

## **Mediation Preparation Considerations for Court-Annexed Programs<sup>1</sup>**

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\*\*Draft\*\***

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<sup>1</sup> Developed by members of the ABA's Court ADR Committee in 2024 in connection with John Lande's Real Practice Systems. [How Can Courts – Practically for Free – Help Parties Prepare for Mediation Sessions?](#) A special thank you to John Lande for the suggestion and to Court ADR Committee members Elizabeth Chaney (DC) and Margaret Huang (NH) for taking the lead on developing the Mediation Preparation Considerations.

## Overview

As part of case administration, many state and federal courts<sup>1</sup> suggest, encourage, or mandate party participation in mediation.<sup>2</sup> The National Standards for Court-Connected Mediation<sup>3</sup> states: “The degree of a court’s responsibility for mediators or mediation programs depends on whether a mediator or program is employed by or operated by the court, receives referrals from the court or is chosen by the parties themselves.”

Given variations in program design, the types of cases, and party participants, courts can enhance their mediation programs by developing materials<sup>4</sup> for program participants focused on mediation preparation. The Best Practice Guidelines and Considerations were developed to assist courts in creating materials suited for their specific mediation programs. In developing the Guidelines and Considerations, the ABA’s Court ADR Committee considered numerous factors, including the following:<sup>5</sup>

- 1) The level of court involvement, including whether the court has a screening process for case assignments;
- 2) Whether the parties or the court chooses the mediator;
- 3) The timing of the mediation, including any statutory time considerations;
- 4) The type of case, from relatively simple small claims cases to complex, multi-party litigation; and
- 5) Whether most of the parties have attorney representation or are self-represented (referred to as “self-represented litigants” (SRL) or *pro se*).

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<sup>2</sup> Many court-annexed alternative dispute resolution (ADR) programs offer other forms of ADR aside from mediation such as neutral evaluation and facilitative communications. Although these Guidelines and Considerations focus on mediation as that is the most used form of ADR, these Guidelines and Considerations can be adapted for developing materials for other forms of ADR used in court-annexed programs/

<sup>3</sup> A Link to the National Standards is included in the Appendix.

<sup>4</sup> Many courts already have materials. These Guidelines and Considerations can be used to revised existing materials. It is suggested that courts annually review their written materials to consider whether any updated are needed.

<sup>5</sup> For example, a small claims mediation program where parties are required to mediate on the day of their trial has different needs than an appellate mediation program where attorneys are common on both sides and often choose the mediator.

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Links to Sample Mediation Preparation Forms

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**Resources**

Sample mediation statement form

Sample one page handout/summary for self-represented litigants (SRL's)

## **A. Preparation for Self-Represented Litigants**

### **1. Court-annexed mediation programs**

Regardless of whether a case is simple or complex, or mediation will be at the trial level or at the appellate level, court resource materials for self-represented litigants regarding mediation preparation should provide self-represented litigants with clear and helpful information.

All court-annexed mediation programs should ensure that materials focused on mediation preparation:

- 1) Are written in plain language;<sup>ii</sup>
- 2) Are well-designed, including links to videos describing the mediation process and/or the court's mediation program (if available);
- 3) Are accessible;<sup>iii</sup>
- 4) Are accessible in multiple languages;
- 5) Are available on the court's website.<sup>iv</sup>

Communication from the court to the litigant about mediation should:

- 6) Include the place and time of mediation; whether virtual and/or online participation is permissible;
- 7) Address the fee for mediation (if applicable) and how the fee is to be paid;
- 8) Address the required participants, and whether other individuals aside from required participants may attend;
- 9) Include a format (such as a form) for written mediation submissions, if appropriate
- 10) Address whether the session(s) will be joint, separate, or some combination thereof;
- 11) Address security considerations;
- 12) Address needs for accommodation such as an interpreter, and/or other accessibility issues;
- 13) Explain the scope of confidentiality in connection with any aspect of the mediation process

### **2. Preparation materials**

Self-represented litigants do not have the luxury of having an attorney assist them with preparing for mediation. As such, court programs can create resources to assist self-represented litigants with preparing for mediation.<sup>v</sup>

At a minimum, resources provided can help self-represented litigants think through:

1. Documents that should be brought to mediation to assist in effective discussion of the issues;
2. Barriers to settlement;
3. Interests of the various parties.

Sample questions and forms are provided in the appendix.

## **B. Attorney Preparation**

### **1. Guidance for attorney-client mediation preparation conversations**

Courts should provide guidance for attorneys as to the best ways to prepare their clients for mediation. Attorneys should be reminded of the importance of consulting with their clients in advance of mediation. Attorneys need to ensure that clients are knowledgeable about the process and understand the difference between litigating and participating in mediation.

Generally, attorneys should discuss with their clients the following:

1. The role the attorney will play in the mediation/the role the client will play in the mediation;
2. The role the mediator will play;
3. The strengths and weakness of the case;
4. The risk and costs of moving forward with litigation;
5. An estimate of the actual costs and hours;
6. Discussion of settlement/resolution parameters;
7. Who will attend the mediation;
8. The materials the attorney would like the party to prepare;
9. Any accommodations that are needed (emotional support animals or individuals; other aids or assistance); and
10. The materials the attorney will prepare on behalf of the client.

### **2. Mediation Statements**

When appropriate, courts should create guidance for attorneys around the submission of mediation statements;<sup>vi</sup> including clarifying the scope of confidentiality for mediation statements.<sup>vii</sup>

Mediation statements (Shared or Confidential) should address the following:

1. Who the parties are;
2. What the nature of the relationship is;
3. When did the dispute emerge and how was it discovered;
4. What is the nature of the dispute;
5. What has happened since the dispute was discovered;
6. What damage has the dispute caused each party;
7. Is there an ongoing or future relationship between the parties;
8. Who are the key players;
9. What is the relevant procedural history;
10. What are the critical issues that would be dispositive of the case;
11. What is the history of settlement negotiations, including each side's last settlement offer;

12. Any accommodations that are needed, and the process for addressing accommodations.

### **C. Mediator Preparation**

A well-prepared mediator is integral to developing trust with parties and improves procedural justice. Courts should provide a framework for court-sponsored mediators to follow when preparing for mediation and should incorporate the Model Standards of Conduct for Mediators. Model Standards of Conduct for Mediators, Standard I. Self-Determination; Standard VI. Quality of Process (Am. Bar Ass'n, Ass'n for Conflict Resol., and Am. Arb. Ass'n 2005).

Preparatory framework for mediators:

1. Conflict Check
2. Appropriateness for mediation

Mediator should consider questions such as:

1. Ability of litigant to bargain (mental incapacity, cognitive defect, fear) and whether accommodations are appropriate;
2. Does one party appear to use the mediation for purposes inconsistent with the mediation process (delay, discovery, intimidation)
3. Identifying all necessary participants (often more than parties such as insurance representatives, other individuals besides attorney with authority, etc.)
4. Willingness to mediate (are there moral, religious, political convictions here that are at play and may impede the process from moving forward).

3. Review Submissions of Mediation Statements, Screening statements (if available). (See sample form Screening Statements, Confidential Mediation Statements)
4. Pre-session communication with each party or attorney. If pre-session communication is feasible, mediators should contact each side after reviewing submissions and before starting the mediation session.
  - a. Sample Agenda
    - i. Introductions
    - ii. Scope of confidentiality
    - iii. Role of the mediator and the process
    - iv. Check for potential conflicts with the mediator
    - v. Discussion of the dispute
      1. Parties (relationship)
      2. Procedural posture/timing of the case
      3. Any offers of settlement to date
      4. Scope (determine whether there are any side issues or disputes)

5. Information that the parties may need to prepare for mediation or to advance settlements (e.g., further discovery, appraisal or inspection of property, professional estimates of repair costs..)

vi. Logistics

1. Selecting a date for the mediation session (if necessary)
2. Determine who will participate (authority to settle)
3. Use of the online platform (if used)
4. Any aids, accommodations, and/or assistance needed by any participant

vii. Structure of the Session

1. Role of the clients and counsel
2. Role of the SRL ( address power balance concern)
3. Openings (length; focus; client or counsel speak?)
4. Caucus v. Plenary sessions
5. General discussions of expectations, opportunities to make the session productive, or obstacles to overcome

viii. Additional topics, suggestions, or questions from counsel/SLR

ix. Explanation of next steps

## Appendix

## **PARTY CONSIDERATIONS IN ADVANCE OF MEDIATION**

### **Worksheet**

1. What do they need the mediator to know?
2. What is one thing they hope to learn from the conversation?
3. What is something important to them that they would like to share?
4. What would help them fully participate in the conversation?
5. What are the goals that they would like to achieve in a mediated outcome?
6. What are the expectations they have for mediation?
7. What are the issues that are non-negotiable for them and the other side?
8. What are the issues where compromise is possible for them and the other side?
9. What are possible settlement options?

## RESOURCES AND OTHER LINKS

- A. Mediation Preparation Form: <https://www.courts.nh.gov/sites/g/files/ehbemt471/files/documents/2022-08/nhjb-2876-dp.pdf>
- B. Mediation Screening and Confidential Mediation Statement forms: <https://www.dccourts.gov/court-of-appeals/appellate-mediation>

Example of Webpage: <https://www.courts.nh.gov/resources/mediation/circuit-court-adr/landlord-tenant>

Appellate Mediation Program – Party’s Confidential Mediation Statement:

<https://www.courts.nh.gov/sites/g/files/ehbemt471/files/documents/2021-04/nhjb-2616-sup.pdf>

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### *Links to Specific Federal ADR Programs*

#### **Northern District of California**

<https://cand.uscourts.gov/about/court-programs/alternative-dispute-resolution-adr/>

#### **District of Columbia**

<https://www.dcd.uscourts.gov/court-mediation-program>

#### **Southern District of Illinois**

<https://www.ilsd.uscourts.gov/mediation/mediationmain.aspx>

#### **Western District of Missouri**

<https://www.mow.uscourts.gov/district/map>

#### **Southern District of New York**

<https://www.nysd.uscourts.gov/programs/mediation-adr>

#### **Western District of New York**

<https://www.nywd.uscourts.gov/alternative-dispute-resolution>

#### **Eastern District of New York**

<https://www.nyed.uscourts.gov/alternative-dispute-resolution>

#### **Pennsylvania Middle District Court**

<https://www.pamd.uscourts.gov/alternative-dispute-resolution>

### ***Select State Court Resources***

California, <https://www.courts.ca.gov/programs-adr.htm>

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Maryland, <http://www.courts.state.md.us/macro/>

### ***Other Select Resources***

Resolution Systems Institute (RSI). RSI is a non-profit organization based in Chicago, IL providing services in the areas of Court Research & Evaluation, Alternative Dispute Resolution, Court ADR Program Design, and Court ADR Program Administration. [www.aboutrsi.org](http://www.aboutrsi.org).

MACRO, “Maryland ADR Research”; <https://mdcourts.gov/macro/researchevaluation>

B. Wright, *Self-Determination in Mediation*, May 13, 2022, [www.mediate.com](http://www.mediate.com).

John Lande, *Planning for Good Quality Decision-Making in Mediation Using Two-Stage Mediation*, May 9, 2019, [www.indisutably.org](http://www.indisutably.org).

<sup>ii</sup> For resources on plain language see <https://www.srln.org/taxonomy/term/200>

<sup>iii</sup> Guidance on accessibility can be found here: <https://archive.ada.gov/pcatoolkit/abouttoolkit.htm>

<sup>iv</sup> For more information on how to design a webpage, see <https://guides.18f.gov/content-guide/our-approach/structure-the-content/>

<sup>v</sup> Courts with more resources may wish to consider conflict coaching as a way of preparing parties for mediation.

<sup>vi</sup> For more information on mediation statements see “First Impressions: Drafting Effective Mediation Statements”

<sup>vii</sup> Uniform Mediation Act Sections (2)(2) and (4) recommend privileging these statements