of your case, remember that any opinion expressed by the mediator is just that: one person's opinion. That opinion is based on limited information, such as summaries of anticipated evidence. Discovery may not have been completed yet. The mediator has not had the opportunity to assess witness credibility, nor has the mediator done independent legal research. In spite of these limitations, the view of a mediator (who in other circumstances may hear cases as an administrative law judge) often gives parties a useful glimpse of how their case may be perceived by a neutral third party. Of course, any views expressed by a mediator under these circumstances are confidential, don't constitute legal advice, and are not predictions as to how the hearing judge will view the issues. Giving such an evaluation is completely discretionary with the mediator, unless the parties have requested, and the mediator has agreed, before the mediation, to provide such an evaluation.

GROUND RULES FOR MEDIATION

1. The parties come to this mediation voluntarily. They understand that they may terminate their participation at any time by telling the mediator.

2. The mediator will not give legal advice to any party. Each party is relying solely on the advice of counsel or on the party's own judgment. The mediator has no legal duty to protect the interests of the parties or to provide them with information regarding their legal rights.

3. All discussions, statements, representations, facts, documents, conduct, promises, offers, views or opinions expressed or presented by any participant, including the mediator, during any part of the mediation process are confidential. These matters cannot be discussed with any person outside of the mediation process without the express written consent of all parties or a court order requiring disclosure. In addition, these matters cannot be introduced as evidence in any subsequent judicial or administrative process. However, these matters can be proven in subsequent proceedings on the basis of evidence not related to the mediation process.

4. The parties agree not to subpoena the mediator, to otherwise require the mediator to appear in any subsequent proceeding, or to ask the mediator to disclose any information relating to any aspect of the mediation process. If so called or subpoenaed, the mediator will refuse to testify or produce any documents or notes relating to the mediation.

5. In order to assist the parties in resolving their dispute in a professional and courteous manner, at the mediation conference the following rules of personal conduct will be observed:

Personal attacks will not be tolerated.

The motivations and intentions of participants will not be impugned.

The personal integrity and values of participants will be respected.

Stereotyping will be avoided.

Commitments will not be made lightly and will be kept.

Delay will not be employed as a tactic to avoid an undesired result.

Disagreements will be regarded as problems to be solved rather than battles to be won.

Participants will not interrupt presentations.