ORDER AND INSTRUCTIONS
FOR
SETTLEMENT CONFERENCES
WITH
U.S. MAGISTRATE JOHN ACOSTA
(rev. 6.30.26)

I. Attendees.

A. Parties: Each party's decision-maker must be present in-person or by Zoom. "Decision-maker" means the person who possesses full and final authority to settle the case without need to contact or confer with a person who is not participating in the settlement conference. If a party has multiple decision-makers who are not present, the attending decision-maker must have unrestricted authority to settle the case. If a public body's or private entity's governing body must give final approval to a tentative settlement, the attending decision-maker must be able to represent that the governing body likely will follow their settlement recommendation.

B. Attorneys: The trial attorney and, if applicable, the settlement attorney for each party must participate in the settlement conference. If a party's trial attorney is from outside the District of Oregon, then both the trial attorney and that party's Oregon counsel must attend the settlement conference.

C. Names and Titles: Identify by name and title each attendee who will represent your side at the settlement conference.

II. Position Statement.

A settlement conference position statement that does not comply with the following requirements will be returned to the party who submitted it.

A. Ten-page limit in letter format. Ten pages means ten pages, single spaced. Use standard margins and no smaller than 12-point font.

B. No "summary judgments". Don't argue that you certainly will obtain or defeat summary judgment or prevail at trial. You will only damage your credibility with me. If you or your client is that confident about your case, then skip the settlement conference and go to trial.

C. Be candid. Candor is key to your credibility with me. If you mention only strengths and admit no weaknesses, the weak aspects of your case are sure to be mentioned in the other side's position statement.

D. Be timely. Submit your position statement no later than five (5) business days before the date of the settlement conference. Send it to me at **John_Acosta@ord.uscourts.gov**. Late statements reduce my ability to understand your position.

E. Address these points:

1. The three (3) best and three worst facts for your case.

2. The legal issues that could change your client's position favorably or unfavorably.

3. The damages claimed and the method for calculating them. (Plaintiffs and defendants each are to provide this calculation.)

4. The factors making settlement difficult for the parties.

5. The common goals that might facilitate settlement.

6. The status of settlement negotiations, including the last settlement proposal made by each party.

7. The fees and costs incurred to date, and the anticipated fees and costs to prepare and try the case.

8. The reasonable and realistic range you currently consider appropriate for settling the case. **NOTE: I'm not asking you to tell me your "bottom line" number, only a range, which you <u>must</u> provide.**

9. The reasonable and realistic range of a jury verdict should the plaintiff prevail at trial.

You may attach key exhibits, **reasonable in number and length**, that are critical to understanding the case.

<u>III. Settlement Authority</u>.

The party who is in the position of being the paying party (usually the defendant) must come to the settlement conference with enough authority to settle the case. "Enough authority" does <u>not</u> mean a predetermined and unyielding amount based on purportedly similar cases, as determined by someone not attending the settlement conference. Similarly, the plaintiff must come to the settlement conference with an open mind, untethered to a prejudged outcome or to "similar cases".

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IV. Preparation.

Participants must be prepared in each of the below-listed areas.

A. Know whose turn it is to make the next number – and know what the previous numbers have been. Lawyers often arrive at the settlement conference and disagree over which party is to make the next settlement number or even over the settlement amounts previously exchanged. **The parties should arrive at the settlement conference having talked in advance about and agreed upon these two questions.**

B. Don't show up at the settlement conference with a new settlement number or asserting new claims or defenses not previously disclosed to the other side. No one likes unpleasant surprises. At the settlement conference, the plaintiff should not open with a number higher than previously discussed, and the defendant should not provide a number lower than previously discussed. If you or your client must change a prior settlement position, convey it to the other side or to me as soon as possible before the settlement conference. **"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.

C. Determine the range and components of economic damages at issue before you arrive. Parties frequently arrive at the 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 an asset or lost sales; damage to the business itself, its market position, or its brand; and the amount of mitigation achieved. These disagreements delay progress and reduce the time available to work through more difficult issues relevant to settlement. Explaining your damages evaluation in advance of the settlement conference helps me facilitate negotiations.

D. Timely provide relevant discovery before the settlement conference. Parties sometimes appear for the settlement conference without having made critical relevant discovery or, almost as bad, made that critical discovery only on the eve of the settlement conference. If the other party previously requested documents months before or if there are documents that you know you would be ordered to produce on a motion to compel, then timely produce those documents before the settlement conference. **"Timely" means sufficiently in advance of the settlement conference to allow the requesting party enough time to properly review the documents and determine how they affect the settlement evaluation. Don't play games.**

E. If the parties are engaging in early mediation, don't show up thinking your case is great. Before full discovery is completed or discovery even has begun, everybody thinks their case is great. It's not, or at least not as great as you think. You haven't seen the other side's case, haven't received documents that contradict your theory of the case, haven't seen and heard the opposing party or each side's witnesses testify in deposition, and haven't weathered a storm of unfavorable rulings on motions. The great majority of cases that don't settle early end up settling later for a number that wasn't as good, all things considered, as the number you could have settled for many months earlier and before you spent a lot of time and money getting there. A 25% adjustment, up or down, to your settlement range usually accounts for these unknowns.

F. Exchange material terms of settlement before you arrive. Don't insist on or propose new material settlement terms or conditions after the parties have reached agreement on the amount to be paid or on non-monetary terms. If a term or condition is essential to your client's willingness to settle, propose it early. **This includes so-called "boilerplate" provisions, such as confidentiality, tax and indemnification obligations, allocation of the settlement payment, no rehire, and non-disparagement.** 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 "settlement" means.

G. 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.

H. 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 to 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 mindset end up changing their position during the process, sometimes more than once. Keep an open mind and allow for the likelihood that you will hear information, arguments, and perspectives you hadn't considered previously or did not think would be important to an impartial party's assessment of your case.

I. Don't open with a ridiculous number. Nothing is achieved except wasting valuable time if a plaintiff opens discussions with the complaint prayer or the best-case verdict, or if the defendant responds with the costs-of-defense or nuisance-value number. Don't posture. Start with a reasonable number that you can support with a practical analysis.

J. Be reasonable. Taking reasonable positions, including at the very beginning of the settlement conference, is the best approach to maximizing the chance to settle the case. It also is the best way to avoid having to pay (or lose) attorney fees if the case is not settled. In *Ingram v. Oroudjian*, 647 F.3d 925, 927 (9th Cir. 2011), the Ninth Circuit held that a district court may properly "consider settlement negotiations for the purpose of deciding a reasonable attorney fee award[.]" Judge Stewart of this court analyzed *Ingram's* rule to deciding an attorney fee petition:

> In response to plaintiff's motion, the County has disclosed a verbal offer of settlement made to plaintiff during a judicial settlement conference on October 1, 2014, as well as subsequent communications relating to that offer. Contending that these communications are inadmissible under FRE 408 and LR 16–4(g), plaintiff seeks to either strike them or place them under seal.
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> The County offers the communications to show that plaintiff rejected a settlement offer in October 2014 that was essentially identical to the offer she accepted in April 2015, thus demonstrating that her attorneys failed to improve her position in any meaningful way. For that purpose, neither FRE 408 nor LR 16–4(g) renders the communications inadmissible.
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> In the Ninth Circuit, a trial judge is permitted to consider settlement negotiations in determining a reasonable amount of attorney fees. In *Ingram v. Oroudjian,* 647 F3d 925 (9th Cir2011), the trial court reduced the plaintiff's requested attorney fees based largely on the plaintiff's limited success in light of the settlement offers made by the defendant and rejected by the plaintiff. In affirming that reduction, the Ninth Circuit followed the approach taken by the Third, Seventh, and Eighth Circuits (as well as the Fourth, Sixth, and Tenth Circuits) and held that "the district court did not err by considering settlement negotiations for the purpose of deciding a reasonable attorney fee award in this case." *Id* at 927.
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> Moreover, a trial court commits plain and reversible error by concluding that it cannot consider settlement offers in making such a determination. In *In re Kekauoha–Alisa v. Ameriquest Mortg. Co .,* 674 F3d 1083 (9th Cir2012), the Ninth Circuit reversed a trial court ruling "that it was prohibited from admitting evidence of the settlement offer by Federal Rule of Evidence Rule 408" when considering a request for attorney fees. *Id.* at 1094. Citing *Ingram,* the court stated that for the purposes of determining a reasonable amount of attorney fees, "it is now clear that this evidence [of settlement negotiations] is admissible." *Id.* It again reversed a trial court for that same reason in *A.D. v. Cal. Highway Patrol,* 712 F3d 446 (9th Cir2013), explaining:
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> > The reasonableness of the [attorney] fee is determined primarily by reference to the level of success achieved by the plaintiff. In evaluating the plaintiffs' level of success, district courts should consider two questions: First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff

> achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

> *Id.* at 460 (citations and internal quotations omitted).
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> In analyzing the second question, the court confirmed that "[u]nder the law now in effect, Federal Rule of Evidence 408 does not bar district courts in the Ninth Circuit from considering amounts discussed in settlement negotiations as evidence of the extent of the plaintiff's success." *Id.* at 460–61, citing *In re Kekauoha–Alisa,* 674 F3d at 1093–94, and *Ingram,* 647 F3d at 927.
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> Therefore, plaintiff's motion to strike or seal the County's references to the settlement negotiations is denied.

Miranda-Oliveras v. Clackamas County, No. 3:12–cv–02317–ST, 2015 WL 5093752, at *1-2 (D. Or. Dec. 21, 2016) (footnotes omitted). *See also Shaklee & Oliver, P.S. v. United States Citizenship and Immigration Service*, Case No. 20-cv-0806-RAJ, 2021 WL 4148175, at *2 (W.D. Wash. Sept. 13, 2021) (citing cases that hold settlement communications are admissible on a limited basis to determine a reasonable amount of attorney fees).[1]

Consistent with the above and in my discretion, be advised that if I determine that a party has engaged in unreasonable settlement conduct, I will inform the assigned judge of my observation.

V. Format and Process.

A. Voluntariness. This is a voluntary process. I have no authority to order or require any party to make an offer, accept an offer, or settle a case. If the case is settled, it will be because the parties willingly decide to settle it. Any party may elect at any time to discontinue its participation in a settlement conference. If the assigned judge has ordered the parties to participate in a settlement conference, then I will require the parties to continue settlement discussions until the case has settled or I have determined that settlement is not possible, whichever first occurs.

B. Good Faith: I expect the parties to participate in a settlement conference in good faith and with a genuine interest in reaching a settlement agreement, and not for some other reason. Remember *Ingram* and its progeny cases.

[1] Be aware also 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).

C. 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. I will, however, inform each party generally how I perceive the other parties to be responding to the process and whether I believe progress is being made. Confidentiality continues to apply to any settlement discussions, written or oral, in which the I am involved after the conference **and also survives the settlement conference whether the case does or does not settle. Violation of settlement conference confidentiality by a party or counsel could result in sanctions.**

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. By agreeing to me as the mediator, you agree to the requirements of U.S. District Court, Oregon, Local Rule 16-4(g), "Alternate Dispute Resolution – Proceeding Privileged," and to the applicability of the mediation process protections set out in ORS Chapter 36, "Mediation and Arbitration." **Under no circumstances may you compel me to provide evidence in a dispute in any forum over whether a settlement occurred, or on any other issue or topic that was part of the mediation.** By agreeing to me as the mediator, you agree to this condition. (Nonetheless, remember again that under *Ingram*, the parties' settlement conduct is relevant and can be disclosed to the trial judge's attorney fee determination.)

Third, exceptions might apply to confidentiality, depending on your 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)."

Fourth, 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 or withheld by using it or referring to it during a settlement conference.

Fifth, if the case does not settle, I will not disclose to the judge assigned to your case anything other than that the case did not settle, except as relevant and applicable under *Ingram*.

Sixth, note the exception to confidentiality under Local Rule 16-4(g): "In a dispute between the parties regarding the terms of the settlement, the terms of the settlement as communicated by the mediator and accepted by the parties are not privileged under LR 16-4(g)(1)."

D. Caucuses. I will meet separately with each party and the party's attorney, and more than once, and I do not convene the parties together in a group, although I make exceptions when circumstances require, such as confirming a settlement agreement on the record when I deem it necessary to do so. I usually begin with the plaintiff, then switch to the defendant. Individual caucuses allow the parties and their attorneys to speak privately and candidly with me about the case and about the options for reaching settlement. These individual caucuses will vary in length, depending on the complexity of the case and the progress of the settlement negotiations. There will be times when I am in the other party's room (virtual or physical) for extended periods of time. During such periods, your patience is appreciated.

E. Conclusion of the Settlement Conference: Possible outcomes of the settlement conference are a settlement, no settlement, or a continuation of settlement discussions after the settlement conference. If an agreement to settle is reached, I might ask the parties and their attorneys to sign a document that contains the essential terms of the parties' agreement. Alternatively, one side may bring a draft agreement for that purpose. Occasionally, a final written agreement will be signed sometime after the settlement conference because of agreed-upon contingencies that first must be satisfied. If so, I might ask the parties to sign a memorandum of understanding in which they acknowledge that they have agreed in principle to settle the case and describing the terms of the understanding.

F. Post-Conference Procedure: If the parties reach a settlement, I will report the case as "settled" to the assigned judge. If the parties wish, I will retain jurisdiction over the settlement for purposes of resolving any disagreements about the settlement terms or the performance of their obligations under the agreement. Retained jurisdiction must be a specific provision included in the settlement agreement and in a final order of dismissal entered by the court.