

Cohen & Associates, Inc.

A Dispute Resolution Practice

AGREEMENT TO MEDIATE AND CONFIDENTIALITY AGREEMENT

1. The undersigned parties have agreed to attempt to settle their dispute through mediation, using the services of **Cohen & Associates, Inc.**
2. The parties understand that mediation is a cooperative process based on factual information and does not assess blame or fault, but serves as an avenue for mutual resolution of their conflict.
3. Mediation is a non-binding process with the sole purpose of helping the parties to reach a resolution to their dispute that is agreeable and acceptable to all parties involved. Once agreement has been reached in mediation, the details of all agreements will be listed in a "Memorandum of Understanding" which should be taken by each party to their respective attorneys for review.
4. California state law provides a way to limit the admissibility and confidentiality of information disclosed in a mediation. The following code appears in its entirety for your review.

Confidentiality Code Sections 1115-1128 of the California Evidence Code.

§ 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. Limitations on 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. Applicability.

- (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 222 of the California Rules of Court.

§ 1118. Requirements for Oral Agreement.

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, tape recorder, or other reliable means of sound 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. Admissibility, Confidentiality of Information Disclosed.

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. Limitations on Admissibility Restrictions.

- (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. Restrictions on Use of Mediator's Reports, Assessments, Evaluations, Recommendations, 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.

§ 1122. Admissibility of Communications or Writings.

- (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. Admissibility of Written Settlement Agreement.

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. Admissibility Of Oral Agreement.

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. When Mediation "Ends".

(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. Inadmissibility Status Continues After End of Mediation.

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. Awards of Fees and Costs to Mediator if Court Determines Sought Material Inadmissible.

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. Effect of Reference to Past Mediation in Future Proceedings.

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.

5. **Cohen & Associates, Inc.** only exceptions to the nondisclosure policy are as follows:
 - a. If all parties to the mediation, including the mediator, agree in writing to allow disclosure;
 - b. If the mediator reasonably believes that a participant will cause physical harm to another person.
6. The parties shall be prohibited from calling either the mediator, or any officer or agent thereof, as a witness to any civil litigation regarding the mediation proceeding. The parties will also be prohibited from requiring the production in court of any records or documents made by the mediator or any officer or agent thereof.
7. **The mediator cannot and will not offer any legal advice to any party. The mediator is a neutral intermediary who may not, and will not, act as an advocate for or give legal advice to any party even though he is an attorney. In this regard, if the mediator is an attorney, no attorney-client relationship is created between any party and the mediator.**
8. The mediator may, at times, meet privately (referred to as a caucus) with any and all parties in this dispute. The mediator will not disclose any information received in caucus without the permission of the party making disclosure.
9. The mediator shall not reveal to third parties information provided by participants without the consent of all participants. However, without disclosing participants, names or other identifying information, the mediator may consult with colleagues about this matter, and may describe this matter in publications about mediation.
10. All information pertaining to the issue(s) being mediated shall be fully disclosed by the parties involved. In the event that any of the parties are unsure about the advisability of disclosure of sensitive information, it is critical to the effectiveness of the mediation process that this be discussed with the mediator in private caucus. The mediator may request copies of all pertinent information.
11. Since the parties are disclosing sensitive information in reliance upon the provisions of this Agreement, any breach of this Agreement would cause irreparable injury for which monetary damages may be inadequate. Consequently, any party to this Agreement may obtain an injunction to prevent disclosure of any such confidential information in violation of this Agreement. Any party breaching this Agreement shall be liable for and shall indemnify the non-breaching parties and the mediator for all costs, expenses,

liabilities and fees, including attorneys' fees and costs, which may be incurred as a result of such breach.

- 12. Should experts such as appraisers, accountants, etc. be required in determining a solution to the conflict in mediation, the information obtained from such persons shall be gathered in a manner mutually agreed upon by the parties.
- 13. A mediation is not a legal proceeding leading to a finding of fault. It is a voluntary negotiation process. Therefore, agreements reached in the mediation process concerning this dispute may differ greatly from the result that may be reached in court. A mediated agreement could be more favorable or less favorable than a decision that a judge or jury may render if this dispute were resolved in court, or by any other dispute resolution process. I agree to hold the mediator harmless from liability based upon a claim that the mediation process failed to provide the same outcome, or an equally advantageous outcome, as could have been obtained in court or in another dispute resolution process.
- 14. This Agreement may be executed in counterparts, each of which shall be deemed an original, and all of which shall constitute one and the same agreement.
- 15. This Agreement is signed before commencement of mediation by each of the parties to the mediation on the dates set forth below.
- 16. The fee schedule, attached as Exhibit "A" applies to this mediation. The undersigned further agree to first mediate any and all disputes relating to or arising under the terms of this agreement.
- 17. My signature following acknowledges that I have the authority to negotiate and settle this matter. I have read and fully understand the terms set forth above in this Agreement to Mediate.

Date _____

Date _____

Print Name of Party _____

Print Name of Party _____

Authorized Signature _____

Authorized Signature _____

Date _____

Date _____

Print Name of Party _____

Print Name of Party _____

Authorized Signature _____

Authorized Signature _____