

## AGREEMENT TO MEDIATE

This agreement is made this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, between the undersigned Participants, and Philip R. Diamond ("Mediator"), with respect to the matter entitled "ABC v. XYZ - Mediation," as follows:

1. The parties agree to submit their dispute to mediation conducted by Mediator. Participants understand that mediation is entirely voluntary and any party may terminate it at any time. The Mediator has no power to decide issues or make decisions for the parties. Nor is the Mediator acting as a representative or advocate for any of the parties and therefore is not providing legal advice or counsel for any participant. The parties are advised and encouraged to obtain legal advice throughout the mediation process and before signing any settlement agreement. The mediator's role will be to assist in the negotiation by facilitating the parties' communication. No guarantee of a specific outcome is made.

2. Mediator may hold sessions/caucuses with only one party. Such caucuses are designed to improve the Mediator's understanding of the Participant's position and to explore options. Information gained by the Mediator during a caucus may be shared with other Participants unless the Participant requests that the information remain confidential.

3. All communications in connection with the mediation are confidential pursuant to California Evidence Code §§1115-1128 (copies attached). The undersigned parties and counsel agree that E.C. §1125(a)(5) shall not apply and thus the mediation (for purposes of confidentiality) shall continue until a party unequivocally notifies the other party(ies) and the Mediator that the mediation has ended. Thus, further communication with the Mediator shall be confidential under the meaning of E.C. §1115-1128.

4. Participants agree that the Mediator (or any member of his staff) will not be called to testify regarding their dispute or to provide any materials from the mediation in any discovery or court proceedings. The Mediator shall not be liable to any party for any conduct, error, act, or omission in connection with the mediation, and shall have the same immunity from civil suit or claim in connection with any conduct, error, act, or omission in connection with the mediation that a judicial officer would have in a court proceeding. Upon conclusion of the mediation, Mediator's files may be destroyed.

5. For a two party mediation, Participants agree to pay the Mediator's fee for services rendered in the amount of \$500.00 per hour (\$250.00 per hour/party). Fees are charged for time spent in preparation for the mediation (including without limitation reviewing briefs and other file materials, site inspections, communications with counsel and others, etc.), the mediation session(s), preparation and review of emails and other correspondence, telephone calls, and travel time outside of Marin or San Francisco Counties. There is an administrative fee in the total amount of \$275/day/party. Fees are based on time expended by Mediator. Fees shall be shared equally by the Participants, unless a different arrangement is made. There is a four (4) hour minimum charge. Participants agree to make an initial deposit in the amount of \$6,550.00 (\$3,275.00 per party) within seven days after Mediator's request therefor, or by no later than fourteen days in advance of the initial mediation session, whichever is earlier. If the initial deposit is not timely paid in full by all Participants, the mediation will be subject to cancellation or re-scheduling by Mediator, and any initial deposit that is made less than 5 calendar days before the initial or any follow-up mediation session shall be made by cashier's check or wire transfer. If the matter is not fully resolved at the close of the initial mediation session and Participants request

Mediator to continue with further settlement efforts, Participants agree to make further deposits as may be requested by Mediator (including without limitation a further deposit in the amount of \$6,550.00 (\$3,275.00 per party) within seven days after Mediator's request therefor, or by no later than fourteen days in advance of any such further mediation session(s), whichever is earlier. Mediation services will be considered concluded when at least one party clearly communicates to the Mediator and all other parties that the mediation process has concluded. Any balance remaining in the deposit upon conclusion of all mediation services will be refunded to the parties. The four-hour minimum charge is forfeited if the mediation is cancelled within 7 calendar days prior to the mediation. Invoices are due and payable upon receipt. There shall be a 1.0% monthly late payment charge on any amount unpaid for more than thirty (30) days. Counsel and the respective parties they represent in this matter are jointly and severally responsible for the payment of all fees and costs payable under this Agreement to Mediate.

6. This Agreement to Mediate may be executed in counterparts. Facsimile or electronic signatures shall have the same force and effect as originals.

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PHILIP R. DIAMOND, Mediator

**APPROVED AND AGREED:**

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John Doe, Esq.  
Attorneys for Plaintiff ABC

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Jane Roe, Esq.  
Attorneys for Defendant XYZ

## **EVIDENCE CODE SECTIONS 1115-1128**

1115. 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. (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. (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. 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. 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. (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. 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.

1122. (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. 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. 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. (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. 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. 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. 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.

**1129. (Effective January 1, 2019)**

(a) Except in the case of a class or representative action, an attorney representing a client participating in a mediation or a mediation consultation shall, as soon as reasonably possible before the client agrees to participate in the mediation or mediation consultation, provide that client with a printed disclosure containing the confidentiality restrictions described in Section 1119 and obtain a printed acknowledgment signed by that client stating that he or she has read and understands the confidentiality restrictions.

(b) An attorney who is retained after an individual agrees to participate in the mediation or mediation consultation shall, as soon as reasonably possible after being retained, comply with the printed disclosure and acknowledgment requirements described in subdivision (a).

(c) The printed disclosure required by subdivision (a) shall:

(1) Be printed in the preferred language of the client in at least 12-point font.

(2) Be printed on a single page that is not attached to any other document provided to the client.

(3) Include the names of the attorney and the client and be signed and dated by the attorney and the client.

(d) If the requirements in subdivision (c) are met, the following disclosure shall be deemed to comply with the requirements of subdivision (a):

#### Mediation Disclosure Notification and Acknowledgment

To promote communication in mediation, California law generally makes mediation a confidential process. California's mediation confidentiality laws are laid out in Sections 703.5 and 1115 to 1129, inclusive, of the Evidence Code. Those laws establish the confidentiality of mediation and limit the disclosure, admissibility, and a court's consideration of communications, writings, and conduct in connection with a mediation. In general, those laws mean the following:

- All communications, negotiations, or settlement offers in the course of a mediation must remain confidential.

- Statements made and writings prepared in connection with a mediation are not admissible or subject to discovery or compelled disclosure in noncriminal proceedings.

- A mediator's report, opinion, recommendation, or finding about what occurred in a mediation may not be submitted to or considered by a court or another adjudicative body.

- A mediator cannot testify in any subsequent civil proceeding about any communication or conduct occurring at, or in connection with, a mediation.

This means that all communications between you and your attorney made in preparation for a mediation, or during a mediation, are confidential and cannot be disclosed or used (except in extremely limited circumstances), even if you later decide to sue your attorney for malpractice because of something that happens during the mediation.

I, \_\_\_\_\_ [Name of Client], understand that, unless all participants agree otherwise, no oral or written communication made during a mediation, or in preparation for a mediation, including communications between me and my attorney, can be used as evidence in any subsequent noncriminal legal action including an action against my attorney for malpractice or an ethical violation.

NOTE: This disclosure and signed acknowledgment does not limit your attorney's potential liability to you for professional malpractice, or prevent you from (1) reporting any professional misconduct by your attorney to the State Bar of California or (2) cooperating with any disciplinary investigation or criminal prosecution of your attorney.

[Name of Client] [Date signed]

[Name of Attorney] [Date signed]

(e) Failure of an attorney to comply with this section is not a basis to set aside an agreement prepared in the course of, or pursuant to, a mediation.