Utah Rules of Court-Annexed Alternative Dispute Resolution

Rule 101. Conduct of mediation proceedings.

(a) Selection of mediator. The mediator shall be selected as provided in Code of Judicial Administration Rule 4-510.05(4).

(b) Pre-mediation conference. Within 10 days following selection, and after consultation with the participating parties or their counsel, the mediator shall conduct a pre-mediation conference and schedule the place, date and time of the mediation conference. The pre-mediation conference may be conducted by telephone, with the parties individually, or together. During the pre-mediation conference, the mediator shall inform the parties of their right to withdraw from the mediation process before a final settlement agreement is signed. The mediation conference should be held within 45 days of the pre-mediation conference. The parties may agree to conduct discovery pursuant to paragraph (f). The mediator may request that the parties exchange and/or submit a disclosure statement prior to the mediation conference.

(c) Mediation conference. The mediation conference shall commence at the place, date, and time agreed upon by the mediator and the parties. All parties shall be present, shall be prepared to discuss, and shall have the authority to fully settle, all relevant issues in the case. The mediator shall conduct the mediation conference and determine the length and timing of sessions and recesses, and the order and manner of presentation of the issues. The mediation conference should proceed in a fashion that furthers the goals of the mediation process, preserves confidentiality, and encourages candor on the part of participating parties. 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.

(d) Separate consultation with parties during the mediation conference. During the mediation 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 the parties. Information disclosed to the mediator on a confidential basis during separate consultation shall not be disclosed to other parties without the disclosing party's consent.

(e) Settlement. In the event that a settlement to all issues is reached during the mediation conference, the participating parties or the mediator shall prepare, and the parties shall execute, a written settlement agreement and promptly file with the clerk of the court any documents appropriate for resolution of the action. In the event that a resolution of less than all of the issues is reached, the parties shall prepare and execute a stipulation concerning those issues that were resolved and identifying those issues that remain in dispute. Upon filing of the stipulation with the clerk, the case shall be withdrawn from the ADR program.

(f) Discovery. Discovery may proceed during the pendency of the mediation proceedings, except as stipulated by the parties. Subpoenas for the production of evidence by nonparties may be issued, served and enforced by the court as provided by the Utah Rules of Civil Procedure.

(g) Termination. If the mediator determines that the parties are unable to participate meaningfully in the process or that a reasonable agreement is unlikely to be achieved, the mediator may suspend or terminate the mediation process without explanation. The parties may terminate the proceedings at any time.

(h) Absent parties. Upon written recommendation by the mediator or motion by any 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.

(i) Change to arbitration. At any time prior to the conclusion of the mediation proceedings, the parties may agree to submit the matter to arbitration. Written notice signed by all parties and counsel of such agreement shall be sent to the Director. Selection of an arbitrator shall be governed by Code of Judicial Administration Rule 4-510(11). The parties may by agreement request that the mediator serve as an arbitrator.

(j) No interlocutory appeal. may be taken from an order granting or denying a motion to refer a civil action pending on January 1, 1995 to the ADR program.

Rule 102. Conduct of nonbinding arbitration proceedings.

(a) Selection of arbitrator(s). The arbitrator(s) shall be selected as provided in Code of Judicial Administration Rule 4-510.05(4).

(b) Pre-hearing conference.

(1) Scheduling, purposes, and participants. Within 30 days after selection of the arbitrator(s), the arbitrator(s) shall conduct a pre-hearing conference for the purposes of: reviewing the case; assisting the parties in defining and narrowing the issues; determining the scope and timing of any discovery, including the exchange of disclosure statements; reaching a stipulation for admission of facts and documents; identifying witnesses; determining the necessity of subpoenas; and scheduling the arbitration hearing. All participating parties or their counsel shall attend the pre-hearing conference. The arbitration hearing shall be held within 120 days of the date of the pre-hearing conference.

(2) Written and oral testimony. Where appropriate in the course of the pre-hearing conference, the arbitrator(s) shall: encourage the use of stipulations, affidavits, proffers of testimony, written submission of expert opinions, and other timesaving evidentiary tools and procedures; and instruct the parties to limit live testimony, if any, to the resolution of factual disputes and witness credibility issues. The arbitrator(s) also shall instruct the parties that, unless otherwise authorized by the arbitrator(s) or agreed upon by the parties, issues other than those defined in the pre-hearing conference shall not be raised at the arbitration hearing and will not be considered in determining any arbitration award.

(c) Interim procedural orders; continuance. The arbitrator(s) shall have the power to make such interim procedural orders in furtherance of the purposes of the arbitration proceeding and these rules as are deemed necessary and appropriate. Upon motion by any party or its own motion, the arbitrator(s) may continue the arbitration hearing, provided the hearing is commenced within 30 days of the original date set at the pre-

hearing conference. Except as to matters of pre-hearing scheduling, or continuance of the arbitration hearing, no party or counsel for a party shall communicate ex parte with the arbitrator(s) concerning the case.

(d) Change to mediation. At any time prior to the conclusion of the arbitration hearing the parties may agree to submit the matter to mediation. Written notice signed by all parties and counsel of such agreement shall be sent to the Director. The mediator may not be the same person as the arbitrator(s) unless the parties by agreement request that one of the arbitrator(s) serves as the mediator.

(e) Exhibits; objections; waiver. Not less than 20 days nor more than 30 days before the arbitration hearing, a party who intends to offer documentary evidence at the arbitration hearing shall serve copies of the exhibits, together with written notice of that party's intention to offer the same, upon all participating parties and the arbitrator(s). Not less than 7 days before the arbitration hearing, each party may serve upon the offering party and the arbitrator(s) written objections to one or more of the exhibits, specifying the exhibit and the specific grounds for objection. Any objections to any exhibit based upon any issue of evidentiary foundation, authentication, or hearsay not served as provided herein shall be deemed to be waived. Each party shall mark all original exhibits and copies prior to the arbitration hearing.

(f) Discovery. Discovery shall be stayed during the pendency of the arbitration proceedings, except as stipulated by the parties. Subpoenas for the production of evidence by nonparties may be issued, served and enforced by the court as provided by the Utah Rules of Civil Procedure.

(g) Record of proceedings. Any participating party, at that party's own expense and upon 5 days notice to the arbitrator(s) and the other participating parties, may make arrangements for stenographic or other non-video recording of the arbitration hearing and cause a transcript to be made of the proceedings, provided that a copy of any such transcript or recording shall be supplied to the arbitrator(s) at no charge. Copies of the transcript or recording shall be made available to all participating parties upon request and at a reasonable expense. Such transcript is not admissible in any subsequent de novo trial, but may be used in connection with a motion to modify or vacate an award. No other disclosure of the transcript or its contents may be made. All transcripts shall be destroyed at such time as an award becomes final or upon a demand for a trial de novo.

(h) Arbitration hearing. The arbitration hearing shall be commenced at the place, date, and time designated and shall be conducted by the arbitrator(s). The arbitrator(s) may administer oaths. If a panel is used, the chair shall preside. The arbitration hearing may proceed in the absence of any party who, after written notice of the scheduling of the hearing, does not appear. At the request of any participating party, non-party witnesses, except when testifying, shall be excluded from the arbitration hearing. The arbitrator(s) shall determine the mode and order of presentation of issues, argument, the testimony of witnesses, and other evidence, limiting the amount of time to which each party is entitled. The burden of proof among the parties shall be allocated and presumptions, if any, shall apply, as if at trial before the court. The arbitrator(s) shall not have the authority to rule on summary judgment motions or other motions pending in the litigation.

(1) Each party to the arbitration proceeding is entitled, in person or through counsel, to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

(2) If the arbitrator(s) finds it necessary to make an inspection or other outside investigation, the arbitrator(s) shall designate the date, time and place of the same, and shall notify all parties and counsel, who may be present at such inspection or investigation if desired.

(3) The arbitrator(s) shall specifically inquire of all parties whether they have any further proof to offer or witnesses to be heard. Upon receiving negative replies and if satisfied that the record is complete, the arbitrator(s) shall declare the hearing closed. If post-hearing briefs are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator(s) for the receipt of briefs.

(4) At any time before the award is made, the arbitration hearing may be reopened on the arbitrator's initiative, or for good cause shown upon application of a party. If the reopening is requested to consider additional issues, the reopening may be held only if all parties agree.

(5) If the parties settle the dispute during the course of the arbitration, the arbitrator may set forth the terms of the agreed settlement in an award.

(i) Issues to be decided. Absent a stipulation by all parties, the arbitrator(s) shall make no determination regarding issues not defined at the pre-hearing conference or subsumed therein. Where the arbitrator(s) determines that such other issues must be determined in order to render an award, and the parties agree to determination of such issues, the parties shall be allowed to present any additional evidence and argument as is necessary to resolve such issues.

(j) Evidence; admissibility; applicability of utah rules of evidence. All oral testimony at the arbitration hearing shall be taken under oath or affirmation. The arbitrator(s) shall determine the admissibility of evidence offered at the arbitration hearing. The arbitration hearing shall be conducted in general conformity with the Utah Rules of Evidence, but the arbitrator(s) may receive evidence otherwise inadmissible if the arbitrator(s) finds the evidence to be relevant and trustworthy and the receipt of such evidence is not unfairly prejudicial to any party against whom it is offered and does not violate any rule of privilege. The arbitrator(s) may take judicial notice of adjudicative facts.

(k) Privacy and confidentiality of arbitration proceedings. To protect and preserve the privacy and confidentiality of an arbitration proceeding and the privacy rights of the parties, all proceedings shall be subject to Rule 103, unless all parties have stipulated that the proceeding be open to the public. Any disclosure statements made or prepared incident to any ADR process shall be treated as negotiations in compromise and shall be subject to exclusion as provided in Rule 408 of the Utah Rules of Evidence.

(l) Arbitration award.

(1) The arbitrator(s) shall prepare and file with the clerk of the court an award within 20 days after the conclusion of the arbitration hearing, and shall mail copies of the award to all participating parties and counsel of record and to the Director.

(2) The award shall be in writing, signed by the arbitrator(s), and shall state with particularity the name(s) of the prevailing party or parties, the name(s) of the party or parties against whom the award is rendered, and the precise amount(s) of the award. With respect to monetary relief, the arbitrator(s) may, but is not required to, make findings of fact or otherwise explain the basis of the award. If issues of law are involved, the award shall specify such issues and how they were resolved. Where equitable or other nonmonetary relief is sought, the award shall state with particularity the nature and extent of such relief, if any, found to be an appropriate remedy.

(3) Upon filing of the award, Utah Code Section 78B-6-206 shall apply.

(4) In all matters where a hearing before a judge is required by law, the final arbitration award shall be treated as a stipulation by the parties.

(5) If, upon trial de novo, the party filing a demand therefor has not achieved a better result than provided in the award, such party shall pay all arbitration fees and costs and the attorneys' fees of the other party. The payment obligation that may be imposed pursuant to this paragraph shall not exceed the lesser of 20% of the amount of the original monetary award or $2,000.

(m) No interlocutory appeal. may be taken from an order granting or denying a motion to refer a civil action pending on January 1, 1995 to the ADR program.

Rule 103. Confidentiality in nonbinding ADR proceedings.

ADR proceedings shall be conducted in a manner that encourages an informal and confidential exchange among counsel, the parties, and the ADR provider to facilitate resolution of disputes. Unless otherwise directed by the court or by stipulation of all parties, ADR proceedings shall be conducted in private.

(a) Confidentiality in ADR communications. Motions, memoranda, exhibits, affidavits, and other written, oral or other communication submitted by counsel or the parties to the ADR provider pursuant to the requirements of these rules or at the direction, if any, of the ADR provider, shall be confidential and shall not be made a part of the record or filed with the clerk of the court. Neither shall any such communication be transmitted to the judge to whom the case is assigned, except as required elsewhere in these rules.

(b) ADR provider confidentiality. All ADR providers shall preserve and maintain the confidentiality of all ADR proceedings in which they officiate. They shall not disclose to or discuss with anyone, including the assigned judge, any information about or related to the proceedings, unless specifically required elsewhere in these rules. ADR providers shall secure and ensure the confidentiality of ADR proceeding records and shall return them to the submitting parties at the conclusion of the proceeding.

Rule 104. Code of ethics for ADR providers.

This Code applies to all arbitrators and mediators on the court roster acting pursuant to these rules and Code of Judicial Administration Rule 4-510.05. A court may impose sanctions against an ADR provider for violations of this Code which raise a substantial question as to the partiality of the arbitrator or a member of the majority of a panel, but a violation of other provisions of this Code does not establish grounds or authority for other judicial review of arbitration awards made under the court-annexed ADR program.

Canon I. ADR Providers Should Uphold The Integrity And Fairness Of The ADR Program.

(a) Alternative Dispute Resolution is an important and proven method for resolving disputes. In order for ADR to be effective, there must be broad public confidence in the integrity and fairness of the process, similar to the confidence the public has in judges who adjudicate cases in the district court of this state. Like the court's judges, ADR providers serving under the program must observe high standards of ethical conduct so that the integrity and fairness of the process will be preserved. Accordingly, ADR providers should recognize their responsibility to the court, to the public, to the parties, and to all other participants in the ADR processes. The provisions of this Code should be construed and applied to advance these objectives.

(b) For a case that is referred to arbitration or mediation, providers should accept an appointment only if they are in a position to adhere to the specific time limits for arbitration and mediation proceedings preserved by the rules.

(c) After accepting appointment to and while serving as provider for a particular case, an ADR provider should avoid entering into any financial, business, professional, family, or social relationship, or acquiring any financial or personal interest which (1) is likely to affect their impartiality or (2) might reasonably create the appearance of partiality or bias. For a reasonable time after an ADR proceeding has been concluded, the provider should avoid entering into any such relationship, or acquiring any such interest, under circumstances which might reasonably create the appearance that the provider had been influenced in the proceeding by the anticipation or expectation of the relationship or interest.

(d) Providers should conduct themselves in a manner that is fair to all parties and their counsel; they should not be swayed by outside pressure, public clamor, fear of criticism, or self-interest.

(e) Providers should neither exceed the authority delegated to them nor do less than is required to exercise that authority.

(f) Providers should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse of, or disruption to, the ADR processes.

(g) The ethical objectives of providers begin prior to acceptance of the appointment to a particular case and continue throughout all stages of the proceedings. In addition, wherever specifically set forth in this Code, certain ethical obligations continue even after the award in the case has been made or after the case has been successfully resolved.

(h) A provider should not directly contact a party to solicit the selection of that provider in a particular case if the party is represented by counsel.

(i) A provider should refrain from promises and guarantees of results. A provider should not advertise statistical settlement data or settlement rates.

(j) A provider should accurately represent his/her qualifications. In an advertisement or other communication, a mediator may make reference to meeting state, national, or private organizational qualifications only if the entity referred to has a procedure for qualifying ADR providers and the provider has been duly granted the requisite status.

(k) A provider should have the participants sign a written agreement to mediate their dispute.

(l) A provider should include in the participants' written agreement to mediate a description of their fee arrangement with the provider.

Canon II. Disclosure And Disqualification.

(a) When requested to serve, ADR providers should carefully consider prior to accepting a case whether they have:

(1) any financial or personal interest in the outcome of the proceeding;

(2) any existing or past financial, business, professional, family, or social relationships which are likely to affect their impartiality or which might reasonably create an appearance of partiality or bias;

(3) any such relationships which they personally have with any party or its lawyer, or with any individual who may serve as a witness; and

(4) any such relationships involving their families, current employers, partners, or significant business associates.

(b) ADR providers should make a reasonable effort to inform themselves of any interests or relationships of the kind described in paragraph (a).

(c) The obligation to consider interests or relationships described in paragraph (a) is a continuing duty which requires an ADR provider who accepts an appointment to disclose, at any stage of the ADR proceeding, any such interests or relationships which may arise, or which are recalled or discovered.

(d) If relationships or interests exist that may create an impression of partiality or bias, but that, in the judgment of the ADR provider, pose no obstacle to objectively evaluating the case, making an arbitration award, or mediating the matter, then the provider should disclose those interests or relationships as early as possible in the course of the ADR proceedings. Such disclosure should be made to all parties and their attorneys and, where the matter is being arbitrated, to the other arbitrators.

(e) Where any ADR provider determines that existing interests and relationships preclude participation as a provider and constitute grounds for self-disqualification or recusal, the ADR provider should recuse and notify the Director of the recusal.

(f) In the event that a mediator is requested by any party to withdraw, the mediator should do so. In the event that an arbitrator is requested to withdraw by fewer than all of

the parties because of alleged partiality or bias, absent a showing of good cause to the contrary, the arbitrator need not withdraw.

Canon III. ADR Providers Should Conduct The Proceedings Fairly And Diligently.

(a) ADR providers should conduct the proceedings in an evenhanded manner and treat all parties with equality and fairness at all stages of the proceedings.

(1) Impartial means free from favoritism or bias in word, action or appearance, and includes a commitment to assist all participants as opposed to any one individual.

(2) ADR providers should guard against bias or partiality based on the participants' personal characteristics, background or performance at the proceeding.

(b) ADR providers should perform their duties diligently and conclude the case as promptly and efficiently as the circumstances reasonably permit, without compromising the interests of justice.

(c) ADR providers should be patient with and courteous to the parties, their attorneys, and any witnesses. They should encourage similar conduct by all participants in the proceedings.

(d) Unless otherwise agreed by the parties, providers should accord to all parties the right to appear in person and to be heard after due notice in writing of the date, time, and place of hearing.

(e) ADR providers should not deny any party the opportunity to be represented by counsel.

(f) Where any party fails to appear, arbitrators may proceed with scheduled ADR proceedings only after ensuring that appropriate written notice was provided to the absent party.

(g) If a panel is selected for arbitration, the chair should permit and encourage all arbitrators to participate equally in the arbitration process.

(h) Mediators shall inform the participants that they may withdraw from mediation at any time and are not required to reach an agreement. However, if the mediation is conducted pursuant to a mandatory mediation program, the mediator shall inform the parties of any participation requirements of that program.

Canon IV. ADR Providers Should Be Faithful To The Relationship Of Trust And Confidentiality Inherent In That Appointment.

(a) Maintaining confidentiality encourages candor, a full exploration of issues, and the integrity of the ADR program. Ethical standards require strict compliance with the promise of confidentiality as an integral element of the ADR process. Participation as a provider assumes building a relationship with the parties that is based on trust. At no time should any provider use confidential information acquired during ADR proceedings to gain advantage, personal or otherwise, or to adversely affect the interests of any party or any other individual or entity.

(b) The provider should discuss the providers' and the participants' expectations of confidentiality prior to undertaking the process. Prior to undertaking the process the

provider should inform the participants of applicable limitations of confidentiality such as statutory, judicial or ethical reporting requirements.

(c) In mediation, the written agreement to mediate should include provisions concerning confidentiality.

(d) ADR providers should not utilize any information disclosed during the ADR processes for private gain or personal advantage. Neither should providers seek publicity from participation in a particular ADR proceeding to enhance their personal or professional position or status.

(e) Unless otherwise agreed by the parties, providers should keep confidential all matters relating to the proceedings and decisions in which they participate. No information about evidence produced, admissions, or stipulations made, legal positions taken, reasons for the amount or nature of all arbitration award, unless set forth therein, or conclusions as to the credibility of any witness should be disclosed to anyone who is not a party to the arbitration proceeding.

(f) No arbitrator is at liberty to inform anyone of, or to discuss with anyone other than the parties and other arbitrators, the award or decision.

(g) Mediators should preserve and maintain the confidentiality of all mediation proceedings. They should not disclose or discuss any information about or related to the proceedings to anyone, including the assigned judge. Mediators should keep confidential from other parties any information obtained in individual caucuses unless the party to the caucus permits disclosure. They should secure and ensure the confidentiality of mediation proceeding records that they do not destroy. They should render anonymous all identifying information when mediation proceeding materials are used for research, training, or statistical compilations.

(h) If subpoenaed or otherwise given notice to testify or to produce documents the mediator should inform the participants immediately. The mediator should not testify or provide documents in response to a subpoena or other notice without an order of the court if the mediator reasonably believes doing so would violate an obligation of confidentiality to the participants.

Canon V. Prohibition Against Discrimination

In their ADR practice, ADR providers should not practice, condone, facilitate, or promote any form of invidious discrimination. ADR providers should be aware of cultural differences and how such differences may affect a party's values and negotiating style. Providers should avoid condoning or displaying stereotypical attitudes toward parties and their attorneys in ADR proceedings.

Canon VI. An Arbitrator Should Make Decisions In A Just, Independent, And Deliberate Manner.

(a) An arbitrator should decide all matters justly, exercising independent judgment; no arbitrator should permit outside pressure to affect or bear upon its decision.

(b) Arbitrators should not delegate the obligation to make an appropriate determination in the case to any other person or authority.

Canon VII. When Communicating With The Parties, Arbitrators Should Avoid Impropriety And The Appearance of Impropriety.

(a) In the absence of a stipulation to the contrary, arbitrators should not discuss a case with any party in the absence of any other party, except that they may discuss with a party such matters as setting the time and place of hearings or making other arrangements for the proceedings.

(b) Whenever an arbitrator communicates in writing with one party, that arbitrator or mediator should at the same time transmit a copy of the communication to each other party and the other arbitrators. Whenever an arbitrator receives from one party any case-related written communication which has not been served on all other parties, that arbitrator promptly should provide the same to the other parties and to the other arbitrators.

Canon VIII. Process And Terms Of Settlement In Mediation.

(a) As self-determination is a fundamental principle of mediation, the mediator recognizes that the primary responsibility for the resolution of a dispute and the forging of a settlement agreement rests with the parties and their attorneys if represented. The mediator’s obligation is to assist the disputants to reach an informed and voluntary agreement.

(b) Primary responsibility for the resolution of a dispute and the forging of a settlement agreement rests with the parties and their attorneys. The mediator's obligation is to assist the disputants to reach an informed and voluntary settlement. In the course of the mediation process, no mediator shall coerce a settlement or otherwise pressure any party or the attorneys for any party into accepting an agreement. Nor shall any mediator make for any party substantive decisions affecting the matter at issue. Mediators may make suggestions and may draft proposals for consideration by the parties and their attorneys, but all decisions are to be made voluntarily and without duress on the part of the mediator by the parties in consultation with their attorneys.

(c) Mediators should not attempt to usurp or otherwise assume the role of counsel for any party.