

First Supplement to Memorandum 2016-50

Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct: Public Comment

The Commission¹ has received the following additional materials relating to its study of the relationship between mediation confidentiality and attorney malpractice and other misconduct:

	<i>Exhibit p.</i>
• Robert Flack (9/21/16)	1
• Robert Flack (9/22/16)	14

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

EMAIL FROM ROBERT FLACK (9/21/16)

Barbara,

I thought I'd send the attached today.

This background is for the formal review by the Commission.

It summarizes an objective study done by U Wisconsin - Madison.

Also, I've included some information about Data Analysis cautions.

I'll have another to send tomorrow.

Best regards,

-Bob



● UNIVERSITY OF WISCONSIN—MADISON

Herbert M. Kritzer



Title: Professor Emeritus

Website: <http://faculty.polisci.wisc.edu/kritzer>

E-Mail: herbert.kritzer@wmitchell.edu

He has conducted extensive empirical research on the American civil justice system, as well as research on other common law systems. He is the author of *Risks, Reputations, and Rewards: Contingency Fee Legal Practice in the United States* (Stanford University Press, 2004), *Legal Advocates: Lawyers and Nonlawyers at Work* (University of Michigan Press, 1998), *The Justice Broker* (Oxford University Press, 1990), and *Let's Make a Deal* (University of Wisconsin Press, 1991), and the coauthor of *Courts, Law and Politics in Comparative Perspective* (Yale University Press, 1996). He is the editor of the multi-volume encyclopedia, *Legal Systems of the World* (ABC-Clío, 2002), and co-editor of *In Litigation: Do the Haves Still Come Out Ahead?* (Stanford University Press, 2003). He currently serves as editor of *Law & Society Review*, the journal of the Law and Society Association. His current research projects include an ongoing study of the influence of law and "jurisprudential regimes" on Supreme Court decision making (articles from this study have been published or are forthcoming in *American Political Science Review*, *Law & Society Review*, and *American Politics Research*), and a study of insurance defense practice with a particular focus on how the handling of cases involving scientific and expert testimony has been influenced by the *Daubert* decision. His teaching areas are law and politics, and research methods (both quantitative and qualitative).

The antecedents of disputes: complaining and claiming

HERBERT M. KRITZER *

Abstract

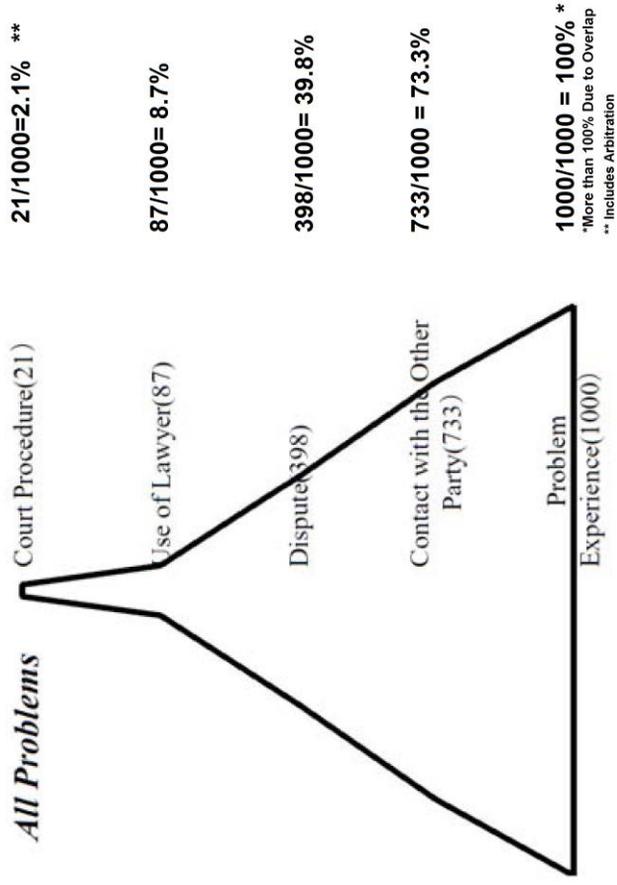
This paper focuses on the earliest stages of the problem resolution function of law and legal institutions: the emergence of grievances and their communication to a responsible party as complaints and claims. While the literature on this subject is broad, both in terms of methods and in terms of the fairly large number of countries where empirical research on this subject has been conducted, it seems appropriate to ask the question, what do we know and not know about this subject? This paper seeks to answer this question and to suggest fruitful avenues of future inquiry. I first discuss the primary metaphors used in the literature. Following that I describe the broad approaches that have been applied in empirical research regarding complaining and claiming. I then examine the explanations that have been advanced for variations in complaining and claiming patterns, both at the individual and the aggregate levels; in this section I identify points of general agreement and issues where agreement is lacking. Finally, I propose an agenda for future research related to complaining and claiming.

The antecedents of disputes: complaining and claiming

Herbert M. Kritzer

The antecedents of disputes...

FIGURE 1: Examples of Dispute Pyramids

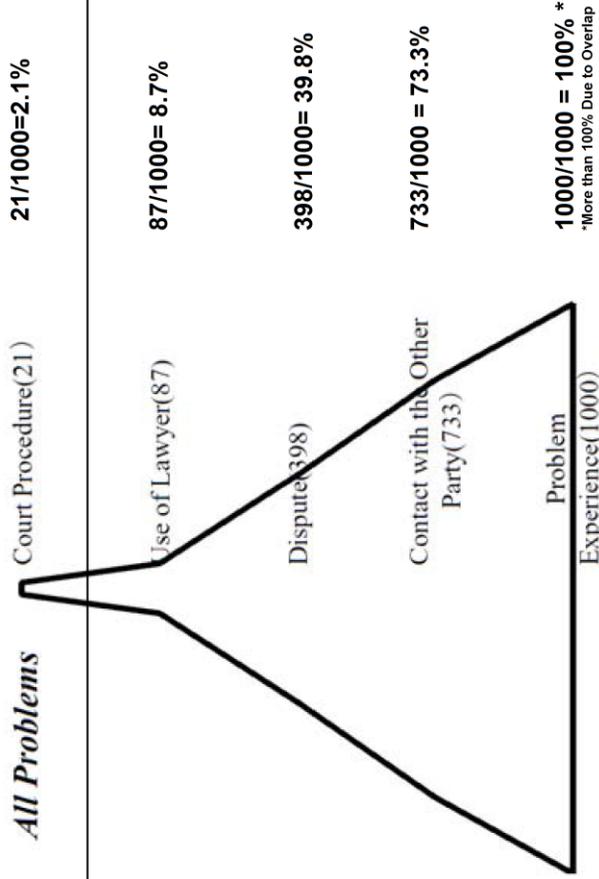


The antecedents of disputes: complaining and claiming

Herbert M. Kritzer

The antecedents of disputes...

FIGURE 1: Examples of Dispute Pyramids



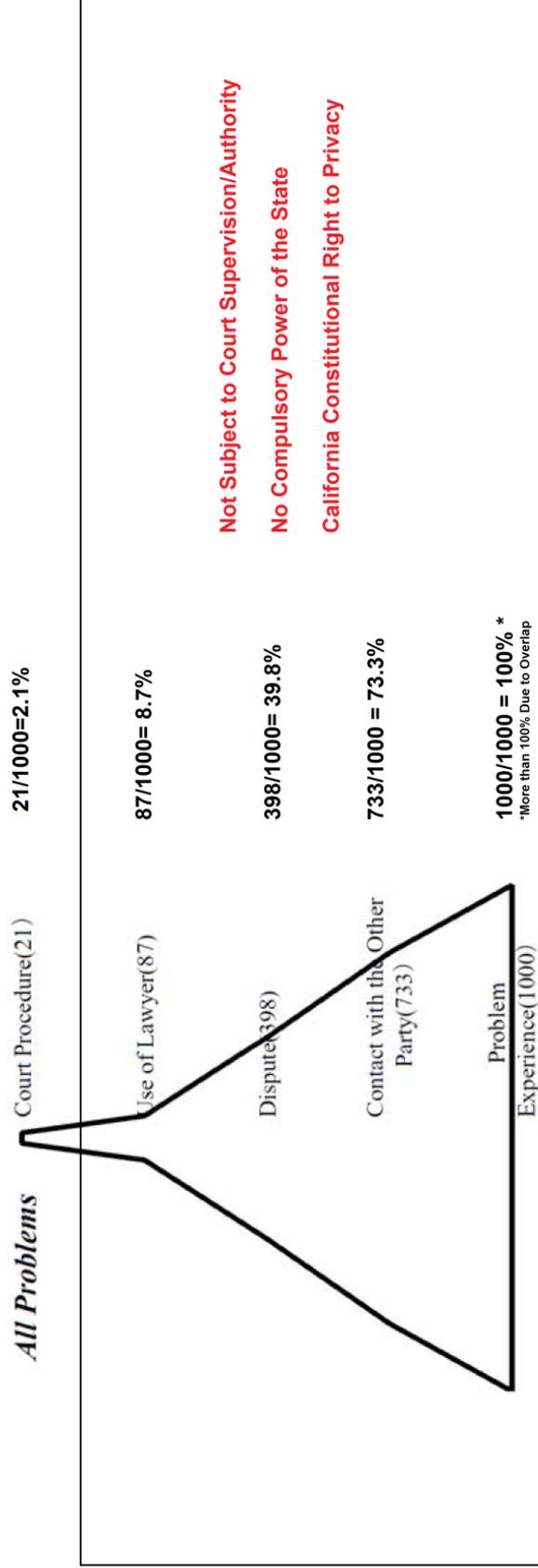
The antecedents of disputes: complaining and claiming

HERBERT M. KRITZER *

Herbert M. Kritzer

The antecedents of disputes...

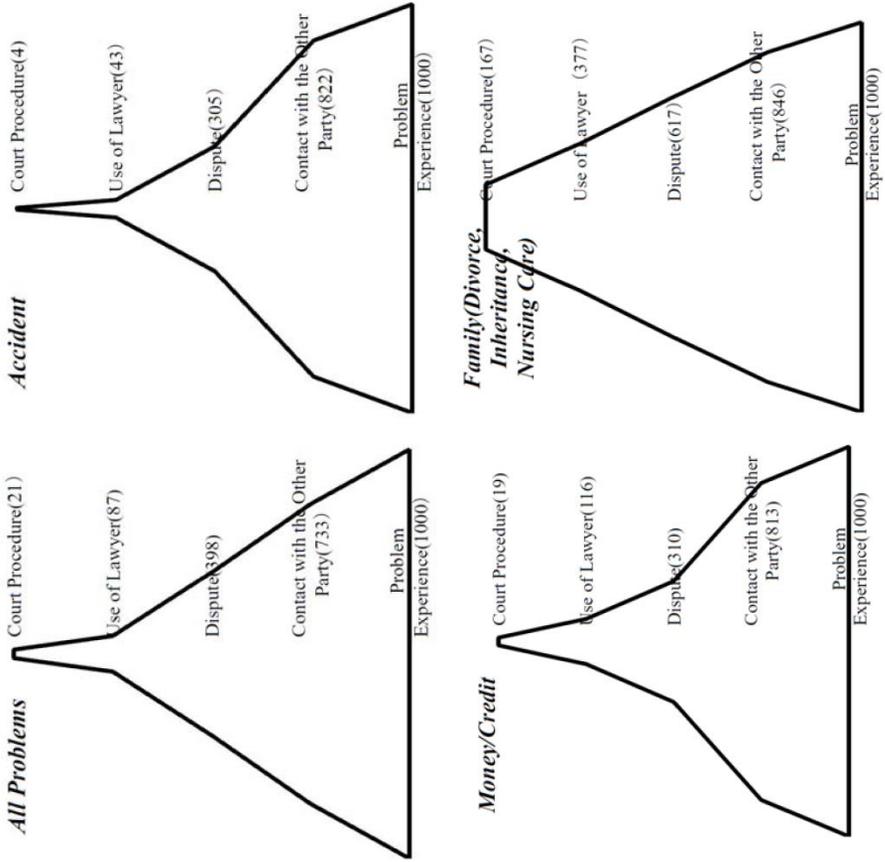
FIGURE 1: Examples of Dispute Pyramids



The antecedents of disputes: complaining and claiming

HERBERT M. KRITZER *

FIGURE 1: Examples of Dispute Pyramids



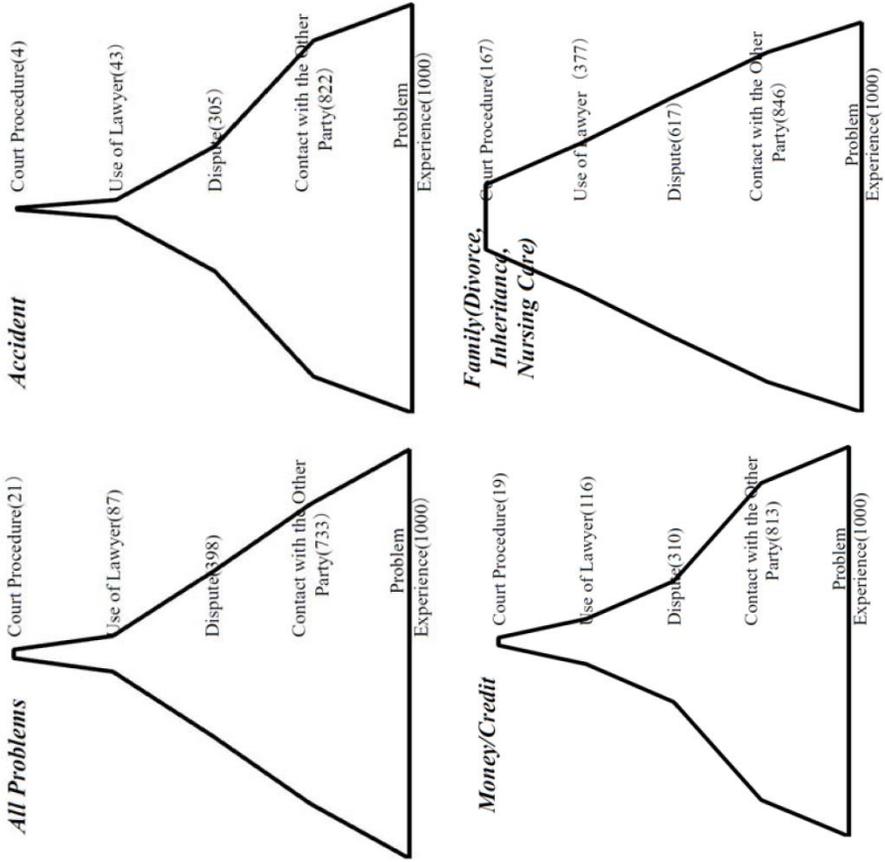
Litigation Experience
 All Problems 2.1%
 Accidents 0.4%
 Money/Credit 1.9%
 Family Law 16.7%

Resolution w/o Litigation
 All Problems 97.9%
 Accidents 99.6%
 Money/Credit 98.1%
 Family Law 83.3%

The antecedents of disputes: complaining and claiming

HERBERT M. KRITZER *

FIGURE 1: Examples of Dispute Pyramids



Resolution w/o Litigation

All Problems	97.9%
Accidents	99.6%
Money/Credit	98.1%
Family Law	83.3%

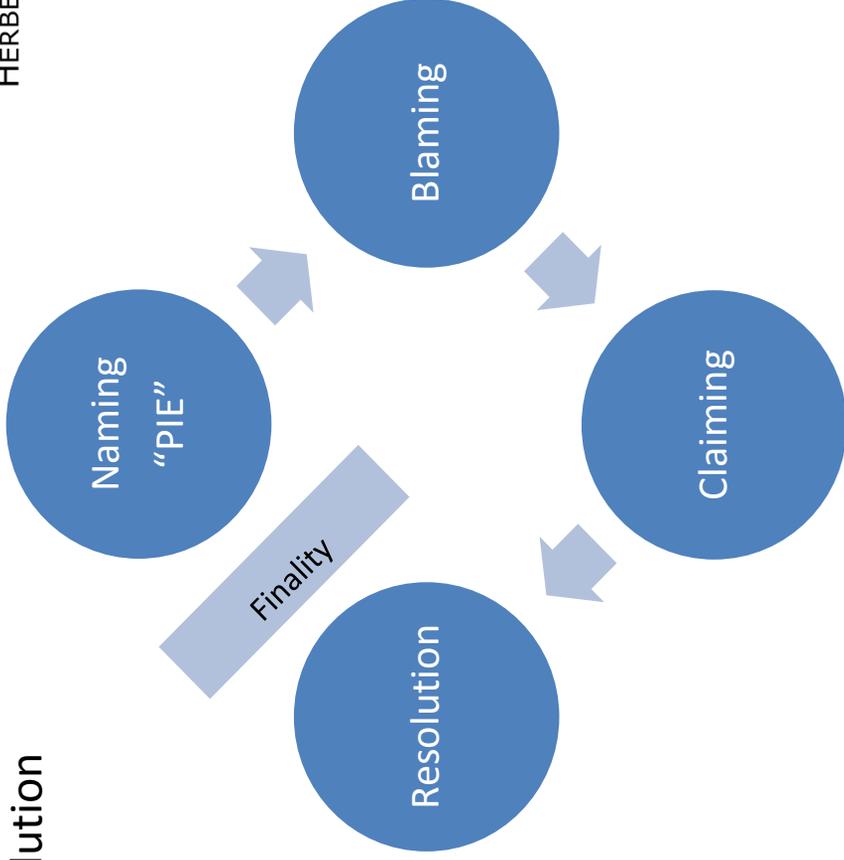
Subject to California's Constitutional Right to Privacy

Source: Murayama (2007, p. 30).

The antecedents of disputes: complaining and claiming

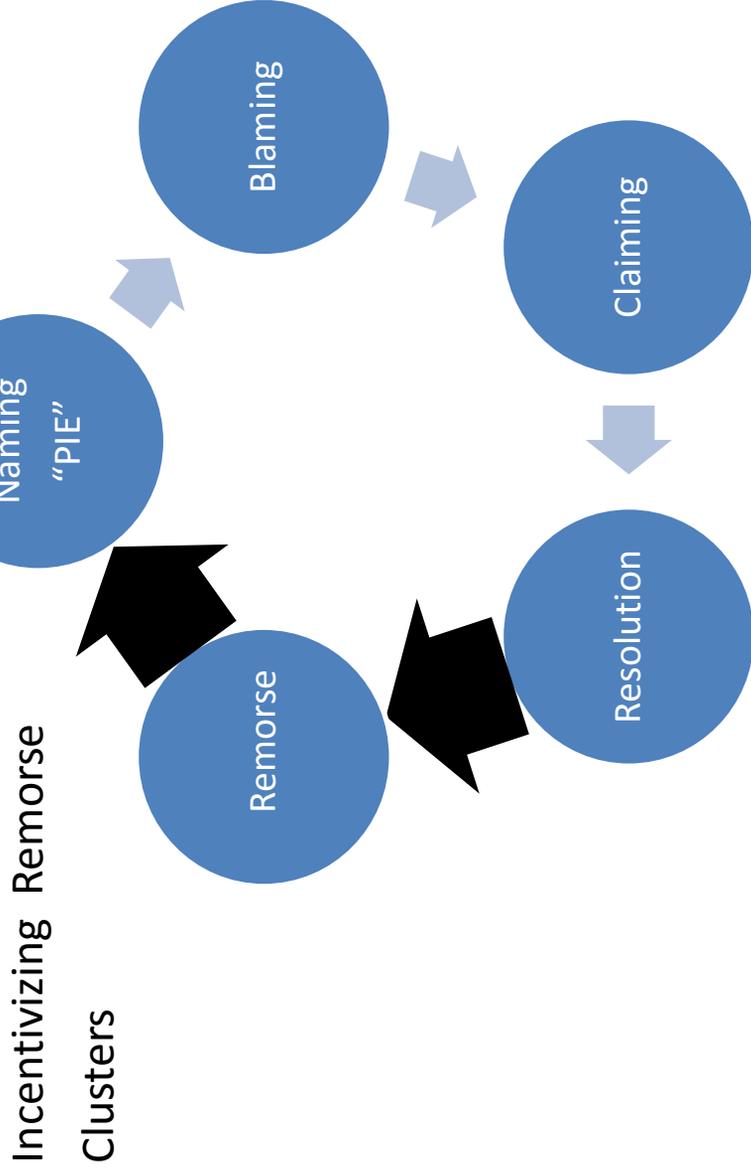
HERBERT M. KRITZER *

Idealized Dispute Resolution



The antecedents of disputes: complaining and claiming

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PIE – Perceived Injurious Event

The antecedents of disputes: complaining and claiming

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“ ... a dispute is fundamentally a social relationship, and that social relationships take on different characteristics depending on:

EX 11

the context in which the relationship is formed,
what value is placed on the relationship,
whether the relationship is pre-existing, and
whether on or more parties to the relationship desires to continue it.”

Impediments to “Objective Data Analysis”

- Heisenberg Effects:
 - The Act of Measuring Changes That Which Is Being Measured
 - Consumer ADR Reporting Requirements in California
- Hawthorne Effects:
 - Being Monitored Changes Behavior
 - Dumping Patients, VA Wait Times; MS Article
- Expectancy Effects:
 - Actors Seek Normative Approval
 - Organizational Identification
 - Yelp Scores

If you measure something, people will change their behavior to address the measured and not the thing the measurement is intended to measure

 Microsoft | Developer

The Old New Thing

5

We all know that once you start measuring something, people will change the way they behave. We hope that the change is for the better, but that's not always the case, and that's especially true if you are using the metrics as a proxy for something else: People will manipulate the metric without necessarily affecting the thing that your metric is trying to measure.

I was reminded of this topic when I read a story in *The Daily WTF* of a manager who equated number of checkins with productivity.

One metric that nearly all software products use to gauge productivity and product progress is the number of bugs outstanding and the number of bugs fixed. Of course, not all bugs are created equal. Some are trivial to fix; others are substantial. But if you believe that the difficulty distribution of bugs, while not uniform, is at least unbiased, then the number of bugs is roughly proportional to the amount of work. The bug count is just a rough guide, of course. Everybody works together, with programmers promising not to manipulate the metrics, and managers promising not to misinterpret them.

At least that's how it's supposed to work.

(All that text up to this point is useless. When you're telling a story, you have to include a lot of useless text in order to motivate or set the scene for the actual story that comes up next or just to make the story sound like an actual story instead of just a sequence of events. What amazes me is that so many people seem to focus on the "literary throat-clearing" and miss the actual story!)

A friend of mine told me about a project from many years (and jobs) ago. Things were pretty hectic, people were working late, it was a stressful time. The bug statistics were gathered by an automated process that ran at 4am, and every day, management would use those statistics as one factor in assessing the state of the project.

My friend was wrapping up another late night at the office after polishing off a few bugs, and as a final gesture, re-ran the bug query to enjoy the satisfaction of seeing the number of bugs go down. Except it went up.

What happened is that another member of the project was also working late, and that other member had a slightly different routine for wrapping up at the end of the day: Run the query and look at the number next to your name. If it is higher than you would like, then take some of your bugs and transfer them to the other members of the team. Choose a victim, add a comment like "I think this is a problem with the XYZ module" (where XYZ is the module the victim is responsible for), and reassign the bug to your victim. It helps if you choose victims who already have a lot of bugs, so they might not even notice that you slipped them another one.

By following this simple nightly routine, you get management off your case for having too many outstanding bugs. In fact, they might even praise you for your diligence, since you never seem to be behind on your work.

Of course, management looks at these manipulated numbers and gets a false impression of the state of the project. But if you're not one of those "team player" types, then that won't matter to you.

And if that describes you, then I don't want you working on my project.

Tags: Other

EMAIL FROM ROBERT FLACK (9/22/16)

Barbara,

Please find attached the following (in portrait form).

1. Statutory Alternatives to Evidence Code Changes

Using B&PC 6148 as a Model

Mediation Agreement Samples

Mediation is Independent of Court Supervision

(Compulsory Power of the State - 1st Amend
Does Not Apply)

Alternative Language for Mediation Agreements

Modeled after Sec. 1542 Waivers

2. Judicial Referral to Mediation Does not attach

Compulsory Power of the State

- a. Referral is not Supervision
- b. Confidentiality is reinforced
- c. Collected statistical data not case related

Thank you for you kind acceptance of this rather late submission.

Best regards,

-Bob

Robert J. Flack, MBA, JD
Attorney and Counselor at Law
Arbitrator and Mediator - AAA

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Mediation Confidentiality Statutory Alternatives

B&PC § 6148 As a Model

Mediation Agreement Samples

Business and Professions Code - BPC
DIVISION 3. PROFESSIONS AND VOCATIONS GENERALLY
CHAPTER 4. Attorneys [6000 - 6243]
ARTICLE 8.5. Fee Agreements [6148]

Section 6148.

(a) In any case not coming within Section 6147 in which it is reasonably foreseeable that total expense to a client, including attorney fees, will exceed one thousand dollars (\$1,000), the contract for services in the case shall be in writing. At the time the contract is entered into, the attorney shall provide a duplicate copy of the contract signed by both the attorney and the client, or the client's guardian or representative, to the client or to the client's guardian or representative. The written contract shall contain all of the following:

- (1) Any basis of compensation including, but not limited to, hourly rates, statutory fees or flat fees, and other standard rates, fees, and charges applicable to the case.
- (2) The general nature of the legal services to be provided to the client.
- (3) The respective responsibilities of the attorney and the client as to the performance of the contract.

(b) All bills rendered by an attorney to a client shall clearly state the basis thereof. Bills for the fee portion of the bill shall include the amount, rate, basis for calculation, or other method of determination of the attorney's fees and costs. Bills for the cost and expense portion of the bill shall clearly identify the costs and expenses incurred and the amount of the costs and expenses. Upon request by the client, the attorney shall provide a bill to the client no later than 10 days following the request unless the attorney has provided a bill to the client within 31 days prior to the request, in which case the attorney may provide a bill to the client no later than 31 days following the date the most recent bill was provided. The client is entitled to make similar requests at intervals of no less than 30 days following the initial request. In providing responses to client requests for billing information, the attorney may use billing data that is currently effective on the date of the request, or, if any fees or costs to that date cannot be accurately determined, they shall be described and estimated.

(c) Failure to comply with any provision of this section renders the agreement voidable at the option of the client, and the attorney shall, upon the agreement being voided, be entitled to collect a reasonable fee.

(d) This section shall not apply to any of the following:

- (1) Services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client or where a writing is otherwise impractical.
- (2) An arrangement as to the fee implied by the fact that the attorney's services are of the same general kind as previously rendered to and paid for by the client.
- (3) If the client knowingly states in writing, after full disclosure of this section, that a writing concerning fees is not required.
- (4) If the client is a corporation.

(e) This section applies prospectively only to fee agreements following its operative date.

(f) This section shall become operative on January 1, 2000.

JAMS Mediation Agreement

I. Participants and Procedure.

The parties, and if they desire, their representatives are invited to attend mediation sessions. No one else may attend without the permission of the parties and the consent of the mediator.

During the session, the mediator may have joint and separate meetings with the parties and their counsel. If a party informs the mediator that information is being conveyed to the mediator in confidence, the mediator will not disclose the information. The parties agree that the mediator is not acting as an attorney or providing legal advice on behalf of any party.

If a party wishes to terminate its participation for any reason, it may do so by giving notice to the mediator and the other parties. The parties will continue to be bound by the confidentiality provisions of this agreement and will also continue to be bound by their agreement to pay for those services rendered up to the point of that party's withdrawal.

II. Disclosure.

The mediator, each party, and counsel confirm that they have disclosed any past or present relationship or other information that a reasonable person would believe could influence the mediator's impartiality and that no conflict of interest or appearance of a conflict of interest exists.

In addition, the mediator practices in association with JAMS. From time to time, JAMS may enter into arrangements with corporations (including insurance companies), government entities, and other organizations to make available dispute resolution professionals in a particular locale, for a specific type of matter or training, or for a particular period of time. Also, because of the nature and size of JAMS, the parties should assume that one or more of the other neutrals who practice with JAMS may have participated in an arbitration, mediation or other dispute resolution proceeding with the parties, counsel or insurers in this case and may do so in the future. Furthermore, the parties should be aware that each JAMS neutral, including the neutral in this case, has an economic interest in the overall financial success of JAMS. The mediator is not aware of any aspect of these relationships that would create a conflict or interfere with his/her acting as a mediator in this matter. The parties acknowledge that these factors do not constitute a conflict of interest or the appearance of a conflict of interest.

III. Confidentiality.

In order to promote communication among the parties, counsel and the mediator and to facilitate settlement of the dispute, each of the undersigned agrees that the entire mediation process is confidential. All statements made during the course of the mediation are privileged settlement discussions, and are made without prejudice to any party's legal position, and are inadmissible for any purpose in any legal proceeding. These offers, promises, conduct and statements (a) will not be disclosed to third parties except persons associated with the participants in the process, and (b) are privileged and inadmissible for any purposes, including impeachment, under Rule 408 of the Federal Rules of Evidence and any applicable federal or state statute, rule or common law provisions.

IV. Disqualification of Mediator and Exclusion of Liability.

Each party agrees to make no attempt to compel the mediator's or any JAMS employee's testimony, nor to compel the mediator or any JAMS employee to produce any document provided by the other party to the mediator or to JAMS. The parties agree to defend the mediator and JAMS from any subpoenas from outside parties arising out of this Agreement or mediation. The parties agree that neither the mediator nor JAMS is a necessary party in any arbitral or judicial proceeding relating to the mediation or to the subject matter of the mediation. Neither JAMS nor its employees or agents, including the mediator, shall be liable to any party for any act or omission in connection with any mediation conducted under this Agreement.

V. Records.

Any documents provided to the mediator by the parties will be destroyed by JAMS 30 days after the conclusion of the mediation, unless JAMS is otherwise instructed by the parties.

VI. Fees.

The parties and their attorneys agree to pay JAMS as set forth in the attached Fee Schedule, which is incorporated in this Agreement.

BY: _____ BY: _____

FOR: _____ FOR: _____

DATED: _____ DATED: _____

BY: _____ BY: _____

FOR: _____ FOR: _____

DATED: _____ DATED: _____

_____ DATED: _____

JAMS [Mediator]

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[ADR Home](#) > Confidentiality Agreement

Confidentiality Agreement

CASE NAME: _____

CASE NO: _____

In order to promote communication among the parties and the mediator and to facilitate settlement of the dispute, all parties agree that the mediator has no liability for any act or omission in connection with the mediation, and further agree as follows:

The mediator is assisting in a neutral capacity and is not serving as an attorney for any party to the mediation. No representations by the mediator should be considered legal advice and the parties are free to consult with legal counsel of their choice should they wish to do so.

All statements made during the course of the mediation are privileged settlement discussions, are made without prejudice to any party's legal position, and are non-discoverable and inadmissible for any purpose in any legal proceeding.

The privileged character of any information is not altered by disclosure to the mediator. Disclosure of any records, reports, or other documents received or prepared by the mediator cannot be compelled. The mediator shall not be compelled to disclose or to testify in any proceeding as to (I) any records, reports, or other documents received or prepared by the mediator or (II) any information disclosed or representations made in the course of the mediation or otherwise communicated to the mediator in confidence.

Since the parties are disclosing sensitive information in reliance upon this agreement or confidentiality, any breach of this agreement would cause irreparable injury for which monetary damages would 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, which may be incurred as a result of such breach.

While the California evidence code shall apply to this mediation, for purposes of confidentiality under the evidence code the mediation does not end unless and until one party notifies in writing the remaining parties and the mediator that the mediation has ended. This confidentiality agreement and any written settlement agreement resulting from this mediation are admissible in any subsequent proceeding to enforce that very agreement.

Dated _____, 20____, and signed before commencement of the mediation by each of the persons whose signatures appear below.

Parties:

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Our Offices

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CENTURY CITY

SAN FRANCISCO

SILICON VALLEY

ORANGE COUNTY

SAN DIEGO

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AGREEMENT TO MEDIATE FORMS – CIVIL

OVERVIEW

An agreement to mediate is the form that the parties and the mediator sign to put everyone on the same page as to the process that will be followed in the mediation, what is to be considered confidential, and the parameters of the process. The agreements, therefore, should be precise in their language and they should be written in easily understood language so as to avoid any future misunderstandings.

Using a standard agreement to mediate for all court-referred mediations helps to ensure that all parties are undertaking the process with the same information and the same expectations. In situations where use of the forms is required, the court has control over how issues such as confidentiality are presented to the parties, helping to reduce missteps and misunderstandings. Even in situations where the forms are simply offered as a tool, they present a defined approach to provide guidance for all participants.

GOOD EXAMPLES

Civil Guidelines for Mediation – Cobb County, Georgia

This agreement to mediate form takes an interesting tack: it provides guidelines about party behavior in the mediation that can lead to a more effective process without making that behavior a point of agreement. It covers all the right topics, including a reminder to get legal advice before signing an agreement, an explanation of the mediator's role, and confidentiality. The language is legible and friendly.

Courts adapting this rule may wish to amend it by rewriting the confidentiality section to be more specific. It states that information gathered in the mediation process is confidential. This could explain what "information gathered" means (e.g., written and oral communications, exhibits made specifically for the mediation, etc.).

Civil Case Mediation Agreement – Cook County Circuit Court, Illinois

This is an example of an agreement to mediate that is signed before the date of the mediation. It does a good job of explaining what the mediator's role is, as well as what is confidential in the mediation. Also done well is the separation of confidentiality from mediator privilege.

Even though mediation in this context is undertaken with representation, courts adapting the form for their own use might want to make the language more accessible to the litigants as well as the attorneys by removing some of the legalese (such as "may elect to terminate its furtherance", "authority to caucus", and "defend and indemnify").

VS.

CIVIL ACTION FILE # _____

CIVIL GUIDELINES FOR MEDIATION

Mediation is a non-adversarial process that is most effective if the parties involved work within the following guidelines:

1. Leave fault and blame aside. Accusations only hinder the process and are not relevant to the issues to be discussed in mediation. Mediation differs from litigation in that the parties, with the assistance of the mediator, reach their own agreement. The mediator will not make decisions for the parties. The mediator will lead the negotiations in assisting the parties to reach a decision that is acceptable to all.
2. Accept responsibility for yourself. State what you want and need. Include your intent, reasons and feelings. This helps facilitate the process.
3. The mediator is not acting in the capacity of an attorney and **does not offer legal advice**. All parties are encouraged to have independent legal counsel. Parties are also encouraged to have their attorney review any settlement prior to the acceptance of any agreement or the signing of any documents. An outline may be completed to incorporate all issues discussed/agreed upon during the mediation session. All parties are also responsible for having their own accountant or tax advisor look over tax ramifications of agreements reached.
4. There may be times when the mediator feels a "caucus" is needed. This is when the mediator will meet with each party separately for clarification of issues. The caucus is the only time during the mediation process that information could be confidential between the parties. Information will not be shared unless permission of that party is obtained.
5. Information gathered in the mediation process is confidential and privileged. Neither the mediator nor any court designee shall willingly testify for or against either party involved should either party end the mediation process and litigate the matter in court. By signing this agreement, all parties are acknowledging that they have been advised that

they may not subpoena the mediator or any court designee to testify concerning this mediation in any subsequent court actions.

6. I understand that the confidentiality of the mediation process shall not excuse the mediator's duty to report any abuse, acts of violence or threats of violence revealed during said process.

7. By signing this agreement, all parties acknowledge they are under court order, from Cobb County Superior Court, to mediate. All agree to participate, in good faith, in each scheduled mediation session. All parties agree to work towards resolution of the issues.

8. I understand that payment of the mediator shall be agreed upon at the mediation conference. The agreed upon fee for this mediation shall be _____ hourly or _____ daily.

I have read and understand the above guidelines for mediation. I understand that neither the Mediator(s) nor court designee shall provide legal or financial advice. I understand that I have been directed and encouraged to seek independent legal advice. I further understand that by signing this agreement I am agreeing to mediate in good faith, at the agreed upon rate, and that I am under court order to do so. I have also been advised that I may not subpoena the mediator or any court designee to testify in court in any subsequent court action.

(date) _____
signature

(date) _____
signature

(date) _____
signature

(date) _____
signature

(date) _____
signature

(date) _____
signature

Mediator

4. Good Faith Participation: The parties agree that they are entering into this mediation process in good faith and shall make a sincere effort to arrive at a mutually acceptable resolution of the dispute. During the proceedings, any party or the mediator may elect to terminate its furtherance. In the event of termination, each party will remain responsible for its share of fees and expenses incurred to that point.

5. Attendance: All the parties shall appear at the proceeding with their attorney of record, if any. A non-individual party shall appear by a duly authorized representative with authority to negotiate settlement of the dispute on behalf of that party. If any party shall not be able to attend the session on the scheduled date, the fact shall be communicated to the mediator and the other parties not less than seven (7) days in advance thereof.

6. Pre-Conference Submissions: The parties agree that a summary of each party's understanding of the facts and theory relative to the issues of liability and damages presented to the mediator, prior to the conference, would facilitate the role of the mediator in conducting a more expeditious and effective mediation. The summary should be submitted to the mediator and exchanged between the parties not less than seven (7) days prior to the conference and should not exceed six (6) pages. Portions of the summary may be designated as "Confidential: Solely for the Mediator."

7. Authority To Caucus: The mediator is authorized to meet and caucus with each party separately during the conference. Any communication or document disclosed to the mediator during the caucus may be communicated and disclosed to the other party unless the mediator is otherwise advised.

8. Confidentiality: The parties agree and understand that the mediation proceedings constitute settlement negotiations between them. Therefore, all statements made by the parties or their representatives, relating to the mediation process, and any documents created for or during the mediation process, are inadmissible and not discoverable for any purpose, including impeachment, in any pending or subsequent proceeding. However, evidence that is otherwise admissible or discoverable is not rendered inadmissible or non-discoverable as a result of its use in the mediation process. A settlement agreement shall be signed and binding upon all parties thereto.

9. Mediator Privilege And Immunity: The parties agree they will neither request nor subpoena the mediator to testify in any matter for any reason, nor will the parties request or subpoena the mediator's notes, records or any materials in the possessions of the mediator, for any purpose. The parties agree that the mediator shall have the same limited immunity as judges and court employees have under the laws of the State of Illinois and agree to defend and indemnify the mediator in connection with any summons or subpoena arising out of the mediation proceeding. The parties also agree the mediator is not a necessary party in any judicial, quasi-judicial or administrative proceeding arising out of this mediation.

10. Fees And Expenses. The mediator shall be entitled to be compensated at the rate of _____ Dollars (\$_____) per hour or any portion thereof, including time required for review of the pre-conference submissions, plus actual expenses incurred in the procedure. A minimum of three (3) hours of billable time shall be due the mediator for the first conference unless it is cancelled not less than ten (10) days prior to the date scheduled.

The cost of the mediator's fees and expenses shall be borne equally by each side of the controversy and shall be paid within thirty (30) days of receipt of the billing statement

[Additional provisions, if any, not inconsistent with Circuit Court of Cook County Local Rule 20.]

IN WITNESS WHEREOF, by their signatures thereto, each party, individually, or by their duly authorized representative, certifies that it agrees with the provisions herein. This agreement may be signed in counterparts.

Dated: _____

PARTIES:

By: _____

By: _____

MEDIATOR:

AGREEMENT TO MEDIATE – WAIVER AND CONSENT FORM

_____ and _____
(collectively referred herein as the “parties”), agree to have _____
_____ (hereinafter collectively referred to as “mediator”)
administer the mediation of their dispute, concerning _____

_____ on the following terms and conditions:

1. The parties are involved in a dispute which they voluntarily wish to submit to mediation. Mediation is a voluntary, structured problem-solving process in which one or more neutral, impartial third persons assist the parties to a dispute in negotiating a voluntary agreement resolving the dispute. The mediator facilitates the negotiations, but does not impose his or her views of what the agreement should be.
2. The mediator believes that the dispute can be resolved. However, because the mediation itself and any agreement resolving the dispute will be the voluntary acts of the parties, the mediator cannot and does not guarantee that the dispute will be resolved.
3. While participating in mediation, each party agrees to make a good faith attempt to reach a reasonable resolution of this dispute through mediation, to cooperate with the mediator and the other parties, to allow the other parties to present their positions without unnecessary interruptions or objections, and to be open, candid and complete in its efforts to resolve the dispute. The mediator assigned to this case agrees to pursue the mediation diligently.
4. The parties understand that the mediator has no authority to decide any case and is not acting as representative, advocate or legal advisor for any party, and is not to provide legal advice to any party involved in mediation. Each party specifically agrees to obtain legal advice on any issue of interest to him/her from their own attorney, and not to rely upon the mediator for such advice.
5. Each party agrees to hold the said mediator harmless for any observations, suggestions, or implications that he/she may make in the course of mediation and/or for any other claim arising from the mediation process. Each party waives any right of action that he/she may have against the mediator for any allegation of wrongful conduct on his/her part while acting in the course of the mediation herein agreed to.
6. The parties have been informed of grievance, EEO and/or MSPB processes, and the time frames associated with them. This agreement to mediate does not negate or suspend any statutory or Collective Bargaining Agreement time frames.
7. Each party understands that mediation can be terminated at any time by any party or by the mediator.
8. Each party agrees that he/she will not call any mediator who mediates this case to act as witness in any pending or future arbitration or administrative or judicial proceeding, to testify to facts concerning or relating to the subject matter here being mediated. No party will depose a mediator or subpoena, compel production of, or otherwise seek documents or information about this case, which may have been retained by a mediator.

9. The confidentiality of the dispute resolution proceeding is established in the Administrative Dispute Resolution Act of 1996. The parties agree that statements made or documents prepared for the mediation process will remain confidential to the fullest extent as permitted by law, except for the limited purpose of implementation and enforcement of a resulting negotiated settlement agreement. In addition, parties agree to keep the discussions held in all sessions, including but not limited to the joint session of the mediation, confidential.
10. Each party agrees to treat everything said or otherwise disclosed by the opposing party, as part of an offer to compromise and settle the dispute being mediated. Each party further agrees that all information provided during the mediation session is without prejudice and will be inadmissible as evidence, in any pending or future arbitration or administrative or judicial proceeding. However, evidence which is otherwise admissible shall not be rendered inadmissible as a result of its use in the mediation.
11. Each party specifically agrees, however, that a fully executed settlement agreement can be admitted to any arbitration or administrative or judicial proceeding, as evidence of such settlement, and will not object to such admission.
12. I understand that no party to this mediation shall be bound to anything said or done at the mediation, other than this Agreement to Mediate and any written settlement agreement executed by all necessary parties. Before its execution, the terms of any settlement agreement are to be approved by any representative of each party. Once executed, a settlement agreement shall be binding upon all parties to the agreement.
13. Each party understands that he/she may have a representative present during the mediation and/or to review a proposed settlement agreement prior to its signing.

By signature below, I agree and consent to these terms and waive the rights herein specified. I know that I have the right to consult legal counsel or other representative, before executing this document.

Signed:

Party Representative

Party Representative

Mediator Mediator

Date: _____

Sample Agreement to Mediate

AGREEMENT TO MEDIATE

This is an Agreement between _____ and _____ and James C. Melamed, J.D., hereinafter "mediator," to enter into mediation with the intent of resolving the following issues: _____

The parties and the mediator understand and agree as follows:

1. Nature of Mediation

The parties hereby appoint and retain James C. Melamed, J.D., attorney at law, as mediator. The parties understand that mediation is an agreement-reaching process in which the mediator assists parties to reach agreement in a collaborative and informed manner. It is understood that the mediator has no power to decide 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 advised to obtain independent legal review of any formal mediated agreement before signing that agreement. The parties 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 here 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.

The parties also understand that the mediator may suspend or terminate the mediation if he feels that the mediation will lead to an unjust or 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 or other contested proceeding. Only a mediated agreement signed by any parties will be so admissible. The only other exceptions to this confidentiality are if all parties waive confidentiality in writing or in an action brought by any party against the mediator. The parties agree not to call the mediator to testify concerning the mediation or to provide any materials from the mediation in any court 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.

5. Full Disclosure

Each party agrees to fully and honestly disclose all relevant information and writings as requested by the mediator and all information requested by any other party, if the mediator determines that the disclosure is relevant to the mediation discussions. In family mediation cases, each party agrees to fully and accurately disclose all income, assets and debts.

6. Mediator Impartiality

The parties understand that the mediator must remain impartial throughout and after the mediation process. Thus, the mediator shall not champion the interests of any party over another in the mediation nor in any court or other proceeding.

7. Coordination with Legal Counsel

The parties agree that the mediator may discuss the parties' mediation process with any attorney any party may retain as individual counsel. Such discussions will not include any negotiations unless the parties instruct the mediator that their attorney(s) have negotiating authority. The mediator will provide copies of correspondence, draft agreements and written documentation to independent legal counsel at a party's request.

8. Mediation Fees

The parties and the mediator agree that the fee for the mediator shall be \$____ 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 \$____ 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:

_____.

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 15 days following the date of such billing, unless otherwise agreed in writing. There shall be a 1.0% monthly service charge on accounts not paid by the last day of the month.

Should payment not be timely made, the mediator may, in his sole discretion, stop all work on behalf of the parties, including the drafting and/or distribution of the parties' Agreement, and withdraw from the mediation. If collection or court action is taken by the mediator to collect fees and/or expenses under this Agreement, the prevailing party in any such action and upon any appeal therefrom shall be entitled to attorney fees and costs therein incurred.

DATED this ____ day of _____, 201__.

Frank Garfield

Mediator

1801 Century Park East, Suite 2400 | Los Angeles CA 90067-2326 | (310) 277-1981 | frgarfield@gmail.com

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[Sample Mediation Agreement](#)

MEDIATION AGREEMENT

This is an agreement between _____ and _____ ("the parties") who desire to enter into mediation under the auspices of Franklin R. Garfield ("the mediator") with the intention of resolving all issues arising from the contemplated dissolution of their marriage. The parties and the mediator agree as follows:

Mediation.

1. *Nature of Mediation.* Mediation is a process in which the mediator assists the parties to reach agreement on all issues in a collaborative manner. The mediator has no power to decide issues for the parties.
2. *Scope of Mediation.* The parties will determine the scope of the mediation and, with the assistance of the mediator, identify the issues to be resolved as early as possible in mediation.
3. *Voluntariness of Mediation.* The parties will try to resolve their situation through mediation. However, mediation is voluntary. Either party may withdraw from mediation at any time for any reason.
4. *Legal Advice.* Mediation is not a substitute for independent legal advice. The parties are encouraged to obtain independent legal advice throughout the mediation process as well as independent legal review of any mediated agreement prior to signing that agreement.
5. *Confidentiality.* The mediation process is confidential. Anything said by the parties in mediation may not be disclosed by the mediator to any third party unless the mediator is compelled to do so by valid court order. The mediation shall be governed by the provisions of Section 1119 of the California Evidence Code, which provides in pertinent part as follows:
 - 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.

The parties have been informed that all forms adopted for use in dissolution proceedings by the Judicial Council of California, including, specifically, the parties' disclosure documents (Schedule of Assets and Debts and Income and Expense Declaration) are not confidential, and may be used by either party for any purpose in accordance with the laws of the State of California.

- c. All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

The mediator will not be called as a witness by either party in any criminal, civil, or administrative action.

There is an obvious exception to the foregoing provisions. Documents prepared during the course of mediation that the parties intend to be binding and enforceable agreements (and hence admissible and subject to discovery) will contain a clause in substantially the following form:

The foregoing document shall not be inadmissible in a court of law, or otherwise protected from disclosure, pursuant to the provisions of §1119(b) of the California Evidence Code. This document shall expressly be deemed admissible in a court of law and otherwise subject to disclosure pursuant to the provisions of §1123 of the California Evidence Code.

6. This Agreement and the mediator's statements for services rendered and costs advanced to the parties by the mediator pursuant thereto are not protected from disclosure by mediation confidentiality, and shall be deemed discoverable and admissible into evidence in any civil action pursuant to Section 1123 of the California Evidence Code.
7. *Caucuses.* As part of the mediation process, the parties may agree that it would be helpful for the mediator to confer with each of them individually. This technique is referred to as a caucus. The form of a caucus varies: It can involve conferences scheduled separately with each party (either in person or by telephone) or brief meetings that take place during the course of a mediation session. The mediator will not caucus with either party unless he has the consent of both parties. Nothing said to the mediator by either party is confidential from the other party unless the parties agree that such communications may be treated as confidential.
8. *Full Disclosure.* Section 721 of the California Family Code specifies that a husband and wife are in a fiduciary relationship that imposes a duty of the highest good faith and fair dealing on each of them and that prohibits either of them from taking any unfair advantage of the other. This duty includes the obligation to make full

disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets and debts.

9. *Valuation.* The mediator will not be requested or required to investigate or confirm the identity or value of the parties' assets or the identity and amount of their liabilities, or the amount of the parties' income or expenses. The parties reserve their rights to have any of these matters investigated or confirmed by a third party (for example, an attorney, accountant, appraiser, actuary, etc.)
10. *Attorneys.* Upon the request of either party, the mediator will provide the parties' attorneys with copies of summary letters, draft agreements, and other documents pertinent to the mediation process.

Mediator.

11. *Appointment of Mediator.* The parties hereby retain Franklin R. Garfield, attorney at law, as the mediator. Even though the mediator is an attorney, the mediator does not represent both parties jointly or either party individually.
12. *Qualifications.* The mediator's education and experience are summarized in his professional resume, which has been provided to each of the parties.
13. *Standards of Practice.* The mediator adheres to the Standards of Practice for Family and Divorce Mediation promulgated by the Academy of Family Mediators (now known as the Association for Conflict Resolution) of which the mediator is a Practitioner Member.
14. *Services.* The mediator will meet with the parties in session and help them identify issues, develop options for resolving those issues, and reach agreement; the mediator will provide the parties with letters after each session summarizing the parties' tentative agreements, the work that must be done by the parties and the mediator before the next session, and the issues that will be discussed at the next session. At the appropriate time, the mediator will prepare a draft of the parties' settlement agreement. At the request of the parties, the mediator will prepare all forms necessary to initiate and process an action for dissolution of marriage, including a stipulated Judgment of Dissolution of Marriage.
15. *Closed Files.* In furtherance of the public policy of the State of California to protect the confidentiality of the mediation process, the mediator does not retain closed files. The parties will be provided with copies of their marital settlement agreement and Judgment of Dissolution of Marriage. All other documents in the file will be destroyed 30 days after the Judgment has been signed by the parties.

Compensation.

16. *Retainer.* The parties shall advance a retainer in the amount of \$_____, payable half by each party prior to the first mediation session, subject to reallocation by further agreement of the parties or, failing agreement between parties, by the Court. Any unused portion of the retainer is fully refundable to the party or parties who paid it.
17. *Hourly Rate.* The mediator shall be compensated at the rate of \$____ per hour for all time spent in connection with the mediation process
18. *Costs.* The mediator shall be reimbursed by the parties for all costs incurred in connection with the mediation process (e.g., copying charges, filing fees, etc.).
19. *Monthly Statements.* The mediator will send monthly statements to the parties itemizing the services performed, the time spent and the charges therefor, plus any costs that may have been advanced by the mediator.
20. *Payment.* The parties shall be jointly and severably liable for the mediator's charges, although the parties may make a different agreement with respect to responsibility for payment as between themselves.

Executed on _____, 2012 at Los Angeles, California.
Franklin R. Garfield

Mediation

Arbitration

Special Master
Services

Fees & Terms



Mediation

[Mediation](#) > Mediation Agreement Form

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Mediation Agreement Form

The undersigned, having agreed to participate in a mediation to be conducted by Mildred E. "Mimi" Methvin ("Mediator") of Satori ADR, J.L.L.C., in the case of _____, pending in _____, for the purpose of compromising, settling or resolving disputed claims, hereby agree as follows:

1. Mediation Proceedings.

Mediation is a process in which parties and counsel agree to meet with a neutral mediator trained to assist them in settling disputes. The mediator improves communication across party lines, helps parties articulate their interests and understand those of the other party, probes the strengths and weaknesses of each party's legal positions, identifies areas of agreement, and helps generate options for a mutually agreeable resolution to the dispute. In all cases, mediation provides an opportunity to explore a wide range of potential solutions and to address interests that may be outside the scope of the stated controversy or which could not be addressed by judicial action. A hallmark of mediation is its capacity to expand traditional settlement discussions and broaden resolution options, often by exploring litigant needs and interests that may be independent of the legal issues in controversy.

2. Authority of the Mediator.

During the course of the mediation, the Mediator is authorized to conduct joint and separate meetings with the parties and, at her discretion, to provide an evaluation of each party's case and to make recommendations for settlement. The parties acknowledge that the Mediator is not acting as an attorney or advocate for any party and that any recommendations or statements by the Mediator do not constitute legal advice. The parties acknowledge that they have been advised to seek and rely on the advice of their own counsel in connection with any settlement or other agreement.

3. Confidential and Privileged Nature of Mediation Proceedings.

All communications, written or oral, made in connection with the mediation are confidential and shall not be disclosed to anyone without specific authority of the parties involved. All documents submitted for the mediation conference will either be returned to the submitting party or destroyed by the mediator upon conclusion of the mediation. Neither the confidential mediation conference statements nor communications of any kind made in the course of the mediation may be used by any party with regard to any aspect of subsequent litigation or trial concerning the issues involved in the mediation. However, evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its disclosure or use during the mediation proceedings. Evidence that the parties have entered into a written settlement agreement during the course of the mediation may be disclosed and is admissible to the extent necessary to enforce the settlement under state or federal law.

4. Exclusion of Mediator Testimony and Limitation of Liability.

The Mediator shall not be subpoenaed or otherwise compelled to testify in any civil proceeding and shall not be required to provide a declaration or finding as to any fact or issue relating to the proceedings or the dispute which is the subject of said mediation proceedings. The Mediator shall not be liable to any party for any act or omission in connection with the mediation proceedings conducted pursuant to this Agreement.

5. Mediator's Services and Compensation.

The Mediator's services shall include attendance at mediation conferences, review of briefs and other written materials, participation in telephone conferences and any other services requested by the parties. The Mediator shall be compensated at the following rate *(include terms of any actual travel or other costs to be reimbursed)*:

A 50% deposit of the full-day or half-day flat rate shall be paid within three (3) business days of booking, unless otherwise agreed.

The undersigned parties shall share the Mediator's fees equally unless a contrary intent is indicated below.

6. Counterpart Execution: Binding on Representatives.

This Agreement may be executed in any number of counterparts which when taken together shall constitute one fully executed Agreement. This Agreement when so executed shall inure to the benefit of and be binding on the undersigned parties as well as their respective representatives or other persons they have caused to be present during these mediation proceedings.

By: _____
(Client Signature)

Date: _____

(Print Name)

By: _____
(Attorney Signature)

Date: _____

(Print Name)

 Tell a Friend  Printer Friendly Page

Consent to Mediate

We agree that:

1. Participation in mediation is voluntary. At any point, a participant may withdraw from the process.
2. Parties will deal with each other in a frank and honest manner, and will approach the mediation in a spirit of good will in the hope of resolving their differences.
3. All writings and all communications made during, or in connection with, the mediation that relate to the substance of the dispute are confidential and cannot be used for purposes outside of the mediation. Exceptions to confidentiality include: a) threats of physical harm to self or others; b) specific information which participants agree to share with anyone outside the mediation; and c) information shared during the mediation which is known or could be obtained through other means.
4. The mediator, as a neutral third party, will facilitate discussion in order to enhance communication and understanding. If participants choose to reach a resolution, the mediator will assist in this process. The mediator serves as a facilitator. The mediator is not an advocate, judge, jury, counselor, or therapist. The mediator does not give legal advice. The mediator will not solve the dispute, express an opinion on who is right or wrong, or make decisions for the parties. The mediator will help the parties generate possible solutions and assist the participants in reaching decisions that are acceptable to each of them. The mediator may determine that during the mediation process, separate meetings with the parties are appropriate.

The mediation process will include:

- an opportunity for all parties to be heard,
 - identification of issues to be resolved in mediation,
 - proposed alternatives for resolution,
 - and, if participants desire, a written agreement.
5. The parties agree not to involve the mediators, the Dispute Resolution Coordinator, or any records pertaining to this mediation in any court or administrative proceedings.
 6. When an agreement is reached, if the parties desire, it will be summarized in writing on the Mediation Agreement form or other agreed upon format. Parties are advised to review the document carefully and seek any desired legal advice prior to signing the agreement. Each participant pledges to abide by the terms of the signed agreement.

I have read and understand the provisions of this agreement.

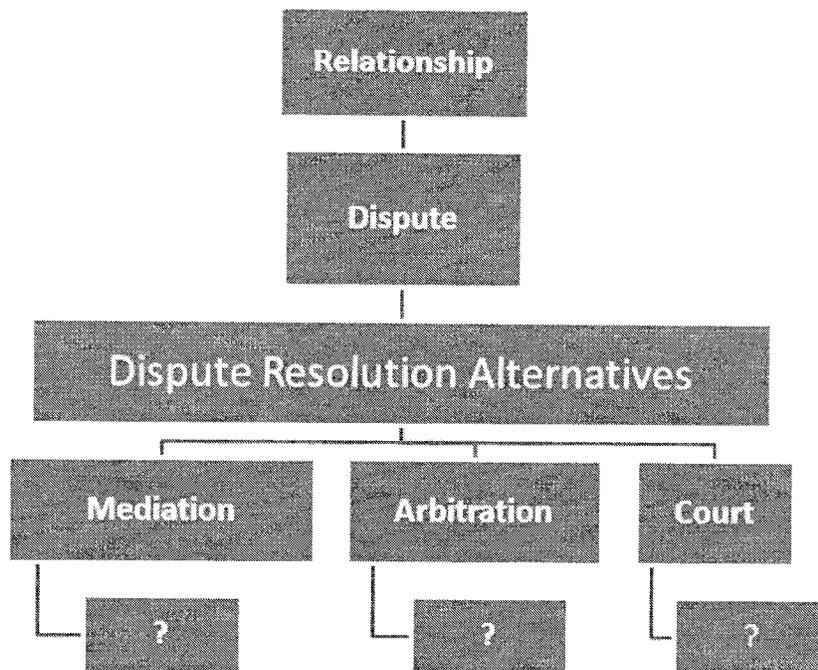
Signature of Participant	Date	Signature of Participant	Date

Signature of Mediator	Date	Signature of Mediator	Date

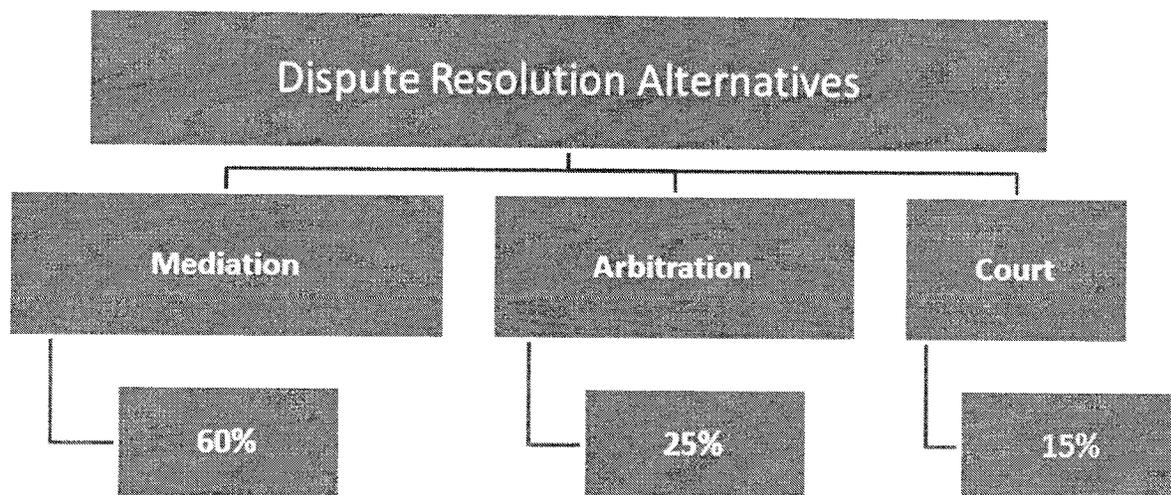
Mediation Processes and Either Independent or Court Jurisdiction

- MOST Arbitrations and Mediations Are Never Exposed to the Court System
 - Benefits Sought are Economy, Efficiency and Privacy
 - These Benefits are Unavailable through the Courts
- Mediation is an Non Compulsory ALTERNATIVE
- ADR Saves Time, Expense and Delay for BOTH the Courts and for the Parties
- CONFIDENTIALITY is an ESSENTIAL Part of the Mediation Process

Mediation Processes and Either Independent or Court Jurisdiction

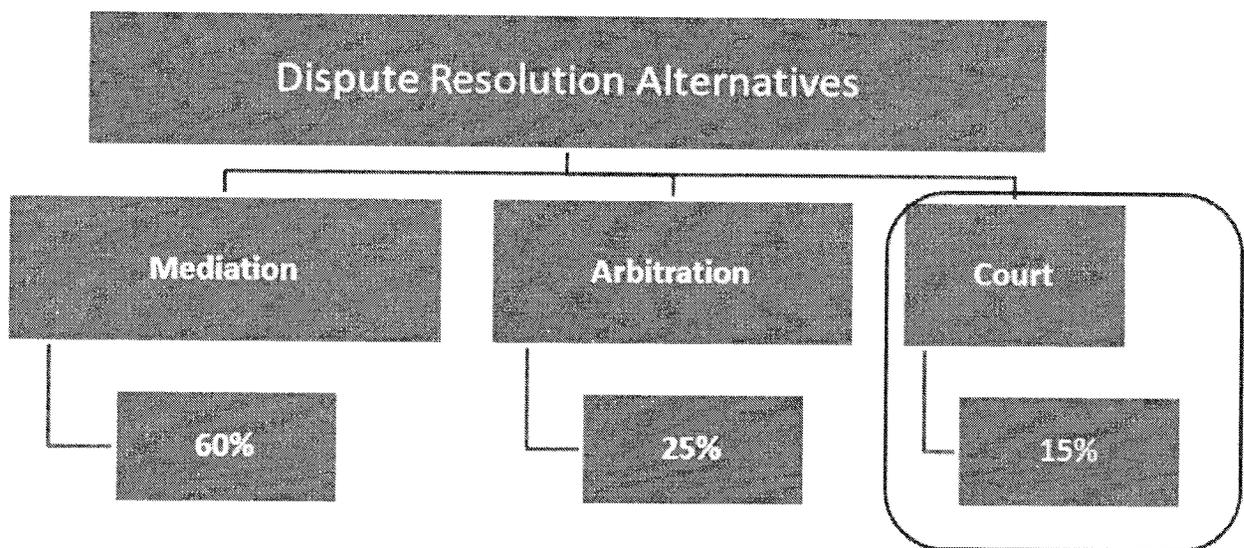


Mediation Processes and Either Independent or Court Jurisdiction



***Most Mediation is Performed Outside of the Court's Jurisdiction**

Mediation Processes and Either Independent or Court Jurisdiction



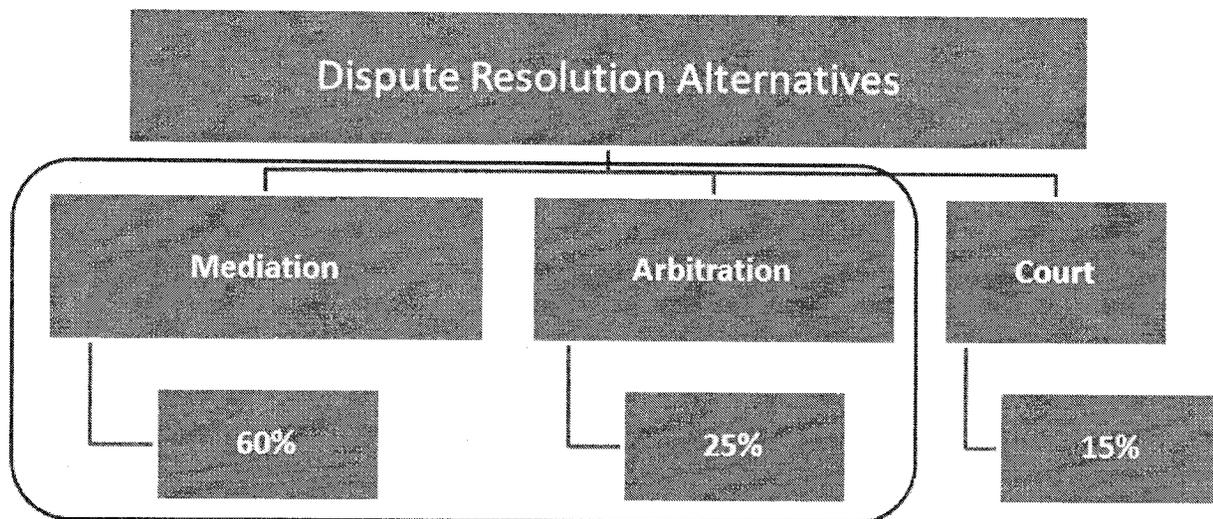
***Most Mediation is Performed Outside of the Court's Jurisdiction**

****1st Amendment May Apply to Court Jurisdiction**

CLRC May 20, 2195

4

Mediation Processes and Either Independent or Court Jurisdiction



**** 1st Amendment Does Not Apply to Independent Jurisdiction**

*** California's Constitutional Right to Privacy Does Apply**

CLRC May 20, 2106

5

Mediation Processes and Either Independent or Court Jurisdiction

- Most of Mediation is Private and Outside of the Jurisdiction of the Courts
- California's Constitutional Right to Privacy Prevents Intervention in the Management of Private Affairs and Contracts
- California is the Only State With an Express Constitutional Right to Privacy

Mediation Processes and Either Independent or Court Jurisdiction

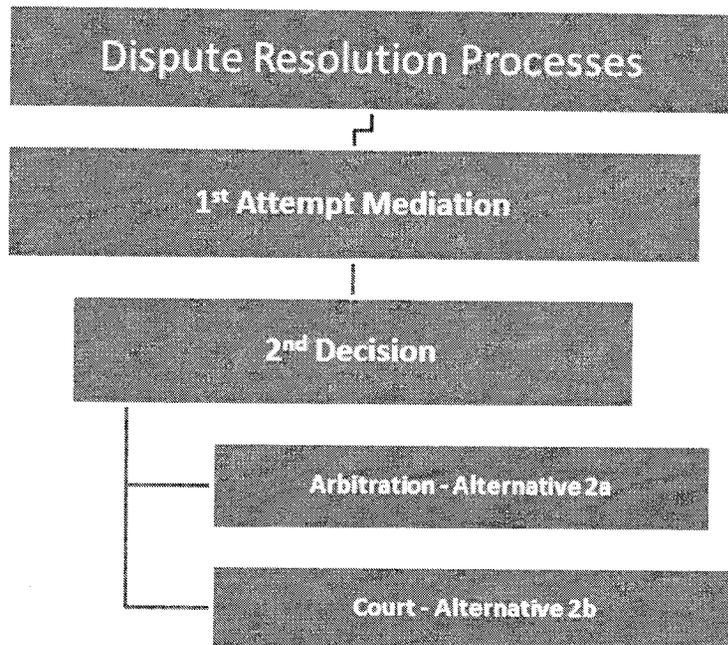
- Mediation and Arbitration are Chosen By The Parties
- Mediation is among the Least Compulsory Forms of Dispute Resolution
- Fundamental Principles of ADR Include:
 - Fairness and Accessibility
 - Efficiency and Economy
 - Privacy and Confidentiality
 - Predictability, Based on Established Law
 - Jurisdiction Based on Private Right of Contract

Mediation Processes and Either Independent or Court Jurisdiction

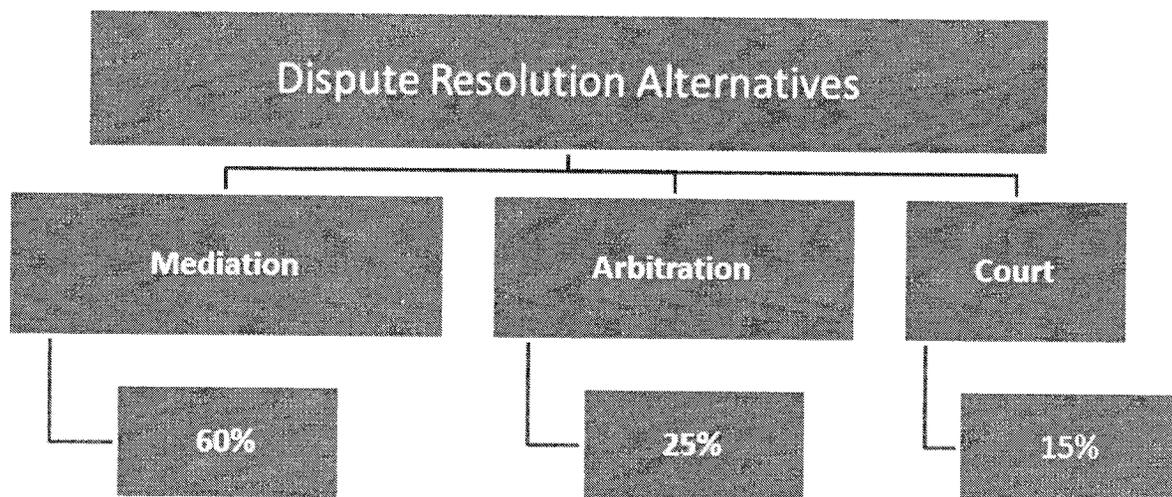
- MOST Arbitrations and Mediations Are Never Exposed to the Courts
- Mediation is an ALTERNATIVE
- Mediation is NON- Compulsory
- ADR Saves Time, Expense and Delay for BOTH the Courts and the Parties
- CONFIDENTIALITY is an ESSENTIAL Part of the Mediation Process
- California's Constitution Guarantees Privacy

Sequence of Dispute Resolution Alternatives

- Mediation is Often Before and Instead of Filing Suit
- Court Jurisdiction Does Not Apply Until Filing
- Settlement Agreements Only Appear In Court Records IF AND WHEN they need to be enforced.



Mediation Processes and Either Independent or Court Jurisdiction



***Most Mediation is Performed Outside of the Court's Jurisdiction**

Additional Confidentiality Provisions

Notwithstanding the provisions of Evidence Code §§1115-1128 et. sec., as they exist now or may be modified in the future, the Parties to this Mediation Agreement agree that the confidentiality provisions of this agreement are based on the long held cultural tradition of privacy in the management of personal affairs as guaranteed by the Article 1 of the California Constitution.

Modeled after 1542 Release:

~~Waiver of 1542 rights: Section 1542 of the California Civil Code provides that "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his settlement with the debtor." Despite this provision, each party waives the right to any future claims or any other rights under Section 1542.~~

Additionally, all settlement communications, including those contemplated under this agreement, are confidential and privileged pursuant to California Evidence Code Sections 1152, 1154, and Federal Rules of Evidence Section 408.

Furthermore, the Neutral in this matter, selected by mutual assent, has been ordained (or otherwise recognized) as a member of the clergy and all communications which relate to this exchange between the Parties and the clergy are confidential communications.

**Court Supervision of Mediation
is a
Phantom
and
Unrelated to the Public's Right to Know**

- **Mere Court Referral**
- **Confidentiality Agreements**
- **Prohibited Reporting and Supervision by
Assigned Judge**



CM ECF

PACER

- ▶ ALTERNATIVE DISPUTE RESOLUTION (ADR)
- ▶ Overview of the ADR Multi-Option Program
 - Early Neutral Evaluation (ENE)
 - Mediation
 - Settlement Conferences
 - Other Processes
- Statistics
- How To Choose an ADR Process
- Selecting a Neutral
- ADR Phone Conferences
- Answers to Common Procedural Questions
- ADR Handbook
- Forms
- ADR Local Rules
- ADR Local Rules Decisions
- Neutral Profiles
- ADR Magistrate Judge
- ▶ Becoming a Neutral
- Biographies of ADR Legal Staff
- Contacting the ADR Unit
- Testimonials and Awards
- Questionnaires
- ADR Annual Reports
- CAREER OPPORTUNITIES
- ▶ CASES
- ▶ CLERK'S OFFICE
- ▶ COURTHOUSE LIBRARIES
- ▶ COURTROOM TECHNOLOGY
- ▶ CRIMINAL CASE PROGRAMS
- ▶ CRIMINAL JUSTICE ACT (CJA)
- ▶ JUDGES
- ▶ PETTY OFFENSE DOCKET/TRAFFIC TICKETS

HISTORICAL SOCIETY

PRACTICE PROGRAM

HOME

Mediation

Governing Rule: ADR Local Rule 6.

Goal:

The goal of mediation is to reach a mutually satisfactory agreement resolving all or part of the dispute by carefully exploring not only the relevant evidence and law, but also the parties' underlying interests, needs and priorities.

See ADR LR 6-1.

Process:

Mediation is a flexible, non-binding, confidential process in which a neutral mediator facilitates settlement negotiations. The informal session typically begins with presentations of each side's view of the case, through counsel or clients. The mediator, who may meet with the parties in joint and separate sessions, works to:

- improve communication across party lines
- help parties clarify and communicate their interests and understand those of their opponent
- probe the strengths and weaknesses of each party's legal positions
- identify areas of agreement and
- help generate options for a mutually agreeable resolution.

The mediator generally does not give an overall evaluation of the case. Mediation can extend beyond traditional settlement discussion to broaden the range of resolution options, often by exploring litigants' needs and interests that may be independent of the legal issues in controversy.

See ADR LR 6-1 and ADR LR 6-10.

Preservation of Right to Trial:

The mediator has no power to impose settlement and does not attempt to coerce a party to accept any proposed terms. The parties' discovery, disclosure and motion practice rights are fully preserved. The parties may agree to a binding settlement. If no settlement is reached, the case remains on the litigation track.

The Neutral:

The court's ADR staff appoints a mediator who is available and has no apparent conflicts of interest. The parties may object to the mediator if they perceive a conflict of interest. Mediators on the court's panel have the following qualifications:

- admission to the practice of law for at least seven years (if a lawyer)
- experience in communication and negotiation techniques
- knowledge about civil litigation in federal court
- training by the court.

The court's panel also includes non-lawyer mediators if they meet the other qualifications and they have appropriate professional credentials in another discipline. Non-lawyer mediators are appointed only with the consent of the parties.

See ADR LR 2-5 and ADR LR 6-3.

Attendance:

The following individuals are required to attend the mediation session in person:

- clients with settlement authority and knowledge of the facts
- the lead trial attorney for each party
- insurers of parties, if their agreement would be necessary to achieve a settlement

Requests to permit attendance by phone rather than in person, which will be granted only under extraordinary circumstances, may be made to the ADR Magistrate Judge. Clients are strongly encouraged to participate actively in the mediation.

See ADR LR 6-9.

Confidentiality:

Communications made in connection with a mediation ordinarily may not be disclosed to the assigned judge or to anyone else not involved in the litigation, unless otherwise agreed.

See ADR LR 6-11.

Timing:

A mediation may be requested at any time. The time for conducting the mediation session is presumptively 90 days after the order of referral, unless another deadline is fixed by the court. The mediator contacts counsel to schedule an initial telephone conference to set the date, time and location of the mediation session and to discuss how to maximize the utility of mediation.

See ADR LR 6-4, ADR LR 6-5 and ADR LR 6-6.

Written submissions:

Counsel exchange and submit written statements to the mediator at least 7 days before the mediation. The mediator may request or accept additional confidential statements that are not shared with the other side. These statements are not filed with the court.

See ADR LR 6-7.

Appropriate cases/circumstances:

All civil cases in which the parties are represented by counsel are eligible. Cases with the following characteristics may be particularly appropriate:

- the parties desire a business-driven or other creative solution
- the parties may benefit from a continuing business or personal relationship
- multiple parties are involved
- equitable relief is sought -- if parties, with the aid of a neutral, might agree on the terms of an injunction or consent decree
- communication appears to be a major barrier to resolving or advancing the case.

See ADR LR 6-2.

Cost:

Mediators shall volunteer up to two hours of preparation time and the first four hours in a Mediation. After four hours of Mediation, the mediator may (1) continue to volunteer his or her time or (2) give the parties the option of either concluding the proceeding or paying the mediator. The proceeding will continue only if all parties and the mediator agree. If all parties agree to continue, the mediator may then charge his or her hourly rate or such other rate that all parties agree to pay.

See ADR LR 6-3(c).



**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

CASE NUMBER

v.

Plaintiff(s)

ORDER/REFERRAL TO ADR

Defendant(s).

The Court, having considered the parties' Request: ADR Procedure Selection, the Notice to Parties of Court-Directed ADR Program, or the report submitted by the parties pursuant to Fed. R. Civ. P. 26(f) and Civil L.R. 26-1, hereby:

ORDERS this case referred to:

- ADR PROCEDURE NO. 1:** (district judge *or* magistrate judge assigned to the case for such settlement proceedings as the judge may conduct or direct).
- ADR PROCEDURE NO. 2:** This case is referred to the ADR Program. Within twenty-one (21) days, plaintiff shall obtain the consent of a neutral listed on the Court's Mediation Panel who will conduct the mediation, and file form ADR-2, Stipulation Regarding Selection of Panel Mediator. If the parties have not selected and obtained the consent of a Panel Mediator within twenty-one (21) days, the ADR Program (213-894-2993) will assign one. Forms and a list of the Panel Mediators are available on the Court website, www.cacd.uscourts.gov. Absent extraordinary circumstances, parties cannot request a continuance within three (3) business days of a scheduled mediation.
- ADR PROCEDURE NO. 3 :** (Private mediation).

The ADR proceeding is to be completed no later than: _____

The Court further sets a status conference for: _____

For ADR Procedure Nos. 1 and 3, counsel are responsible for contacting the judge or private mediator at the appropriate time to arrange for further proceedings.

Dated: _____

United States District Judge/Magistrate Judge
EX 51

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NUMBER:

Plaintiff(s)

v.

Defendant(s).

**MEDIATION
CONFIDENTIALITY AGREEMENT**

RETURN A COPY OF THIS AGREEMENT TO THE ADR PROGRAM OFFICE. DO NOT FILE WITH THE COURT.

Consistent with Central District of California Civil L.R. 16-15, General Order 11-10, related Federal Rules of Evidence and to the extent applicable, California Evidence Code Sections 703.5 and 1115-1128, the participants in mediation in the above-captioned case agree that:

1. No written or oral communication made by any party, attorney, mediator or other participant in a mediation in the above-named case may be used for any purpose in any pending or future proceeding unless all parties, including the mediator, so agree.
2. The parties agree that evidence admissible or subject to discovery or disclosure shall not be inadmissible or protected from disclosure solely by reason of its introduction or use in the mediation. Disclosure of information that otherwise is privileged shall not alter its privileged character.
3. The parties shall not subpoena the mediator or any documents submitted to or prepared by the mediator in connection with or during the mediation. The mediator shall not testify voluntarily on behalf of a party.
4. This agreement shall not preclude the reporting of information to the Central District of California ADR Program Office pursuant to General Order 11-10.
5. In an action or proceeding to enforce a settlement, this agreement shall not render inadmissible a written settlement agreement, or a settlement placed on the record, reached as a result of the mediation.

Dated: _____

Print Name

Print Name

Signature

Signature

Email address

Email address

Describe Role in Mediation

EX 52

Describe Role in Mediation

Print Name

Signature

Email address

Describe Role in Mediation

Print Name

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Describe Role in Mediation

NOTE: If additional signatures are required, attach an additional page to this request.

Name, Address and Telephone Number of Attorney(s):



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NUMBER

v. Plaintiff(s)

Defendant(s).

MEDIATION REPORT

Instructions: The mediator must file this Report within 5 days after the conclusion of a mediation session even if the negotiations continue. If the case later settles with the assistance of the mediator, the mediator must file a subsequent Report.

1. A mediation was held on (date): _____ .
 A mediation did not take place because the case settled before the session occurred.
2. The individual parties and their respective trial counsel, designated corporate representatives, and/or representatives of the party's insurer:
 - Appeared as required by Civil L.R. 16-15.5(b).
 - Did not appear as required by Civil L.R. 16-15.5(b).
 - Plaintiff or plaintiff's representative failed to appear.
 - Defendant or defendant's representative failed to appear.
 - Other:
3. Did the case settle?
 - Yes, fully, on _____ (date).
 - Yes, partially, and further facilitated discussions are expected. (See No. 4 below.)
 - Yes, partially, and further facilitated discussions are **not** expected.
 - No, and further facilitated discussions are expected. (See No. 4 below.)
 - No, and further facilitated discussions are **not** expected.
4. If further facilitated discussions are expected, by what date will you check in with the parties?
 _____ .

Dated: _____

Signature of Mediator

Name of Mediator (print)

The Mediator is to electronically file original document.

EX 54

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**UNITED STATES BANKRUPTCY COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

In re)	Bk. No.
	}	
	}	[Chapter]
Debtor(s).	}	
<hr style="border: 0.5px solid black;"/>		
	}	Adv. No.
	}	
Plaintiff(s)/Movant(s),	}	MEDIATOR'S <u>CONFIDENTIAL</u>
v.	}	REPORT OF MEDIATION
	}	CONFERENCE
	}	<u>CONFIDENTIAL -- NOT</u>
	}	<u>TO BE FILED WITH THE</u>
	}	<u>COURT</u>
Defendant(s)/Respondent(s).	}	
<hr style="border: 0.5px solid black;"/>		

I hereby certify that the following information is true and correct to the best of my information and belief:

1. How did you learn of your mediation assignment? (PLEASE CHECK ALL THAT APPLY)
 - (a) Received Court order _____; (b) Phone call _____;
 - (c) Fax from Mediation Program staff _____;
 - (d) Other _____.
2. In what capacity did you serve?
 - (a) Mediator _____; (b) Alternate Mediator _____;
 - (c) Successor Mediator _____; (d) Successor Alternate Mediator _____.

- 1 3. How did the mediation assignment conclude?
 2 (a) Settled _____; (b) Did NOT settle _____.
- 3 4. How many hours did you spend scheduling and preparing for the mediation
 4 conference? _____
- 5 5. How many hours did you spend attending the conference? _____
- 6 6. Which dispute resolution procedure(s) did you use? (IF MORE THAN ONE
 7 METHOD USED, PLEASE ESTIMATE PERCENTAGE OF TIME SPENT ON EACH)
- 8 (a) Early neutral evaluation: _____ (_____%)
 9 (b) Settlement negotiation: _____ (_____%)
 10 (c) Mediation: _____ (_____%)
 11 (d) Other: _____ (_____%)

12 (Describe): _____
 13 _____

- 14 7. Were you compensated for your mediation services? _____
- 15 8. Have you filed Form 706 (Mediator's Certificate Regarding Completion of
 16 Mediation Conference) with the Court, and mailed courtesy copies to the judge assigned
 17 to the matter and to Judge Russell (the Mediation Program Administrator)? _____

18 9. Comments/suggestions: _____
 19 _____
 20 _____
 21 _____
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23 DATED: _____ (Name of Mediator)
 24 _____
 25 _____ (Signature of Mediator)
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MEDIATION CONFERENCE ATTENDANCE FORM

Case Name: _____

Case No.: _____

Adversary Proceeding Name: _____

Adversary Proceeding No.: _____

Date(s) of Conference(s): _____

Mediator: _____

Instructions: All attorneys and client representatives who attend the conference shall provide the following information to the Mediator. **PLEASE WRITE OR PRINT CLEARLY.**

ATTORNEYS

Name: _____

Name: _____

Firm: _____

Firm: _____

Address: _____

Address: _____

Phone: _____

Phone: _____

E-mail: _____

E-mail: _____

Attorney for: _____

Attorney for: _____

Name: _____

Name: _____

Firm: _____

Firm: _____

Address: _____

Address: _____

Phone: _____

Phone: _____

E-mail: _____

E-mail: _____

Attorney for: _____

Attorney for: _____

[Attach additional page(s) if necessary.]

CLIENT AND/OR CLIENT REPRESENTATIVES

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Name: _____

Name: _____

Title: _____

Title: _____

Organization: _____

Organization: _____

Address: _____

Address: _____

Phone: _____

Phone: _____

Party Representing: _____

Party Representing: _____

Name: _____

Name: _____

Title: _____

Title: _____

Organization: _____

Organization: _____

Address: _____

Address: _____

Phone: _____

Phone: _____

Party Representing: _____

Party Representing: _____

[Attach additional page(s) if necessary.]

Mail to: Hon. Barry Russell
Mediation Program Administrator
United States Bankruptcy Court
255 East Temple Street, Suite 1660
Los Angeles, California 90012