ORDER
and
Instructions and Information
for
Settlement Conferences

This document explains the settlement conference process as I conduct it and my expectations of the lawyers and parties in preparing for the settlement conference. Please read these instructions carefully because the contents constitute **ORDERS** by the court. The parties and their lawyers are expected to follow these instructions in every particular. Variances from these instructions not approved in advance by Judge Acosta could result in sanctions.[1]

Expectations

Each of the following expectations is the product of hard experience as a settlement conference judge. Meeting these expectations will ensure that the time spent preparing for and conducting the settlement conference is time well-spent.

I. Attendees.

A. Each party must have physically present at the settlement conference the representative who is the decision-maker with respect to the amount of money to be offered or agreed to in settlement. "Decision-maker" means the person who possesses full and final authority to settle the case without need to contact or confer with a person not present at the settlement conference. If a party has multiple decision-makers, they must either be present as well or have given the decision-maker in attendance unrestricted authority to settle the case. **This order includes claims and risk managers or representatives handling the case for a party's insurance company.** Lawyers ask about this requirement and whether it includes their client's insurance carrier representative. It does. So don't call to ask if I'm "serious" about this requirement. I do make exceptions for good cause on a case-by-case basis, so you

[1] The authority of the court to enter orders pertaining to the convening and conducting of a settlement conference is well established. *See* 28 U.S.C. § 473(b)(5) (court may require "representatives of the parties with authority to bind them in settlement discussions be present or available by telephone during any settlement conference"); FED. R. CIV. P. 16(c)(1) ("If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement."); FED. R. CIV. P. 16(f)(1) (court may impose sanctions if a party or attorney fails to appear, is substantially unprepared to or does not participate in good faith, or fails to obey a pretrial order); USDC Oregon Local Rule 16-4(e)(2) (court may on its own motion schedule a settlement conference).

may ask for a good-cause exception to this requirement.

B. Geographic distance from Portland does not excuse the decision-maker's in-person attendance. If attempting to settle the case is important to your client, then attending the settlement conference in-person should be equally important, especially if your client is the party who requested the settlement conference. In-person attendance also is respectful of the other parties who have arranged to be personally present.

C. The trial attorney and, if applicable, the settlement attorney for each party must attend the settlement conference in person. If a party's trial attorney is from outside Oregon, then that attorney and that party's Oregon counsel must be physically present at the settlement conference.

D. Identify by name and title the attendees to the settlement conference.

E. Appropriate attendees are the named parties (individuals and designated representatives of companies, organizations, and public bodies), and the lawyers of record for the parties. Settlement counsel also is an appropriate attendee. I do not discuss the case with and do not allow any other persons to participate in a settlement conference, unless the person's participation or attendance is requested by the party's attorney of record and I approve the request in advance.

II. Position Statement.

Any settlement conference statement that does not comply with the following requirements will be returned to the party who submitted it for revision and re-submission:

A. Limit the statement to eight (8) pages. Eight pages means eight pages.

B. Do NOT submit a position statement that reads as if it is a summary judgment brief. Do not try to convince me that you certainly will obtain or thwart summary judgment, or that you are certain to prevail at trial. If you or your client are that confident about your case, then a settlement conference is a waste of everyone's time. Go to trial instead.

C. Be candid. Candor is key to your credibility with me and to my ability to effectively mediate your case. No purpose is served by praising your strengths and admitting no weaknesses, or by discussing only the myriad shortcomings of the opponent's case. Any unfavorable aspect of your case that you choose to not share with me usually appears in the other side's position statement, so omitting weaknesses will damage your credibility with me before the settlement conference even begins. Again, if you really believe your case is that good, then go to trial.

D. Be timely. Please send me your position statement no later than five (5) business days

in advance of the date the settlement conference will occur. Late statements reduce my ability to be fully prepared for the conference. **To facilitate timely submission of your statement, you may e-mail it directly to me at John_Acosta@ord.uscourts.gov. If you e-mail your statement DO NOT also send me a copy by mail, and vice versa.**

E. Your position statement must address these points:

1. The three (3) best and three worst facts for your case.
2. Any legal issues which, when ruled upon, could substantially change your client's position in the case, either favorably or unfavorably.
3. An explanation of any factors making settlement difficult for the parties.
4. Any common goals that might facilitate settlement.
5. The status of settlement negotiations, including the last settlement proposal made by each party. Please tell me if the parties have settled some part of the case already, and identify the issue or issues that have been settled.
6. The fees and costs you have incurred to date, and an estimate of the anticipated fees and costs you will incur to prepare, try, and participate in an appeal of the case.
7. The range – reasonable and realistic – you currently consider appropriate for settling the case. **Note:** this is not an invitation to tell me your "bottom line" number, which I do not want to know, at least not at the outset of the settlement discussions.

You may attach key exhibits, reasonable in number and length, such as documents constituting the alleged contract, letters or e-mails that contain an alleged admission or memorialize key facts, and similar documents, if the exhibits are critical to understanding the case or the parties' respective positions.

III. Settlement Authority.

The party who is in the position of being the paying party (usually the defendant or defendants) must come to the settlement conference with enough authority to settle the case. Opinions will vary on what amount of money constitutes "enough authority." I appreciate that the parties disagree on the settlement value of the case and that they asked for a settlement conference at least in part for that reason. However, the paying party's representative should not attend the settlement conference if s/he has been told by someone else not attending the settlement conference that s/he must get a settlement for "X" because the paying party won't agree to settle the case for more than that, no matter what. Such a position does not allow for changes in the negotiating position when new information or new perspectives are revealed or discussed during the settlement conference.

IV. Preparation.

Participants should be prepared in advance of the settlement conference in each of the below-listed areas. **NOTE: IF ANY PARTY TO A PROPOSED SETTLEMENT CONFERENCE IS UNABLE TO MEET ANY OF THESE EXPECTATIONS, I WILL DECLINE TO CONDUCT YOUR SETTLEMENT CONFERENCE.**

A. Know whose turn it is to make the next number. Lawyers often arrive at the settlement conference and disagree which party is to make the next settlement number. **The parties should arrive at settlement conference having talked about and agreed which of them is to make the next settlement number.**

B. Don't show up at the settlement conference with a new settlement position, or asserting new claims or defenses not previously disclosed to the other side sufficiently in advance of the settlement conference. No one likes unpleasant surprises. At the settlement conference, then, the plaintiff should not give me a higher number and the defendant should not give me a lower number than the parties had discussed prior to the settlement conference. Such changes negatively affect the entire process and impair my ability to move the parties toward a settlement. If you or your client must change a prior position, convey it to the other side as soon as possible before the settlement conference or contact me to discuss it so that I can advise you how best to proceed. Note: "as soon as possible" does **not** mean late in the afternoon of the day before the settlement conference. Don't play games.

The same is true for new claims and new defenses. Parties prepare their settlement positions based on an analysis of existing claims and defenses. The plaintiff should not assert for the first time at the settlement conference one or more new claims not previously contained in the complaint or disclosed to the defendant; similarly, the defendant should not assert for the first time new substantive defenses. **If you arrive at the settlement conference using as a negotiation tactic the threat of asserting new claims or defenses, I will cancel the settlement conference and assess you and your client with the other side's attorney fees and costs incurred to prepare for and attend the settlement conference.**

C. Agree on the range of economic damages at issue before you arrive. Parties frequently arrive at settlement conference with greatly contrasting assumptions and calculations about the economic damages, past and future, at issue in the case. There often is disagreement over even the most basic and easily determined facts such as hourly wage or annual salary, the type and value of benefits, the value of lost sales or the business itself, and the amount of mitigation achieved. These disagreements delay progress and subtract from the time available to work through more difficult issues relevant to settlement.

D. Exchange material terms of settlement before you arrive. Don't insist on or propose new substantive conditions for settlement after the parties have reached agreement on the amount or the other non-economic terms. If a term or condition is essential to your client's

willingness to settle, propose it early. Preferably, counsel should exchange written settlement terms, even if only in bullet-point form, in advance of the settlement conference so that each side knows what other understands by "settlement."

E. Come prepared to give-up stuff. Settlement is a compromise, not a capitulation. Don't show up expecting the other side to give you everything you want or that I will be able to convince it to do so. If the case is to settle, one side will have to pay more than it hoped to pay and the other side will have to accept less than it hoped to get.

F. Expect that at some point during the process you will be outside your predetermined comfort zone. It is counter-productive and ultimately unrealistic to come into a settlement conference having already decided that you will not take less than a certain amount or not pay more than a certain amount. Almost always, parties who begin with that mind-set change their minds during the process. Keep an open mind and allow for the likelihood that you will hear information, arguments, and perspectives you hadn't considered previously.

G. Make meaningful and good-faith offers and counter-offers. Yes, it's scary to be the first one to make a "big" move. But, somebody has to do it first so it might as well be you. How does this help your settlement posture? Once you do, you give me the leverage to convince the other side to make a similarly meaningful move and you make it more difficult for the other side to justify incremental increases or decreases in its numbers. Plus, it moves the process toward final resolution more quickly and effectively.

H. Be reasonable – or you will pay. Taking reasonable positions is the best approach to maximizing the chance to settle the case. It also is the best way to avoid being penalized if the case does not settle. In *Ingram v. Oroudjian*, 647 F.3d 925, 927 (9th Cir. 2011), the Ninth Circuit, following the Third, Seventh, and Eighth Circuits, held that a district court may properly "consider settlement negotiations for the purpose of deciding a reasonable attorney fee award[.]" *See also In re Kekauoha-Alisa*, 674 F.3d 1083, 1093-94 (9th Cir. 2012)(same). Be aware that some areas of law, such as copyrights, have specific rules requiring the court to consider the parties' litigation conduct when determining a party's subsequent request for attorney fees. *See, e.g., Countryman Nevada, LLC v. DOE-73-164-181-226*, Case No. 15-cv-433-SI, 2016 WL 3437598 (D. Or. June 17, 2016). **So, be warned:** if your case is one in which attorney fees can be awarded, you will pay more (or get less) if you are unreasonable in settlement negotiations and found to have "unduly extended the duration of the litigation" by not "aggressively pursu[ing] settlement at the early stages of the case[.]" *Ingram*, 467 F.3d at 927-28.

Voluntariness

This is a voluntary process. Unless the assigned judge has ordered the parties to participate in a settlement conference, the parties' participation is by agreement and any party may elect at any time to discontinue its participation in a settlement conference. In other words, you can quit when you want and I won't make you stay. Also, I will not exercise any authority as a judge to order or require any party to make an offer, accept an offer, or settle the case. If the case settles, it will be because the parties willingly decide to settle it.

Good Faith

I expect that parties who voluntarily agree to participate in a settlement conference do so with the intent of participating in good faith and with a genuine interest in reaching a settlement agreement, and not for some other reason. Remember *Ingram*.

Confidentiality

This is a confidential process, both during and after it concludes. First, I will not disclose discussions with one party to another party without the consent of the disclosing party. Note, however, that I will advise each party generally how I perceive the other parties to be responding to the process and whether I believe progress is being made. Confidentiality survives the settlement conference whether or not the case is settled, and it continues to apply to any settlement discussions, written or oral, in which the I am involved after the conference.

Second, communications exchanged between the parties and me or between the parties during the conference are privileged and confidential, and are not admissible as evidence in the pending case, should settlement not occur. *See* Local Rule 16-4(g), "Alternate Dispute Resolution – Proceeding Privileged." Likely, such communications, as well as communications between a party and its attorney regarding mediation and settlement, are not admissible in any other judicial proceeding as well. On these points, at least one judge in this district has so ruled. *See Fehr v. Kennedy, et al.*, No. 08-1102-KI, 2009 WL 2244193 (D. Or. July 24, 2009). Note, however, that there might be exceptions to the general rule of settlement communications confidentiality, depending on the case's subject matter or the status of one or more parties. *See, e.g.*, ORS 36.224, "State agencies; confidentiality of mediation communications; rules. (1) Except as provided in this section, mediation communications in mediations in which a state agency is a party, or in which a state agency is mediating a dispute as to which the state agency has regulatory authority, are not confidential and may be disclosed or admitted as evidence in subsequent adjudicatory proceedings, as described in ORS 36.222 (7)."

Nonetheless, remember that *Ingram* allows evidence of settlement negotiations as relevant to the trial judge's attorney fee determination. Also, documents and facts disclosed by the parties during discovery or in other case proceedings that are subsequently used or referred to during the settlement conference are not confidential simply because they are used or referred to during the

settlement conference. In other words, discoverable information cannot be protected by using it or referring to it during a settlement conference.

Third, if the case does not settle, I will not disclose to the assigned judge anything other than the case did not settle, or any opinions and observations I might have about the parties' positions, arguments, offers and counteroffers, as well as the discussions I have with the parties (but: remember *Ingram*).

Fourth, whether or not the case settles, after the settlement conference the parties and their attorneys, and their other representatives, are prohibited from disclosing, discussing, or characterizing in any way the negotiations, the positions of the parties or any of them, and the outcome of the settlement conference by any means, including but not limited to through or on a website, any form of social media, the press, orally, in writing, and in any other manner of communication, dissemination, or disclosure to any person, entity, and the public generally. The only exceptions to this prohibition are the consent of all parties who attended the settlement conference and the express permission of the court.

Violation of any aspect of this confidentiality provision will result in sanctions, the form and severity of which to be decided in my sole discretion.

Caucuses

During the settlement conference I will meet with each party and the party's attorney, and more than once. These individual caucuses allow the parties and their attorneys to speak privately and candidly with me about the case and about options for reaching settlement. These individual caucuses will vary in length, depending on the complexity of the case and the settlement negotiations. There will be times when I am in the other party's room for extended periods of time. During such periods your patience is appreciated.

Conclusion of the Settlement Conference

The settlement conference likely will result in one of three possible outcomes: settlement, no settlement, or continuation of settlement discussions beyond the day of the settlement conference. If an agreement to settle the case is reached, I might ask the parties and their attorneys to sign a document that contains the essential terms of the parties' agreement before they leave the courthouse. Alternatively, one side may bring a draft agreement for that purpose. In some cases a written agreement will be signed later because of agreed-upon contingencies that must be satisfied. In those cases, I might ask the parties to go on the record in court or sign a memorandum of understanding to state that they have agreed in principle to settle the case, states the terms of the understanding, and makes clear there is no agreement until the contingencies have occurred or been satisfied and the parties have signed the final agreement.

Post-Conference Procedure

If the parties reach a settlement, I will report the case as "settled" to the assigned judge. You then should expect the assigned judge to issue some form of dismissal order. A judge may vacate a dismissal order if the settlement is not consummated (*e.g.*, the paying party fails to pay), but another possibility is that the judge will leave the order in place and the aggrieved party will be required to pursue a breach of contract claim.

If the parties wish, I will retain jurisdiction over the settlement for purposes of resolving any disagreements about the settlement terms. This must be a specific provision of the settlement agreement and should be included in a final order of dismissal.