

2 Cal. Transactions Forms--Bus. Transactions § 14:55.10

California Transactions Forms Business Transactions March 2019 Update

Alan S. Gutterman^{ab}

Chapter 14. Alternative Dispute Resolution

June R. Lehrman and Edith C. Schaffer*

III. Mediation

D. Form

Agreement to mediate with single mediator

This is an Agreement between *[name of first party]*, a *[corporation/partnership/limited liability company]* organized and existing under the laws of the State of *[name of state]* having an office at *[address of first party]* (“Party 1”), *[name of second party]*, a *[corporation/partnership/limited liability company]* organized and existing under the laws of the State of *[name of state]* having an office at *[address of second party]* (“Party 2”) (Party 1 and Party 2 are sometimes collectively referred to below as the “Parties” and individually as a “Party”), and *[name of mediator]* (“Mediator”) to enter into mediation with the intent of resolving all issues regarding: *[description of subject of mediation]*. The Parties and the Mediator understand and agree as follows:

1. Nature of Mediation

The Parties hereby appoint and retain the Mediator as mediator for their negotiations. The Parties understand that Mediator is an attorney, but will in this mediation not serve as any Party’s nor all Parties’ legal counsel. The Parties understand that mediation is an agreement-reaching process in which the Mediator will assist the Parties to reach agreement in a collaborative, consensual and informed manner. It is understood that the Mediator has no power to decide disputed issues for the Parties. The Parties understand that mediation is not a substitute for independent legal advice. The Parties are encouraged to secure such advice throughout the mediation process and are strongly advised to obtain independent legal review of any formal mediated agreement before signing that agreement. The Mediator may come to require one or both Parties to have their agreement reviewed by legal counsel to ensure that Party is reaching a reasonably informed agreement. The Parties understand that the Mediator’s objective is to facilitate the Parties themselves reaching their bet agreement. The Parties also understand that the Mediator has an obligation to work on behalf of all Parties and that the Mediator cannot render individual legal advice to any Party and will not render therapy nor arbitrate within the mediation.

2. Scope of Mediation

The Parties understand that it is for the Parties, with the Mediator's concurrence, to determine the scope of the mediation and this will be accomplished early in the mediation process.

3. Mediation is Voluntary

All Parties herein state their good faith intention to complete their mediation by an agreement. It is, however, understood that any Party may withdraw from or suspend the mediation process at any time, for any reason or no reason.

The Parties also understand that the Mediator may suspend or terminate the mediation, if the Mediator feels that the mediation will lead to an unreasonable result, if the Mediator feels that an impasse has been reached, or if the Mediator determines that he can no longer effectively perform his facilitative role.

4. Confidentiality

It is understood between the Parties and the Mediator that the mediation will be strictly confidential. Mediation discussions, any draft resolutions and any unsigned mediated agreements shall not be admissible in any court, administrative or other contested proceeding. Only a mediated agreement signed by the Parties may be so admissible. The Parties further agree to not call the Mediator to testify concerning the mediation nor to provide any materials from the mediation in any court or other contested proceeding between the Parties. The mediation is considered by the Parties and the Mediator as settlement negotiations. All Parties also understand and agree that the Mediator may have private caucus meetings and discussions with any individual Party, in which case all such meetings and discussions shall be confidential between the Mediator and the caucusing Party(ies), unless the Parties agree otherwise.

5. Mediator Impartiality and Neutrality

The Parties understand that the Mediator must remain impartial throughout and after the mediation process. Thus, the Mediator will not champion the interests of any Party over another in the mediation nor in any court or other proceeding. The Mediator is to be impartial as to Party and neutral as to the results of the mediation. The Mediator will seek to affirmatively reveal any operative biases and will disclose any and all prior contacts with the Parties and their legal counsel.

6. Mediation Fees

The Parties and the Mediator agree that the fee for the Mediator shall be *[\$dollar amount of fee]* per hour for time spent with the Parties and for time required to study documents, research issues, correspond, telephone call, prepare draft and final agreements and do such other things as may be reasonably necessary to facilitate the Parties reaching full agreement. The Mediator shall also be reimbursed for all expenses incurred as a part of the mediation process.

A payment of *[\$dollar amount of payment]* toward the Mediator's fees and expenses shall be paid to the Mediator along with the signing of this agreement. Any unearned amount of this retainer fee will be refunded to the Parties. The Parties shall be jointly and severally liable for the Mediator's fees and expenses.

As between the parties only, responsibility for mediation fees and expenses shall be: *[percentage amount of fees and expenses]%* to Party 1, *[percentage amount of fees and expenses]%* to Party 2.

The Parties will be provided with a monthly accounting of fees and expenses by the Mediator. Payment of such fees and expenses is due to the Mediator no later than *[number of days]* days following the date of such billing, unless otherwise agreed in writing.

7. Miscellaneous

This agreement contains the entire understanding between the Parties and supersedes all previous agreements, understandings and communications between the parties regarding the Mediator's services, whether oral, electronic or in writing. This agreement applies to and binds the Parties' heirs, executors, administrators, successors and assigns. This agreement cannot be modified except by a writing signed by both Parties. This agreement will be governed by and construed in accordance with the laws of the State of *[name of state]* without regard to principles of conflict of laws, and any action, claim or proceeding hereunder shall be commenced exclusively in the courts of the State of *[name of state]* located in the City of *[name of city]* or the federal courts of the United States of America located in such State and City.

DATED this *[ordinal number of day]* day of *[name of month]*, *[number of year]*.

[Name of Party 1]

By:

[Name of authorized representative]

[Title of authorized representative

[Name of Party 2]

By:

[Name of authorized representative]

[Title of authorized representative

[Name of Mediator]

Mediator

Notes

Notes On Use

Use of form: This form is a basic agreement between two parties to designate a single mediator to assist them in negotiations to resolve certain disputes to be described in the agreement. The format for the mediation is decidedly less formal and the primary role of the mediator is to facilitate discussions between the parties as opposed to collecting and analyzing documentation submitted by both parties outlining their arguments in favor of their particular position. The agreement makes it clear that the mediator has no power to decide issues between the parties and that his or her role is strictly limited to assisting the parties in reaching agreement “in a collaborative, consensual and informed manner”.