

E DISPUTE RESOLUTIONS

MEDIATION CONFIDENTIALITY AGREEMENT

Re: Mediation of _____

California Superior Court Case No:

County of

E DISPUTE RESOLUTIONS File Number **EDR** _____

THE MEDIATOR: The mediator is acting in a neutral capacity, solely to facilitate settlement and will not act as an advocate for any party. The mediator will not provide legal advice to any party and no statements of the mediator are to be construed as legal advice to any party.

THE PARTIES: To achieve open and honest communication among all parties involved in the above-referenced matter, as well as to promote and facilitate a resolution of the dispute, the parties to this mediation agree to the following (the "Agreement"):

THE MEDIATION PROTECTION: The parties' only purpose and desire in participating in this mediation is to settle, compromise and resolve their dispute, in whole or in part, to the extent possible. As such, **all discussions and disclosures of any kind made during this mediation are deemed confidential settlement negotiations and are to remain confidential** under all state and federal rules protecting such disclosures from later discovery or use in evidence at trial or otherwise. **Confidential means confidential.**

To this end, the parties agree and acknowledge that California Evidence Code §§ 1115-1128 and 703.5, as attached hereto and incorporated herein, apply to this mediation. **THE PARTIES AGREE AND ACKNOWLEDGE THAT THIS AGREEMENT APPLIES TO ALL PRESENT AND FUTURE CIVIL, QUASI-JUDICIAL, ADMINISTRATIVE OR OTHER PROCEEDINGS, INCLUDING ARBITRATIONS OR OTHER PRIVATE DISPUTE RESOLUTION MECHANISMS.**

Additionally, to facilitate open and candid discussions, **all documents and disclosures made to the mediator are privileged.** Moreover, in some cases, the mediation process may continue even after parties conclude the mediation covered by this document. As such, should the mediator's efforts continue, any of the mediator's later oral and written discussions with the parties remain subject to this Agreement. In this regard, the parties acknowledge and waive the automatic termination provisions of section 1125(a)(5). Likewise, the parties agree and acknowledge that this Agreement may be signed before, during or after the mediation.

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PURSUANT TO CALIFORNIA EVIDENCE CODE § 1123, THE PARTIES AGREE AND ACKNOWLEDGE THAT ANY WRITTEN SETTLEMENT AGREEMENT PREPARED AND SIGNED BY THE PARTIES DURING THE MEDIATION IS BINDING AND ENFORCEABLE AND SUBJECT TO DISCLOSURE TO ENFORCE ITS TERMS PURSUANT TO CALIFORNIA CODE OF CIVIL PROCEDURE §664.6.

Executed on _____, 2016

Names of counsel

Names of parties

West's Ann.Cal.Evid.Code §§ 1115-1128 & 703.5

§ 1115. Definitions

For purposes of this chapter:

- (a) “Mediation” means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.
- (b) “Mediator” means a neutral person who conducts a mediation. “Mediator” includes any person designated by a mediator either to assist in the mediation or to communicate with the participants in preparation for a mediation.
- (c) “Mediation consultation” means a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator.

§ 1116. Effect of chapter

- (a) Nothing in this chapter expands or limits a court's authority to order participation in a dispute resolution proceeding. Nothing in this chapter authorizes or affects the enforceability of a contract clause in which parties agree to the use of mediation.
- (b) Nothing in this chapter makes admissible evidence that is inadmissible under [Section 1152](#) or any other statute.

§ 1117. Application of chapter

- (a) Except as provided in subdivision (b), this chapter applies to a mediation as defined in [Section 1115](#).
- (b) This chapter does not apply to either of the following:
 - (1) A proceeding under Part 1 (commencing with [Section 1800](#)) of Division 5 of the Family Code or Chapter 11 (commencing with [Section 3160](#)) of Part 2 of Division 8 of the Family Code.
 - (2) A settlement conference pursuant to [Rule 3.1380 of the California Rules of Court](#).

§ 1118. Oral agreements

An oral agreement “in accordance with Section 1118” means an oral agreement that satisfies all of the following conditions:

- (a) The oral agreement is recorded by a court reporter or reliable means of audio recording.
- (b) The terms of the oral agreement are recited on the record in the presence of the parties and the mediator, and the parties express on the record that they agree to the terms recited.
- (c) The parties to the oral agreement expressly state on the record that the agreement is enforceable or binding, or words to that effect.
- (d) The recording is reduced to writing and the writing is signed by the parties within 72 hours after it is recorded.

§ 1119. Written or oral communications during mediation process; admissibility

Except as otherwise provided in this chapter:

- (a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
- (b) No writing, as defined in [Section 250](#), that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
- (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

§ 1120. Evidence otherwise admissible

- (a) Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.
- (b) This chapter does not limit any of the following:
 - (1) The admissibility of an agreement to mediate a dispute.
 - (2) The effect of an agreement not to take a default or an agreement to extend the time within which to act or refrain from acting in a pending civil action.
 - (3) Disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute.

§ 1121. Mediator's reports and findings

Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with [Section 1118](#).

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§ 1122. Communications or writings; conditions to admissibility

(a) A communication or a writing, as defined in [Section 250](#), that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if either of the following conditions is satisfied:

(1) All persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally in accordance with [Section 1118](#), to disclosure of the communication, document, or writing.

(2) The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, or orally in accordance with [Section 1118](#), to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.

(b) For purposes of subdivision (a), if the neutral person who conducts a mediation expressly agrees to disclosure, that agreement also binds any other person described in [subdivision \(b\) of Section 1115](#).

§ 1123. Written settlement agreements; conditions to admissibility

A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if the agreement is signed by the settling parties and any of the following conditions are satisfied:

(a) The agreement provides that it is admissible or subject to disclosure, or words to that effect.

(b) The agreement provides that it is enforceable or binding or words to that effect.

(c) All parties to the agreement expressly agree in writing, or orally in accordance with [Section 1118](#), to its disclosure.

(d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

§ 1124. Oral agreements; conditions to admissibility

An oral agreement made in the course of, or pursuant to, a mediation is not made inadmissible, or protected from disclosure, by the provisions of this chapter if any of the following conditions are satisfied:

(a) The agreement is in accordance with [Section 1118](#).

(b) The agreement is in accordance with [subdivisions \(a\), \(b\), and \(d\) of Section 1118](#), and all parties to the agreement expressly agree, in writing or orally in accordance with [Section 1118](#), to disclosure of the agreement.

(c) The agreement is in accordance with [subdivisions \(a\), \(b\), and \(d\) of Section 1118](#), and the agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

§ 1125. End of mediation; satisfaction of conditions

(a) For purposes of confidentiality under this chapter, a mediation ends when any one of the following conditions is satisfied:

(1) The parties execute a written settlement agreement that fully resolves the dispute.

- (2) An oral agreement that fully resolves the dispute is reached in accordance with [Section 1118](#).
- (3) The mediator provides the mediation participants with a writing signed by the mediator that states that the mediation is terminated, or words to that effect, which shall be consistent with [Section 1121](#).
- (4) A party provides the mediator and the other mediation participants with a writing stating that the mediation is terminated, or words to that effect, which shall be consistent with [Section 1121](#). In a mediation involving more than two parties, the mediation may continue as to the remaining parties or be terminated in accordance with this section.
- (5) For 10 calendar days, there is no communication between the mediator and any of the parties to the mediation relating to the dispute. The mediator and the parties may shorten or extend this time by agreement.
- (b) For purposes of confidentiality under this chapter, if a mediation partially resolves a dispute, mediation ends when either of the following conditions is satisfied:
 - (1) The parties execute a written settlement agreement that partially resolves the dispute.
 - (2) An oral agreement that partially resolves the dispute is reached in accordance with [Section 1118](#).
- (c) This section does not preclude a party from ending a mediation without reaching an agreement. This section does not otherwise affect the extent to which a party may terminate a mediation.

§ 1126. Protections before and after mediation ends

Anything said, any admission made, or any writing that is inadmissible, protected from disclosure, and confidential under this chapter before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends.

§ 1127. Attorney's fees and costs

If a person subpoenas or otherwise seeks to compel a mediator to testify or produce a writing, as defined in [Section 250](#), and the court or other adjudicative body determines that the testimony or writing is inadmissible under this chapter, or protected from disclosure under this chapter, the court or adjudicative body making the determination shall award reasonable attorney's fees and costs to the mediator against the person seeking the testimony or writing.

§ 1128. Subsequent trials; references to mediation

Any reference to a mediation during any subsequent trial is an irregularity in the proceedings of the trial for the purposes of [Section 657 of the Code of Civil Procedure](#). Any reference to a mediation during any other subsequent noncriminal proceeding is grounds for vacating or modifying the decision in that proceeding, in whole or in part, and granting a new or further hearing on all or part of the issues, if the reference materially affected the substantial rights of the party requesting relief.

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§ 703.5. Judges, arbitrators or mediators as witnesses; subsequent civil proceeding

No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under [paragraph \(1\)](#) or [\(6\) of subdivision \(a\) of Section 170.1 of the Code of Civil Procedure](#). However, this section does not apply to a mediator with regard to any mediation under Chapter 11 (commencing with [Section 3160](#)) of Part 2 of Division 8 of the Family Code.

<End>