

# Judicial Settlement Conference Procedures



AMERICAN ARBITRATION ASSOCIATION®

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# Judicial Settlement Conference Procedures



## Introduction

While millions of business transactions occur every year without incident, on occasion, disagreements develop. Many disputes are resolved by litigation or arbitration. But many more, in fact nearly all, cases are resolved by parties reaching a settlement.

In order to reach an acceptable settlement parties may seek the assistance of a third party neutral to help them achieve resolution through a facilitated negotiation. Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision-making by the parties to the dispute, providing the opportunity for parties to reach mutually satisfactory agreements, when desired.

But some parties want a higher degree of feedback from their neutral. They want to participate in a dispute resolution process that mirrors the process and shares the goals and objectives of a judicial settlement conference. These parties believe that a candid evaluation of the strengths, weaknesses and value of their claims provided by a respected, retired judge will contribute to a faster, less expensive resolution of their dispute. For them, the AAA<sup>®</sup> offers its Judicial Settlement Conference to assist in achieving a settlement.

AAA developed its Judicial Settlement Conference service to provide businesses, individuals, and government agencies a new Alternate Dispute Resolution procedure historically utilized by courts, that works well, and with which parties and their representatives have confidence and comfort. This service offers faster, more economical resolution of disputes by allowing parties to set their own schedule, select their own neutral and respected retired judge and devise their own remedy.

## Special Panel of Judges

AAA's Judicial Settlement Conference utilizes a specially selected panel of retired Judges who have heard hundreds of cases while on the bench. Their experience conducting court settlement conferences provides the skill to work with parties toward achieving settlement by conducting a fair and neutral airing of the issues.

The AAA has identified and selected a panel for the Judicial Settlement Conference made up of former federal or state trial, appellate and high court judges who have heard a wide variety of cases and have been selected for their skill at conducting settlement conferences.

While the Judicial Settlement Conference Judge assists the parties in reaching a settlement, the Judge does not have the authority to make a binding decision or award. Parties maintain their self-determination in accepting or rejecting the opinions provided or any settlement or resolution proposal. Parties and their representative(s) understand that the Judicial Settlement Conference Judge will comment on the strength or weakness of a case, the relative value of a case, or the likely outcome of subsequent proceedings where the Judicial Settlement Conference Judge deems appropriate. Parties may select whether this evaluative commentary is communicated orally or in writing and in open session or confined to private meetings with the parties during the Judicial Settlement Conference. Judicial Settlement Conferences may be held at locations convenient for the parties and are not limited to cities with AAA offices.

The American Arbitration Association® (AAA), a not-for-profit, public service organization, offers a broad range of dispute resolution services to business executives, attorneys, individuals, trade associations, unions, management, consumers, families, communities, and all levels of government. Services are available through AAA headquarters in New York and through offices located in major cities throughout the United States. In addition, the AAA serves as a center for education and training, issues specialized publications, and conducts research on all forms of out-of-court dispute settlement.

## Judicial Settlement Conference Standard Clause

If the parties want to adopt Judicial Settlement Conference as a part of their contractual dispute settlement process, the following Judicial Settlement Conference clause can be inserted into the contract in conjunction with a standard arbitration provision:

*If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by Judicial Settlement Conference administered by the American Arbitration Association under its Judicial Settlement Conference Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure.*

If the parties choose to use Judicial Settlement Conference to resolve an existing dispute, they can enter into the following submission:

*The parties hereby submit the following dispute to Judicial Settlement Conference administered by the American Arbitration Association under its Judicial Settlement Conference Procedures. (The clause may also provide for the qualifications of the Judicial Settlement Conference Judge, method of payment, locale of meetings, whether the evaluations by the Judicial Settlement Conference Judge are communicated orally or in writing, in private or joint sessions, and any other item of concern to the parties.)*

## Judicial Settlement Conference Procedures

### JSC-1. Agreement of Parties

Whenever, by stipulation or in their contract, the parties have provided for Judicial Settlement Conference of existing or future disputes under the auspices of the American Arbitration Association (AAA) or under these Procedures, the parties and their representatives, unless agreed otherwise in writing, shall be deemed to have made these Procedures, as amended and in effect as of the date of filing of a request for Judicial Settlement Conference, a part of their agreement and designate the AAA as the administrator of their Judicial Settlement Conference.

The parties by mutual agreement may vary any part of these Procedures including, but not limited to, agreeing to conduct the Judicial Settlement Conference via telephone or other electronic or technical means.

### JSC-2. Initiation of Judicial Settlement Conference

Any party or parties to a dispute may initiate Judicial Settlement Conference under the AAA's auspices by making a request for Judicial Settlement Conference to any of the AAA's regional offices or case management centers via telephone, email, regular mail or fax. Requests for Judicial Settlement Conference may also be filed online via AAA WebFile at [www.adr.org](http://www.adr.org).

The party initiating the Judicial Settlement Conference shall simultaneously notify the other party or parties of the request. The initiating party shall provide the following information to the AAA and the other party or parties as applicable:

- i. A copy of the Judicial Settlement Conference provision of the parties' contract or the parties' stipulation for Judicial Settlement Conference.
- ii. The names, regular mail addresses, email addresses (if available), and telephone numbers of all parties to the dispute and representatives, if any, in the Judicial Settlement Conference.
- iii. A brief statement of the nature of the dispute and the relief requested.
- iv. Any specific qualifications the Judicial Settlement Conference Judge should possess.

Where there is no preexisting stipulation or contract by which the parties have provided for Judicial Settlement Conference of existing or future disputes under the auspices of the AAA, a party may request the AAA to invite another party to

participate in “Judicial Settlement Conference by voluntary submission.” Upon receipt of such a request, the AAA will contact the other party or parties involved in the dispute and attempt to obtain a submission to Judicial Settlement Conference.

### JSC-3. Fixing of Locale (the city, county, state, territory and, if applicable, country of the Judicial Settlement Conference)

- i. When the parties’ agreement for Judicial Settlement Conference is silent with respect to locale and the parties are unable to agree upon a locale and:
  - a. The dispute is not a construction dispute, the AAA shall have the authority to consider the parties’ arguments and determine the locale; or
  - b. The dispute is a construction dispute, the locale shall be the city nearest to the site of the project as determined by the AAA.
- ii. When the parties’ agreement for Judicial Settlement Conference requires a specific locale, absent the parties’ agreement to change it, the locale shall be that specified in the agreement for Judicial Settlement Conference.
- iii. If the reference to a locale in the agreement for Judicial Settlement Conference is ambiguous, the AAA shall have the authority to consider the parties’ arguments and determine the locale.

### JSC-4. Representation

Any party may participate without representation (*pro se*), or by any representative of that party’s choosing, or by counsel, unless such choice is prohibited by applicable law. A party intending to have representation shall notify the other party and the AAA of the name, telephone number and address, and email address if available of the representative.

### JSC-5. Appointment of the Judicial Settlement Conference Judge

Parties may view a geographic list of AAA Judicial Settlement Conference Judges on AAA’s website at [www.adr.org](http://www.adr.org) in an effort to agree on a Judicial Settlement Conference Judge. If the parties have not agreed to the appointment of a Judicial Settlement Conference Judge and have not provided any other method of appointment, the Judicial Settlement Conference Judge shall be appointed in the following manner:

- i. Upon receipt of a request for Judicial Settlement Conference, the AAA will send to each party a list of Judicial Settlement Conference Judges from the AAA’s Panel of Judicial Settlement Conference Judges. The parties are encouraged to agree

to a Judicial Settlement Conference Judge from the submitted list and to advise the AAA of their agreement.

- ii. If the parties are unable to agree on a Judicial Settlement Conference Judge, each party shall strike unacceptable names from the list, number the remaining names in order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all Judicial Settlement Conference Judges on the list shall be deemed acceptable to that party. From among the Judicial Settlement Conference Judges who have been mutually approved by the parties, and in accordance with the designated order of mutual preference, the AAA shall invite a Judicial Settlement Conference Judge to serve.
- iii. If the parties fail to agree on any of the Judicial Settlement Conference Judges listed, or if acceptable Judicial Settlement Conference Judges are unable to serve, or if for any other reason the appointment cannot be made from the submitted list, the AAA shall have the authority to make the appointment from among other members of the Panel of Judicial Settlement Conference Judges without the submission of additional lists.

### JSC-6. Judicial Settlement Conference Judge's Impartiality and Duty to Disclose

Judicial Settlement Conference Judges are required to abide by the *Model Standards of Conduct for Mediators* in effect at the time a Judicial Settlement Conference Judge is appointed to a case. Where there is a conflict between the *Model Standards* and any provision of these Judicial Settlement Conference Procedures, these Procedures shall govern. The Standards require Judicial Settlement Conference Judges to: (i) decline to conduct a Judicial Settlement Conference if the Judge cannot conduct it in an impartial manner, and (ii) disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the Judge and could reasonably be seen as raising a question about the Judge's impartiality.

Prior to accepting an appointment, Judicial Settlement Conference Judges are required to make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for the Judicial Settlement Conference Judge. Judicial Settlement Conference Judges are required to disclose any circumstance likely to create a presumption of bias or prevent a resolution of the parties' dispute within the time-frame desired by the parties. Upon receipt of such disclosures, the AAA shall immediately communicate the disclosures to the parties for their comments.

The parties may, upon receiving disclosure of actual or potential conflicts of interest, waive such conflicts and proceed with the Judicial Settlement Conference. In the event that a party disagrees as to whether the Judge shall

serve, or in the event that the conflict of interest might reasonably be viewed as undermining the integrity of the Judicial Settlement Conference, the Judge shall be replaced.

### JSC-7. Vacancies

If any Judicial Settlement Conference Judge shall become unwilling or unable to serve, the AAA will appoint another Judicial Settlement Conference Judge, unless the parties agree otherwise, in accordance with section JSC-5.

### JSC-8. Duties and Responsibilities of the Judicial Settlement Conference Judge

- i. The Judicial Settlement Conference Judge shall conduct the Judicial Settlement Conference based on the principle of party self-determination.
- ii. The Judicial Settlement Conference Judge is authorized to conduct separate or *ex parte* meetings and other communications with the, parties and/or their representatives, before, during, and after any scheduled Judicial Settlement Conference. Such communications may be conducted via telephone, in writing, via email, online, in person or otherwise.
- iii. The parties are encouraged to exchange all documents pertinent to the relief requested. The Judicial Settlement Conference Judge may request the exchange of memoranda on issues, including the underlying interests and the history of the parties' negotiations. Information that a party wishes to keep confidential may be sent to the Judicial Settlement Conference Judge, as necessary, in a separate communication with the Judicial Settlement Conference Judge.
- iv. The Judicial Settlement Conference Judge shall evaluate the merits of the dispute during the Judicial Settlement Conference. The evaluations shall be communicated to each party privately or, if the parties agree, to all parties jointly. Unless parties agree otherwise, evaluations shall be communicated orally.
- v. The Judicial Settlement Conference Judge does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. Subject to the discretion of the Judicial Settlement Conference Judge, the Judge may make oral or written recommendations for settlement to a party privately or, if the parties agree, to all parties jointly.
- vi. In the event a complete settlement of all or some issues in dispute is not achieved within the scheduled Judicial Settlement Conference(s), the Judicial Settlement Conference Judge may continue to communicate with the parties, for a period of time, in an ongoing effort to facilitate a complete settlement.
- vii. The Judicial Settlement Conference Judge is not a legal representative of any party and has no fiduciary duty to any party.
- viii. The Judicial Settlement Conference Judge shall set the date, time, and place for each conference. The parties shall respond to requests for conference dates in a timely manner, be cooperative in scheduling the earliest practicable date, and

adhere to the established conference schedule. The AAA shall provide notice of the conference to the parties in advance of the conference date, when timing permits.

### JSC-9. Responsibilities of the Parties

The parties shall ensure that appropriate representatives of each party, having authority to consummate a settlement, attend the Judicial Settlement Conference.

Prior to and during the scheduled Judicial Settlement Conference(s) the parties and their representatives shall, as appropriate to each party's circumstances, exercise their best efforts to prepare for and engage in a meaningful and productive Judicial Settlement Conference.

### JSC-10. Privacy

Judicial Settlement Conferences and related Judicial Settlement Conference communications are private proceedings. The parties and their representatives may attend Judicial Settlement Conferences. Other persons may attend only with the permission of the parties and with the consent of the Judicial Settlement Conference Judge.

### JSC-11. Confidentiality

Subject to applicable law or the parties' agreement, confidential information disclosed to a Judicial Settlement Conference Judge by the parties or by other participants (witnesses) in the course of the Judicial Settlement Conference shall not be divulged by the Judicial Settlement Conference Judge. The Judicial Settlement Conference Judge shall maintain the confidentiality of all information obtained in the Judicial Settlement Conference, and all records, reports, or other documents received by a Judicial Settlement Conference Judge while serving in that capacity shall be confidential.

The Judicial Settlement Conference Judge shall not be compelled to divulge such records or to testify in regard to the Judicial Settlement Conference in any adversary proceeding or judicial forum.

The parties shall maintain the confidentiality of the Judicial Settlement Conference and shall not rely on, or introduce as evidence in any arbitral, judicial,

or other proceeding the following, unless agreed to by the parties or required by applicable law:

- i. Views expressed or suggestions made by a party or other participant with respect to a possible settlement of the dispute;
- ii. Admissions made by a party or other participant in the course of the Judicial Settlement Conference;
- iii. Proposals made or views expressed by the Judicial Settlement Conference Judge; or
- iv. The fact that a party had or had not indicated willingness to accept a proposal for settlement made by the Judicial Settlement Conference Judge.

### JSC-12. No Stenographic Record

There shall be no stenographic record of the Judicial Settlement Conference.

### JSC-13. Termination of Judicial Settlement Conference

The Judicial Settlement Conference shall be terminated:

- i. By the execution of a settlement agreement by the parties; or
- ii. By a written or verbal declaration of the Judicial Settlement Conference Judge to the effect that further efforts at Judicial Settlement Conference would not contribute to a resolution of the parties' dispute; or
- iii. By a written or verbal declaration of all parties to the effect that Judicial Settlement Conference is terminated; or
- iv. When there has been no communication between the Judicial Settlement Conference Judge and any party or party's representative for 21 days following the conclusion of the Judicial Settlement Conference.

### JSC-14. Exclusion of Liability

Neither the AAA nor any Judicial Settlement Conference Judge is a necessary or proper party in judicial proceedings relating to the Judicial Settlement Conference. Parties to a Judicial Settlement Conference under these Procedures shall be deemed to have consented that neither the AAA nor any Judicial Settlement Conference Judge shall be liable to any party for any error, act or omission in connection with any Judicial Settlement Conference conducted under these Procedures. Parties to a Judicial Settlement Conference under these Procedures may not call the Judicial Settlement Conference Judge, the AAA or

AAA employees as a witness in litigation or any other proceeding relating to the Judicial Settlement Conference. The Judicial Settlement Conference Judge, the AAA and AAA employees are not competent to testify as witnesses in any such proceeding.

The Parties to Judicial Settlement Conferences further agree that Judicial Settlement Conferences are mediation proceedings. Accordingly confidentiality and other laws applicable to mediations shall apply to Judicial Settlement Conference proceedings.

### JSC-15. Interpretation and Application of Procedures

The Judicial Settlement Conference Judge shall interpret and apply these Procedures insofar as they relate to the Judicial Settlement Conference Judge's duties and responsibilities. All other Procedures shall be interpreted and applied by the AAA.

### JSC-16. Deposits

Unless otherwise directed by the Judicial Settlement Conference Judge, the AAA will require the parties to deposit in advance of the Judicial Settlement Conference such sums of money as it, in consultation with the Judicial Settlement Conference Judge, deems necessary to cover the costs and expenses of the Judicial Settlement Conference and shall render an accounting to the parties and return any unexpended balance at the conclusion of the Judicial Settlement Conference.

### JSC-17. Expenses

All expenses of the Judicial Settlement Conference, including required traveling and other expenses or charges of the Judicial Settlement Conference Judge, shall be borne equally by the parties unless they agree otherwise. The expenses of participants for either side shall be paid by the party requesting the attendance of such participants.

### JSC-18. Cost of Judicial Settlement Conference

A \$250 non-refundable deposit, which will be applied toward the cost of the Judicial Settlement Conference, is required to initiate the AAA's administration of the Conference and the appointment of the Judicial Settlement Conference Judge.

The cost of the Judicial Settlement Conference is based on the hourly or daily Judicial Settlement Conference rate of the Judicial Conference Judge. In addition, the parties will be assessed an administrative fee for the AAA's services of \$75 for each hour charged by the Settlement Conference Judge. There is a four-hour, or one half-day minimum charge for a Judicial Settlement Conference. Expenses referenced in section JSC-17 may also apply.

If a matter submitted for Judicial Settlement Conference is withdrawn or cancelled, or results in a settlement after the request to initiate a Judicial Settlement Conference is filed, but prior to the Judicial Settlement conference taking place, the cost is \$250 (to which the deposit will be applied), plus any Judicial Conference Judge time and charges incurred. These costs shall be borne by the initiating party unless the parties agree otherwise.

### Conference Room Rental

Conference rooms are available in most major cities on a rental basis. Please contact your local AAA office for availability and rates. The costs described above do not include the use of AAA conference rooms.

