



Convening the Mediation: What Can and Should Mediators Do When All Parties Haven't Yet Agreed to Mediate?

November 18, 2015 – 2:00 pm – 3:30 pm EST

PROGRAM SUMMARY

Confidentiality, neutrality, voluntariness and self-determination are critical elements of the mediation process. These principles potentially are challenged when one party wants to mediate, the other party (or parties - family, elder or complex commercial disputes, etc.) has not yet agreed to participate and an ADR provider or individual mediator is asked to help persuade the part(ies) to come to the table. Additional issues pile on when a mediator hears about a dispute and wants to sell the mediation process (and the mediator) to potential parties. Ethics experts and practitioners will conduct an interactive session discussing best practices in convening a mediation.

AGENDA

2:00 p.m.	Welcome and Introduction of Speakers	(5 minutes)
2:05 p.m.	Mediation Intake <ul style="list-style-type: none">• Convening Upon Request• Convening Without a Request	(75 minutes)
3:20 p.m.	Conclusion and Questions	(10 minutes)
3:30 p.m.	Evaluation	(5 minutes)
3:35 p.m.	Adjourn	

Kristen M. Blankley is an Assistant Professor at the University of Nebraska College of Law, where she teaches on a wide variety of alternative dispute resolution and ethics topics, including negotiation, mediation, arbitration, and professional responsibility. Professor Blankley also an active scholar in the field of Alternative Dispute Resolution, publishing on arbitration, mediation, and ethics in alternative dispute resolution issues. She has written on topics including class action arbitrations, judicial review of arbitration awards, Federal Arbitration Act preemption, mediation ethics, and mediation confidentiality. She is active in the mediation community both locally and nationally.



NANCY WIEGERS GREENWALD
ngreenwald@construction.org

Nancy Wieggers Greenwald is an experienced arbitrator and mediator who has more than 30 years of experience as an attorney and business executive in the construction industry, including as the owner of a design-build firm. Since 2010, Ms. Greenwald has directed her energies to the creation of practical, cost effective solutions for resolving construction and commercial disputes. She is the founder of [Construction Dispute Solutions, PLLC](#).

Nancy Greenwald is currently the Executive Director of the [Construction Institute](#) of the University of Hartford, in Hartford, CT. The mission of the Construction Institute is "*to be a leading knowledge network for the exchange of information and innovative ideas by creating stronger collaborative relationships among architects, engineers, constructors, owners and other industry stakeholders.*" Lawyers, including neutrals, are an important part of the membership and are welcome to join.

Ms. Greenwald serves on the American Arbitration Association's Construction Industry Panel of Arbitrators and Mediators as well as the FINRA arbitration panel and has been appointed as a private arbitrator by the Virginia Courts. Ms. Greenwald is a member of the Executive Committee and Leadership Council of the Dispute Resolution Section of the American Bar Association, a member of the Forum on Construction Law, the Litigation Section, and the Business Law Section. Ms. Greenwald is a former co-chair of the Women in Dispute Resolution Committee and the Women Advocate Committee of the ABA, a member of the Women's Bar Association of DC and is a past co-chair of the Fairfax Bar Association Alternative Dispute Resolution Section. She is a certified as a mediation trainer by the Dispute Resolution Services office of the Virginia Supreme Court and has regularly served as a discovery motions conciliator in the Circuit Court of Fairfax County, Virginia.

Ms. Greenwald has numerous publications in dispute systems design, arbitration and complex construction contracts. She received her J.D. from Harvard Law School (1981, *cum laude*) and her Sc.B. from Brown University (1978, *magna cum laude*).



Conna A. Weiner, Esq.

- Current Employer-Title** Independent Mediator, Arbitrator, and Legal Consultant
- Profession** ADR Practitioner (mediator, arbitrator, facilitator), Attorney
- Work History** Independent Mediator, Arbitrator, and Consultant 2013-present (consulting clients have included Bayer Healthcare (device and pharmaceuticals)); General Counsel, North America, Mylan, Inc., 2010-2012; Research Consultant on Legislative Project (non-legal), Clark University, 2012; Vice President and Lead Counsel, Shire Human Genetics Therapy, 2009-2010; U.S and global roles at Novartis from 1993-2009, including the following: Head Litigation, Ex-Americas, 2009; General Counsel and Global Compliance Officer, Novartis Animal Health, Inc./Novartis, 2007-2009 (managing general lawyers, patent and trademark groups); Vice President, Legal Novartis Pharmaceuticals Corporation, 2004-2007 (U.S. Legal Head Ophthalmology, Transplant, Managed Care and Government Contracting, Antitrust); Executive Director and Section Head approximately 1996 on; Litigation Associate, Paul, Weiss, Rifkind, Wharton & Garrison, 1987-1993.
- Experience** Experience: In addition to this description, please see www.connaweineradr.com for additional information.
Diversified U.S. and international experience as (a) general civil litigator and (b) in-house counsel, including in General Counsel positions, in multinational life sciences/healthcare corporations (general practice, litigation management and pharmaceutical/device specific issues)
*General practice: full panoply of issues crossing an inside counsel's desk in a multinational, multifunctional legal corporate setting: employment issues, IT/software licensing, general facilities contracts, etc.
*Complex civil litigation/investigations, including securities, banking, loan guarantees, Lanham Act and trademark, U.S. nationwide multi-district litigation involving pharmaceutical pricing antitrust allegations, Hatch-Waxman and other patent litigation, purchase price adjustment and other commercial agreement litigation, asset acquisition (material adverse event exercise in government-ordered divestiture), Administrative Procedure Act, product liability, government contractor audits, False Claims Act, significant compliance investigation in Brazil and Argentina, employment; global litigation management and Sarbanes-Oxley reporting of same.
*Complex commercial transactions, including licensing, asset purchases and divestitures (both voluntary and government-driven, in the U.S. and the EU), global research, development and commercialization collaboration agreements, global clinical trial-related agreements. Contracting partners have included, in addition to general service providers and suppliers for businesses, pharmaceutical and device companies and other industry participants (such as suppliers) and healthcare companies (including payors and providers); post-merger integration planning and participation.
*Intellectual Property, including licensing and acquisition issues, Hatch Waxman

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and other patent litigation, trademark and copyright litigation, related counseling, management of global patent, trademark/copyright group.

*Supply Chain issues, such as procurement practices, global supply and manufacturing, product shortages, quality issues, recalls.

*Counseling, contracting and collaborations involving transactions and business arrangements with government healthcare programs (such as Medicare, Medicaid, Federal Supply Schedule), private payors (HMO's, pharmacy benefit managers and other health insurance entities) and providers (community hospitals and academic medical centers), distributors (wholesalers, retailers, specialty distributors).

*Regulatory, including securities law disclosures, product research (such as research subject protection) and development, pharmaceutical and device product approval, labeling and launch requirements, federal and state law government affairs issues involving drugs and devices, sales and marketing practices counseling (advertising, promotional and anti-kickback/anti-bribery, False Claims, privacy (HIPPA, state laws, EU laws).

*Research and Development-related counseling and contracting, including clinical trials, clinical research organization agreements, sponsored research, material transfer and related agreements.

*Antitrust and Trade Association Counseling

*Numerous therapeutic areas and technologies, including transplantation and immunology, drug-coated stents, epilepsy, oncology, vaccines, ophthalmics, companion and farm animal diseases and pest control, orphan drugs (such as lysosomal storage disease therapies, radiology, vascular interventional, small molecules, biotechnology, generics, devices.

*Compliance policies, procedures, investigations (U.S. and as a global general counsel and compliance officer).

Alternative Dispute Resolution Experience

As an advocate: At Paul, Weiss, end-to-end representation of clients in three-year, ad hoc arbitration involving complex international commercial dispute. Parties chose to perform some discovery (documents, depositions), employ expert witnesses, etc.; full hearing before retired federal judge. Involvement in two significant ICC arbitrations while at Novartis.

AAA Commercial Arbitration Panel: biotechnology valuation; healthcare payor-provider disputes (provider termination and benefit coverage); creditor-debtor disputes; general commercial; franchise terminations

MA Fee Arbitration Board: Attorney-client fee disputes.

Alternative Dispute Resolution Training

Facilitation Skills for Mediators, Cambridge Dispute Settlement Center training, run by the Public Conversations Project, 2015; Health Care Arbitration, American Health Lawyers Association, 2015; AAA, Award Writing 2015; AAA Fundamentals and Best Practices for New AAA Arbitrators, 2013; Appointed AAA 2013 Higginbotham Fellow for up and coming diverse ADR professionals - week long training in arbitration and mediation rules, techniques, ethics; as Higginbotham Fellow, given access with the consent of the parties to observe several complex AAA arbitrations; Michael Lewis and Linda Singer's Advanced Commercial Mediation multi-day training (through JAMS); AAA Essential Skills for the New Mediator, 2012; AAA Payor-Provider Rules, 2010; Mediation

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The AAA provides arbitrators to parties on cases administered by the AAA under its various Rules, which delegate authority to the AAA on various issues, including arbitrator appointment and challenges, general oversight, and billing. Arbitrations that proceed without AAA administration are not considered "AAA arbitrations," even if the parties were to select an arbitrator who is on the AAA's Roster.

Services of North Central MA -- mediation training and observations.
Pursuant to confidentiality and party/AAA agreements, in my capacity as an AAA Higginbotham Fellow and over the past few years, I have had the unique opportunity to observe 4 significant, complex, AAA arbitrations, which included one before a three arbitrator panel and three additional sole arbitrator arbitrations, involving construction, music industry, law partnership and patent infringement disputes;

Professional Licenses Admitted to Bar: New York, 1987; Massachusetts, 2013; U.S. District Court, Eastern and Southern Districts of New York, 1989.

Professional Associations Currently: American Health Lawyers' Association; Licensing Executives Society; American Bar Association (Section on Dispute Resolution); National Task Force on Diversity in ADR. New York State Bar Association (Section on Dispute Resolution) Massachusetts Bar Association (Member, MBA ADR Committee), Boston Bar Association.

Education Oberlin College (BA-1983); University of Chicago Law School (JD-1986).

Significant post law-school continuing legal and other education/training: American Health Lawyers' Association Fundamentals of Healthcare Law (2010); Legal Issues in Academic Medicine (2013); Legal Issues in Higher Education (2010); Patent fundamentals, licensing and litigation courses; Hatch-Waxman workshops Compliance training Mini-MBA Boston University (2010); Wharton Executive Leadership Education and other executive leadership courses and training.

Publications and Speaking Engagements

Publications:

Article: "Striving for the 'Bulletproof' Mediation Settlement Agreement," with Edna Sussman, CPR Alternatives and NYSBA Dispute Resolution Lawyer, April 2015

Outlines, Research Summaries and Forms for ABA Section on Dispute Resolution Panel: Mediation Convening and Intake Best Practices

Speaking Engagements (chronological order):

Panelist: 2013 ABA Section on Dispute Resolution Annual Meeting, "What Clients Are Looking for in Arbitration"

Presenter: 2013 ExecuSummit on ADR, "Arbitration Evolution"

Panelist: 2013: Massachusetts Law Weekly Panel for Inside Counsel, "ADR and Business Disputes"

Panelist, 2014: New England Corporate Counsel Association, "Dispute Resolution: Managing Your Exposure and Avoiding Your Day in Court (And What To Do If You Can't Avoid It)"

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Semi-Final Judge, ABA National Mediation Competition, 2014

Organizer and Moderator, Tech Sand Box (MA start-up incubator) program on Managing Dispute in Life Sciences Collaborations, 2014

Panel, Association of Strategic Alliance Professionals: Managing Disputes in Life Sciences Collaborations

Panelist, 2015 CPR Annual Meeting, ADR in Intellectual Property Cases

Panelist, 2015 ABA Section on Dispute Resolution Annual Meeting: High Technology ADR

Organizer and Moderator, 2015 ABA Section on Dispute Resolution Annual Meeting: Mediation Convening and Intake Best Practices

Presentation/speech with Sasha Carbone Arbitration Practice Development, Diversity and AAA Higginbotham Fellowship, 2015 American Arbitration Association Annual Board Meeting.

Current Board Membership: Community Dispute Settlement Center, Cambridge, MA; Chair, Program Committee

Citizenship

United States of America

Languages

English

Locale

Boston, Massachusetts, United States of America

Compensation

Hearing: \$2450.00/Day
Study: \$350.00/Hr
Cancellation Period: 0 Days
Comment: I practice in both Boston and New York and the surrounding areas. Therefore, I will not seek reimbursement for travel within a reasonable distance from Boston and will also generally waive travel expenses to the New York-New Jersey metropolitan area. I am very open to establishing agreed caps on any travel charges.

Cancellation: Written notice required; payment for all time and nonrefundable expenses incurred through date of notice and for post-cancellation wind-up time and expenses (return of confidential materials, etc.); if hearing scheduled, fees in accordance with AAA rules to

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account for time held.

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Item 5: Safety Tips, Prepared by Professor Kristen Blankley, University of Nebraska Law School

Ways to Make Mediation Safer in Cases of High Conflict

Mediation is, by its very nature, a potentially volatile situation. While our perception of mediation might focus on the end goals of peacemaking and relationship building, we often forget that parties enter the mediation in various states of conflict. While conflict is neither good nor bad in the abstract, conflict certainly has the potential to escalate if not successfully managed.

Safety should be one of our primary concerns as a mediator, if not our utmost concern. When we think about safety, we should consider the safety of the parties and ourselves. Safety concerns may come to light in a variety of situations, from threats of violence to table thumping to displays of weapons in the mediation room. This short article considers a wide variety of safety tips broadly arranged into the categories of pre-mediation, mediation session, and post-mediation.

Before the Mediation Begins:

Know Your Surroundings

Before you mediate, be sure that you have become familiar with the location where you will be conducting the session. Do you know where all of the *doors* and *emergency exits* are located? Can you locate the *fire alarm* or *telephone*? Will anyone be at that location if you are mediating at *night*? Will anyone be screening the parties for *weapons*? Is the *parking lot* well lit?

If you are mediating in your own location, you hopefully know all of this information already. If you are mediating on location for one of the parties or at a different neutral site, you may have to do some research, especially if you suspect some hostility. In some situations, mediating at a courthouse can be ideal, especially if you are concerned about the presence of a weapon or suspect the need for police back-up, if necessary.

Keep Important Numbers on Hand

Certainly, we all know that we can call *911* in an emergency. Other numbers can also be helpful, such as the *Department of Health and Human Services*.

Address Safety Issues with Parties in Initial Private Sessions

Conducting an *initial private session* of some sort with each party to a mediation can be helpful in a wide variety of mediation cases. During those sessions, you can talk to both parties about the relationship with the parties and whether the parties have any particular *safety concerns*,

button-pushing triggers, or suspicion of *weapons* possession. In Nebraska, for example, family mediators are required to screen for *domestic intimate partner abuse*, but an initial private session to discuss safety may be helpful in every case, no matter the subject matter. If the preparation session indicates that safety measures must be taken, you can make process choices based on these concerns, such as mediating in caucus or asynchronously.

Prepare Yourself for the Individual Case

In addition to the initial private session, mediators can engage in other preparation to help you make these safety decisions. It might be helpful to review the *case file* on JUSTICE or other type of database to determine if any *protection orders* have been sought or ordered in the case. In some situations, you might want to conduct a *background check* on a party.

Understand Certain Human Behavior

Most of us have heard about *fight or flight* (or *freeze*), but we could learn more about our human reactions to difficult situations. Understanding these reactions may help us understand our own behavior as well as the behavior in the parties in the room.

During the Mediation:

Arrange Your Room

Consider how you arrange your mediation room in order to promote safety. Consider who should sit *closest to the door* in the event that you need to quickly exit the room. Think about the *seating arrangement* and how closely the parties are to one another and your proximity to both of them. In the unusual situation, you may need to remove all *scissors, pencils, letter openers*, and other ordinary objects that may be used as weapons.

Consider Modifications to Your “Usual” Procedures

You may want to discuss safety issues in your mediator’s *opening statement*, such as telling the parties that the process is intended to be a safe space and that you can take precautions if a party no longer feels safe. If you usually invite *opening statements*, you may decide to eliminate them so as to not heighten emotions. Alternatively, opening statements could be given in *caucus*, instead.

Speaking of Caucuses

Separating the parties in terms of space or time may be a safer way of mediating a high conflict case. If parties do not feel comfortable meeting in the same room, then use separate caucus rooms for the entire mediation. If parties do not feel comfortable being in the same building at the same time, then you could consider an asynchronous mediation meeting with different parties on different days.

Take a Break

If things get heated during a session, changing something in the situation may help calm the temperature in the room. Your options are plentiful: *take a break, tell a joke, offer some snacks, call a bathroom break*. In an extreme situation, you may need to *close the session*. These techniques should help diffuse the situation and help you assess whether a safety threat is real.

Have Some Company

If you do not feel comfortable being alone with the parties, then make appropriate arrangements. In some situations, solo mediators may want to use a *co-mediation* model in order to assert additional authority in the room. At a minimum, you may want to ensure that other *office personnel* are in the building and able to check in on your room if tensions elevate. To achieve these ends, you may need to mediate *during business hours* and avoid nights and weekend mediations.

Stay Aware

When you suspect that safety may be a concern, you should stay alert. Consider trying to *widen your peripheral vision* in order to take in more of the room. Be sensitive to *sudden movements*, especially if you fear a weapon in the room. In addition, keep an eye on the non-aggressing party to determine if that party is giving non-verbal cues that the aggressor party may be escalating.

Trust Your Gut

Many of us are mediators because we have a good way with people and can often *read their emotions*. If you think a party is merely joking or letting off steam, you very well might be right! Although we generally err in favor of more safety than less, we also do not want to go overboard. We also want to do our best not to escalate the situation ourselves.

Following the Mediation:

The moments following the close of a mediation may be one of the most critical times in the entire process. *Stagger the exit times* of the parties, if possible. One easy way to stagger the exit times is to break the parties into *caucus* rooms and dismiss the victim party first, while the aggressor party is still in the building. Have the parties leave through *different exits*, if possible, and *walk the parties to their car*, if appropriate. In extreme circumstances, you may need to call a *police escort* to ensure that both parties leave the mediation safely.

Agreement to Mediate Checklist

Prepared by Conna Weiner

www.connaweineradr.com

AGREEMENT TO MEDIATE – CHECKLIST

Selected, suggested topics to be addressed in a more fully developed agreement; note that confidentiality is provided for as a matter of contract and specifically includes intake/screening and other communications before the agreement to mediate was signed, as well as pursuant to recited applicable laws.

1. The Mediation Process

The purpose of the mediation process is to assist the parties cooperatively and informally to negotiate a resolution of their dispute that is acceptable to them and that they each believe is a resolution that is better than alternatives to a negotiated compromise and settlement, such as stalemate, arbitration or litigation.

(a) Role of the Mediator.

Facilitate and improve communications and information exchange about the dispute; neutral and impartial

The mediator may discuss the dispute with the parties together and separately (ex parte) before, during or after the mediation session in an effort to help resolve the dispute.

The parties will follow the recommendations of the mediator as to the agenda and process most likely to resolve the dispute.

[The mediator may, in her discretion, and in addition to facilitating discussions, provide an evaluation of the likely resolution of the dispute if it is not settled.]

Mediator is not giving legal advice and is not acting as any party's attorney. The mediator does not owe any fiduciary duty to any party and is an impartial and neutral participant in the process.

Mediator not a therapist, social worker or psychiatrist.

(b) Voluntary Process.

Process is voluntary.

Parties shall raise with the mediator any concerns they have about the process before or during the mediation

Any party may terminate or withdraw from the mediation for any reason at any time by written notification to the mediator and the other parties.

(c) Preparation.

The mediator shall seek to speak to the participating parties separately before the mediation to understand the nature of the dispute, the parties' fundamental interests and concerns and the parties' views about any impediments to settlement.

Parties shall endeavor to come to the mediation prepared with reasonable knowledge of the basic facts, documents and law of their case that are within their control, such as: insurance, issues that need to be covered, drafts of documents they would like to be signed, required approvals, legal or approval requirements.

(d) Participants; Authority to Settle.

Bring to the mediation those persons or representatives believed to be necessary or appropriate to resolve the dispute.

Obtain full authority or have full authority to settle the dispute among those in attendance.

2. Legal Representation

The parties understand that they may consult legal counsel at any time, and, if the parties have not already arranged for legal representation in connection with the mediation, they are strongly urged to do so. [Consider: If a party has any concerns about proceeding without additional legal advice, they should immediately advise the mediator so that the mediation can be suspended or terminated.]

3. Confidentiality

(a) Scope of Confidentiality.

The parties and the mediator agree that the entire mediation process is confidential and privileged pursuant to _____ and, in addition, any other applicable state law, and shall be treated as a compromise negotiation for

the purposes of the Federal Rules of Evidence (such as F.R.E. 408) and any applicable state laws.

The parties and the mediator further agree as a matter of contract that the entire mediation process, including but not limited to intake, screening and any preliminary discussions before this agreement to mediate was signed, with either party or both parties and the mediator or the mediator representatives, is confidential and agree not to disclose any information [specify confidential information as appropriate]

(b) Exceptions to Confidentiality

(i) The parties may disclose information about the mediation to their respective attorneys, financial advisors and, in the case of a business or non-profit organization, those within the business or organization with a need to know, provided, however, that they shall inform all such individuals that the information is confidential and privileged, may not be disclosed to others and is governed by the terms of this agreement.

(ii) The mediator may disclose to appropriate authorities information obtained in the course of the mediation concerning [include exceptions compliance with state law requirements, such as child/elder abuse, serious harm to an individual, criminal activity, etc.]

(iii) The confidentiality and privilege provided for in this agreement shall not apply to information the parties agree in writing, after the conclusion of the mediation, may be disclosed.

(iv) Unless the parties agree otherwise in writing, nothing in this agreement shall prevent any party from presenting an interim or final agreement or signed memorandum of understanding executed as part of the mediation process to a court for purposes of enforcement of that agreement or understanding.

(c) Testimony. The parties agree that: (i) they shall not seek to obtain the testimony of the other party or the mediator regarding the mediation, and that the mediator will be disqualified as a witness or expert in any pending or subsequent litigation or arbitration involving the parties and relating in any way to the dispute or (ii) the disclosure of the mediator's file or documents related to the matter, and that if either party seeks such testimony or disclosure by the mediator in contravention of this provision, that person shall reimburse the mediator for all costs in connection therewith, including reasonable attorney's fees, and shall compensate the mediator at the mediator's then current hourly rate.

(d) Separate Meetings. The mediator may communicate separately with either or both parties or their counsel as part of the mediation process and, in connection with any such separate communication, a Party or/his/her counsel may request that the mediator keep confidential all or party of what was communicated. The mediator agrees to honor all such requests except to the extent that the substance of the communication falls within one of the exceptions to confidentiality set forth in this agreement.

(e) Stenographic Record. The parties and the mediator agree that, except insofar as all parties may otherwise agree in connection with the recording of a settlement agreement, there shall be no stenographic record or other recording of any meeting. The parties and the mediator may, however, take notes during the mediation sessions.

(f) Duration of Confidentiality Obligations. The confidentiality obligations set forth in this agreement shall remain in effect even after the completion of the mediation process, regardless of whether the matter is resolved by settlement or not.

4. Disclosure of Prior Relationships

(a) The mediator's obligation. The mediator shall make reasonable effort to learn and has disclosed to the parties (i) all social, business or professional relationships of which the mediator is aware that the mediator has had with the parties or their counsel; (ii) any financial interest the mediator has in any party or in the outcome of the case; and (c) any other circumstances that may create doubt regarding the mediator's impartiality in the mediation.

(b) The parties' obligation. The parties hereby confirm that they are not aware of any conflict of interest with regard to the mediator's serving in this matter, or any prior relationship with the mediator that has not been disclosed. Extensive information about the mediator's background is available [in her disclosure statement provided to the parties] [on her website] [on the mediation organization's website] [specify other sources] at and should be reviewed by the parties.

(c) Mediator Liability The parties agree that the mediator shall not be liable for any act or omission in connection with this mediation other than for acts of gross negligence or bad faith.

5. Future Relationships The mediator shall not undertake any attorney legal work for or against either party regarding the subject matter of the mediation.

6. Compensation.

(a) Services Covered by this Agreement; Hourly Rates and Expenses. [Adjust as necessary but disclose every item that will be billed.] The parties understand that they will be billed for all time spent in preparation for and at mediations sessions, telephone conferences, sending and responding to emails, preparing documents, whether before, during or after the mediation sessions(s), and review of memos and other material submitted to the mediator by the parties. The parties will be billed at the mediator's cost for such necessary expenses as copies, faxes, long distance telephone calls, mailings and other items. The mediator's hourly rate for all services performed by the mediator shall be _____.

(b) Allocation of Costs. The parties agree to pay these fees and expenses in the following manner: ____% by _____ and ____% by _____.

(c) Deposit; payments. [Specify any deposits/retainers required, where invoices are to be sent, address for payments.]

[(d) Cancellation. In the event that a party cancels a scheduled mediation for any reason on less than one weeks' notice to the mediator, that party shall pay forfeit their deposit.]

7. Miscellaneous.

(a) Entire Agreement. This agreement constitutes the entire agreement of the parties and mediator as to the mediation described herein and supersedes all previous oral and written agreements between or among themselves regarding the mediation. No modification of this agreement may be made except in a writing signed by the parties and the mediator.

(b) Governing Law. The terms of this agreement shall be governed by the law of _____.

(d) This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, and all of which together shall be deemed to be one and the same instrument.

[Include party reps as well as their lawyers]

[Party A]

[Party B]

[Mediator]

SAMPLE

[DATE]

VIA ELECTRONIC MAIL

[CLAIMANT NAME
ATTORNEY NAME AND ADDRESS]

[RESPONDENT NAME
ATTORNEY NAME AND ADDRESS]

RE: **[CASE NAME AND NUMBER IF ANY]**

ENGAGEMENT LETTER AND AGREEMENT TO MEDIATE

To Counsel and the Parties:

The undersigned Parties hereby agree to participate in mediation of their dispute in accordance with the following terms:

1. **DEFINITION OF MEDIATION:** Mediation is a voluntary process in which a neutral person (the Mediator) facilitates communication between the parties and, without deciding the issues or imposing a solution on the Parties, assists them to reach a mutually agreeable resolution to their dispute. The goal of Mediation is a formal written Mediated Settlement Agreement, acceptable for court filing.
2. **VOLUNTARINESS AND SELF-DETERMINATION:** Participation in mediation is voluntary. The Mediator will conduct the mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary decision in which each party makes free and informed choices as to process and outcome. The mediation process can be terminated at any time by either party or by the Mediator.

[COMMENT: This language is adapted from the *The Model Standards of Conduct for Mediators, 2005, Standard 1.A.*]

3. **ROLE OF THE MEDIATOR:** The Mediator assists the Parties in identifying issues, reducing obstacles to communication, maximizing the exploration of alternatives, and reaching a voluntary and mutually agreeable solution to the Parties' dispute. The Parties understand and agree that the Mediator does not represent any Party in this mediation. The Mediator does not give legal or financial advice or legal or financial counsel. The Mediator has no duty to provide advice or information or to assure that any Party understands the consequences of his or her actions. The Mediator's function is to promote and facilitate voluntary resolution of the matter.
4. **APPOINTMENT OF MEDIATOR:** The Parties agree that [YOUR NAME HERE] shall be the mediator.

5. **APPLICABLE RULES:** **[COMMENT: Where specific rules are specified in the underlying contract or otherwise, I identify them in the Engagement letter.]**
6. **PRE-MEDIATION SCHEDULING CONFERENCE:** The Mediator will schedule a pre-mediation scheduling conference within 10 business days after receiving signed copies of this Agreement signed by all Parties. At this conference, the Mediator and the Parties will review the Mediation Process Agreement (copy attached).
7. **COOPERATION AND GOOD FAITH:** The Parties agree to cooperate with each other and with the Mediator and to actively participate in the search for fair and workable options.
8. **CONFIDENTIALITY:** The parties recognize that the mediation sessions are compromise negotiations and are inadmissible in any litigation of their dispute to the extent allowed by law. All memoranda, work products and other materials contained in the case files of a Mediator are confidential. Any communication made in or in connection with the mediation, which relates to the controversy being mediated, including screening, intake, and scheduling a mediation, whether made to the Mediator, to a party, or to any other person, is confidential. However, a written mediated agreement signed by the parties shall not be confidential, unless the parties otherwise agree in writing.
9. **CONSULTING WITH ADVISERS:** All parties are encouraged to consult with an attorney, accountant or other advisor before, during and after the mediation session and before finalizing an agreement regarding legal rights and obligations.
10. **CAUCUSES:** The mediator may hold private sessions (caucuses) with either party at any time. The information gained in private sessions may not be shared in joint session, unless the participant consents to disclosure.
11. **MEDIATOR'S IMMUNITY FROM FUTURE SUBPOENA OR DISCOVERY REQUESTS, AND DISQUALIFICATION AS WITNESS**

The Parties may not subpoena or otherwise require or compel the Mediator to testify or to produce any of her records, notes or work product concerning any aspect of the Mediation in any further proceedings of any type and in any jurisdiction.

The Mediator will be disqualified as a witness, consultant or expert in any pending or future action relating to the Dispute or other subject matter of the Mediation, including actions between people not parties to the Mediation.

To the extent the Mediator receives a third-party request, in the form of a subpoena or other legal demand, for any such information or documents related to the Mediation, then, as soon as practical after its receipt and prior to complying to the extent required by law, the Mediator will so inform the Parties of the request and its terms in order to enable the Parties to respond accordingly to the issuance of the request.

12. **COMMUNICATION**

Any and all correspondence relating to this Mediation and/or documents to be filed with or submitted to the Mediator outside the hearing may be sent directly to the Mediator to the e-mail address specified.

Communications to the Mediator shall be emailed to the Mediator at: [E-MAIL Address].

Communications to the Parties shall be as follows:

Communications to Claimants: [email address].

Communications to Respondent: [email address]

13. **MEDIATOR'S ACKNOWLEDGEMENTS AND DISCLOSURES**

The Mediator acknowledges that she is independent of the Parties and the Dispute, and is impartial. Each Party acknowledges receipt of a copy of the Mediator's resume and any disclosures previously made and/or attached hereto. Each Party and its Counsel have made reasonable effort to learn and have disclosed to the other Party and Mediator, in writing, any fact or circumstance that constitutes a conflict of interest or raises an appearance of bias or evident partiality that might justify the Mediator's removal or recusal.

The Parties and the Mediator are satisfied that any relationships that have been so disclosed will not affect the Mediator's independence or impartiality. Notwithstanding such relationships that the Mediator and the Parties did not discover despite good faith efforts to do so, the Parties wish the Mediator serve in this Mediation, waiving any claim based on those relationships, and the Mediator agrees to so serve.

The disclosure obligations set forth above are continuing on both the Parties and the Mediator until this Mediation is concluded. The ability of the Mediator to continue serving as Mediator shall be explored by the Mediator and the Parties with each such disclosure, to the extent any such disclosures subsequently occur.

14. **MEDIATOR'S COMPENSATION**

The Mediator's rate is \$XXX per hour. Study time, pre-mediation conference(s) and post-mediation follow-up are billed at hourly rate. Travel and accommodations, if required, at actual cost. No charge for travel time except for case related work. Cancellation fee: 100% of payment is due if cancellation is within 2 working days of commencement of mediation; 50% of payment is due if cancellation is within 5 working days of commencement of mediation. Cancellation fees apply only to schedule in-person sessions and not to telephone sessions. There would be no administrative or other fees charged to the Parties.

The Parties shall split equally the fees and expenses of the Mediator upfront, unless they agree otherwise and inform the Mediator of this. Within 5 days after the PreMediation

Scheduling Conference, the Mediator will send the Parties an estimate of the mediation costs. On or before [DATE] The Parties shall each pay [50% of ESTIMATE], by check made payable to "XXXXX" ("the firm"), with receipt required on or before XXXXXX.

10. BILLING, PAYMENTS

Payments shall be remitted by US postal mail to:

[XXXXX]

12. NO ACTION AGAINST MEDIATOR

The Parties specifically stipulate and agree that no action may be brought against the Mediator arising from the discharge of her duties in connection with the Mediation, and expressly agree that the Mediator shall not be liable to pay any Party or its counsel for any act or omission relating in any way to or in connection with the Mediation. Each Party expressly covenants not to commence an action or administrative proceeding, in court or in Mediation, against the Mediator concerning her services as Mediator. No Party or Counsel will ever subpoena the Mediator to testify in any action or proceeding, in Mediation or otherwise, as to anything arising out of, relating to, or connected in any way with the Mediation. The Parties also agree that the Mediator is not in any way a necessary party in any judicial proceeding related in any way to the Mediation. Each Party agrees to hold the Mediator harmless against any claims, demands, or lawsuits. The Parties further agree that in the event a Party does subpoena the Mediator to testify, that Party shall compensate the Mediator at her then-applicable hourly rate for all the Mediator's time and expenses related to the Mediator's response to the subpoena.

13. COUNTERPART EXECUTION

This document may be executed in any number of counterparts. Each of the counterparts shall be deemed an original. Once each counterpart is duly executed by an appropriate Party or Counsel, all such counterparts will collectively constitute the executed agreement.

14. SEVERABILITY

If any portion of this document is to be unenforceable, that portion is so severed from this agreement with the remaining provisions continuing in full force and effect.

Please sign on the appropriate line below, scan and e-mail a copy of the signed letter to the Mediator and opposing Counsel no later than 5:00 pm, Thursday, [XXXXX].

Very truly yours,

[XXXXXX]

Mediator

For and on behalf of Claimants

[NAME OF CLAIMANTS]

Printed name of attorney

For and on behalf of Respondent

[NAME OF RESPONDENT]

Printed name of attorney

Item : Mediation Intake – Checklist in Light of Needs for Impartiality, Voluntariness, Confidentiality and Self-Determination

© Conna Weiner

A. Is mediation the best dispute resolution process for the problem?

1. What is “intake?”: The first meaningful communication between a mediator and a potential client.¹ If referred by a court, mediation is already the chosen dispute resolution process.

2. Compare “convening”: “Conflict interventions usually begin with a convening process, in which the disputants come together with a third party to discuss the conflict and decide on a course of action....Convening is the first stage in conflict intervention. Its role, as the name implies, is to bring disputants to a preliminary meeting where they will discuss the issues of a conflict and consider options for its resolution. Its goal is to pave the way for an actual conflict resolution process such as mediation, negotiation or consensus building.”²

*convening is also used more generally in mediation to mean securing the agreement of all parties to mediate; this is part of the mediation intake process.

3. Mediation intake should include some element of convening assessment as defined in point 2 above. Ideally, many of the questions asked below should inform a discussion with the client as to whether or not mediation is the appropriate next step. Explaining that compromise is key to a good mediation is critical.

B. Assess the degree to which you can promise that the intake process before an agreement to mediate is signed is confidential in your state or program

1. Different states have different definitions of what is covered by their confidentiality statutes, to the extent that confidentiality of mediation communications is required by statute.³ We understand that Virginia amended its mediation confidentiality statute to specifically include intake and screening due to the incidence of subpoenas issued to receptionists and intake administrators by attorneys.

¹ We are indebted to Israela A. Brill – Case of the Boston Law Collaborative for allowing us to include with our materials “**The Importance of Intake in Mediation.**” See Item 3. A number of our points here were influenced by this piece.

² Spangler, Brad. “**Convening Processes.**” *Beyond Intractability*. Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder. Posted October 2003

<http://www.beyondintractability.org/essay/convening-processes>.

³ See selected statues included with our materials as Item 4. The Uniform Mediation Act appears to cover intake confidentiality.

2. The period before an agreement to mediate is signed is a time for appropriate caution. Depending on the rules applicable to your program or in your state, you may want to adjust the amount of information you collect in writing.

C. Convening at the Request of One Party - Reaching Out to Bring Another Party to the Table Requires Special Care

1. Many individual mediators are reluctant to try to persuade a party to mediate who has not yet agreed to do so because, among other things, it may compromise their neutrality in the eyes of that party. There are also issues potential confidentiality issues, as referenced above, if an agreement to mediate has not been signed. Mediator-lawyers may be reluctant to reach out to those who may be represented by counsel. We think that these issues can be managed and that it is a good thing to try to increase awareness of and the use of mediation.

2. Understand what efforts the person who has called you for help has made to approach the other party (this will come out in the intake form elements we suggest below). Although we do not think it is at all inappropriate for mediators or mediation providers to reach out to parties to persuade them to mediate, it is obviously ideal for the parties to come to you having agreed to mediate.

3. Ensure that you understand whether the parties are represented by counsel, in particular the party to whom you will be reaching out. Ask the party who has called you to request your assistance whether or not he knows if the other party is represented by counsel. If there is counsel involved, and you know the identity of that attorney, you should consider addressing your communications to the attorney as well as the other party.

4. We do not believe that the ethical problems associated with a lawyer representing a client calling an opposing party directly when he or she knows that that party is represented by counsel are triggered when a lawyer-mediator is clearly playing the role of a mediator in contacting a represented party wearing their mediator hat. Nevertheless, particularly when the mediator is also an attorney, it is the better practice to make the other side's attorney aware of the contract.

4. Assess the form in which you (either a mediator or mediation provider) will approach the other party: Letter? Email? Telephone call? An email that can be copied to the party who has approached you for help may be the most transparent and is especially appropriate if the other side is represented by an attorney.

5. Encourage, as a next step, a joint session with the all parties to discuss the mediation process further – in other words, encourage a joint “convening” process.

6. The emphasis in these “pre-agreement” mediation communications will be on education about the mediation process and accurate “promotion” of the effectiveness of the mediation process. We think that teaching people about the mediation process is one justification for engaging in the convening process.

7. Try, at some point, to give the more reluctant party the same opportunity to answer the intake questions we suggest below and in the sample intake form so that you start collecting “equal information” from both sides. The party won’t necessarily be ready to engage in full intake, but the same questions should be asked about the dispute to the extent possible and practical. This is particularly important in connection with issues relating to safety/abuse, competence, disabilities, etc. Try to control the level of detail shared about the dispute at this point, while getting the information you need to assess conflicts, your competence and other important issues (see D 1 below)

8. Do not share what the requesting party has told you during their initial discussion with you unless you have their agreement, just as you would treat communications made during an individual session during the mediation.

9. Individual mediator involvement in suggesting mediation to another party may present more issues than having intake staff who will not be mediating (such as the effect on the appearance of impartiality).

D. Intake questions should be systematic, consistent and reasonably thorough; both parties should participate in mediation intake if time allows

1. Some mediators prefer to know as little as possible about the dispute and the participants before the mediation is commenced in order to preserve their impartiality. We recommend working from a reasonably detailed mediation intake form (See Item 6 in these materials) because we believe that the benefits outweigh the risks in this regard, as is discussed throughout this outline. For example, questions regarding mediator conflicts and competence to hear the dispute should be understood up front, as well as who should attend the mediation or would need to approve any agreement.

2. If intake confidentiality is a concern in your state, be careful about recording “admissions” by a potential mediation client that, for example, they owe money.

3. Ideally, as mentioned above, both/all involved parties should fill out or provide the information sought by your checklist or form. Being able to tell the parties that equivalent information has been provided during the mediation intake process by all “sides” helps support the **mediator’s neutrality** and **voluntariness of the participation by the parties**. An agreement to mediate will also be executed, of course, but joint participation from the beginning is ideal.

E. Collect essential information about the parties and their special needs/barriers to a voluntary and safe mediation

1. Name, contact information, best times to reach them.
2. Assess whether or not there are any capacity issues that may affect the parties' abilities to participate in a fully self-determined way. This can be particularly important in elder law matters; this area requires highly specialized and detailed intake and could be a separate panel discussion in itself.⁴
4. Assess whether or not there are any disability issues that may need reasonable accommodation.⁵
5. Assess whether or not there are any safety/abuse issues involved in the dispute. See panelist Prof. Kristen Blankley's piece included with our materials as Item 5 on "**Ways to Make Mediation Safer in Cases Of High Conflict.**" As with capacity and elder care issues, this sort of intake is highly specialized. Note exceptions to some state confidentiality statutes for threats, criminal plans, etc. See Item 4, statutory excerpts, included with our materials.

F. Determine Prior Experience with and Provide Education About and Support for the Mediation Process; Encourage the Parties to Obtain Legal or Other Advice Necessary to Support the Principle of Self-Determination

1. Ask the parties whether or not they have prior experience with mediation and their understanding of the process. This is especially important in cases where you are bringing another party to the table.
2. Describe the process, possibly with reference to additional resources you like (videos, on-line pamphlets, etc.)
 - (a) voluntary and non-binding – both parties will need to sign an agreement to participate in the mediation process; no one can be forced to sign an agreement regarding the dispute, and the mediation can be ended at any time.

⁴ There are numerous resources available on the internet relating to elder care mediation training and assessment issues; see, for example the **Association for Conflict Resolution Task Force on Eldercare Coordination October 2014 report**,

<http://www.eldersandcourts.org/~media/Microsites/Files/cec/ACR%20Guidelines%20for%20Elder%20Caring%20Coordination%202014.ashx>

⁵ See **Questions and Answers for Mediation Providers: Mediation and the Americans with Disabilities Act (EEOC, Department of Justice)**
www.mediate.com/articles/eeocada.cfm#

(b) confidential – they will agree to keep the mediation confidential and many state laws and programs provide that the mediation is confidential

(c) mediator is neutral and impartial and is simply helping the parties communicate, understand their needs and interests and come to an agreed compromise; the mediator may be a lawyer but will not give legal advice to either party

(d) Encourage parties to seek legal advice from a qualified attorney on legal issues or other professionals (social work, psychiatrist, etc.) as necessary. This is critical to the principle of self-determination/informed consent.

(e) If you perform “evaluative” mediation, disclose this to the parties and get permission from all of them to do this; disclose other issues about your style of mediation.⁶

3. Encourage the use of mediation as an effective tool for resolving disputes outside of court in a time-saving and cost-effective way, but don’t oversell possibility of reaching an agreement. (See ABA Model Standards of Conduct for Mediators, included in our materials as Item 8, Standard VII, Advertising and Soliciting).

G. Collect Information about the dispute to help assess the status of the dispute, what the parties think they are entitled to, how they see the dispute being resolved and who needs to be at the mediation to really resolve the conflict.

1. The intake collection form should have a reasonably detailed list of subject areas which may arise in your practice.

2. Determine whether or not a court case is pending involving the dispute and secure the public documents and lawyer contact details (see discussion in Section C 3-4 above); caution parties not to share privileged and confidential information without their attorneys’ consent and before an agreement to mediate is signed.

3. The intake collection form should contain open-ended but reasonably probing questions about the nature of the dispute, such as:

(a) Describe the events that have happened to date; what is the basic nature of the dispute. Is it about money owed? More than that?

(b) What actions have you taken to resolve the dispute?

(c) What actions, if any, has the other party taken to resolve the dispute? What do you think their position is regarding the dispute and why?

⁶ If the mediator will play an evaluative role, this should be disclosed and agreed in the agreement to mediate. See Agreement to Mediate checklist included as Item 13.

(d) What other actions do you believe that you need to take to resolve the dispute?

(e) What are you hoping will come out of the mediation? [Listen, then probe:] Just an agreement about money? Any form of non-monetary benefit, such as return of goods, acknowledgement that they will do certain things under a contract or otherwise, or stop doing something? An apology?

(f) What was your last contact with the other party about this dispute?

(g) others involved in the dispute; who needs to be at the mediation in order to resolve?

(h) Do you need approval from anyone else in order to come to an agreement about resolving the dispute?

(i) What information or documents do you think that you will need to resolve the dispute?

H. Assess to what extent pre-mediation preparation may be necessary and appropriate

Complex commercial and other types of matters involving a number of parties and complex issues often involve significant pre-mediation preparation such as information and document exchange, individual sessions with the mediator after the mediation is agreed to but before it is convened, preparation of position papers by attorneys, etc. Preparation is often significantly under-utilized in part because its benefits significantly under-appreciated. (There is also the practical issue of time.) As you are collecting information about the dispute, you should be assessing the benefits of pre-mediation preparation as part of the intake process. (see questions G 3 (h) and (i) above, for example)

I. Identify and Evaluating Potential Conflicts of Interest

1. Impartiality is absolutely critical to the mediation process. It is important to go beyond basic questions during intake to try to flush out potential conflicts of interest.⁷ The questions under Sections E-G above will help flesh out these issues. To evaluate potential conflicts of interest, you need to learn who the parties are, what they do and on whom they are relying for support. In commercial transactions, the names of individuals involved in the transaction or contract, the names of any experts who have rendered an opinion, the companies/individuals who have

⁷ See n. 1, supra, Brill-Case, The Importance of Intake in Mediation

provided estimates of damages claimed, etc. Family and elder care matters often involve others outside of the immediate dispute.

2. To help the parties determine whether or not they believe that conflicts exist, ideally a mediator disclosure form should be prepared by the mediator discussing his/her background and experience that can be provided to potential mediation participants. This is done consistently in arbitration, but not so consistently in mediations.

J. Assess Your Competence to Mediate a Particular Case

Disclose your experience to the parties and any limitations you may have.

K. Intake is an opportunity to get a sense of the clients, their personalities and negotiating styles⁸

Listening to how the parties express themselves gives you insight into what to expect from them in mediation. Make certain that you believe that you can work with these parties about this particular problem. Gain information about potential party dynamics that may derail the mediation if not managed.

L. Disclose your fees and costs.

* * *

Intake issues can and should be more fully explored in individual premediation sessions after the mediation has been successfully convened.

⁸ See id.

SAMPLE INTAKE FORM: INDIVIDUAL AND SMALL BUSINESS

Note to Participants: This form is designed to provide a template for the types of information that should be collected from all parties as part of the mediation intake process in matters involving individuals and small businesses. Whether or not the entire form is completed in writing (in hard copy or on line) or all or parts of it are completed (or only discussed) on the telephone or in person will depend on (a) the level of confidentiality protection available for the intake process – before a mediation has been agreed to by the parties – and (b) the preferences/practices of an individual or mediation organization. It can and should be used as relevant by all parties who have agreed to be involved in the mediation so that each party understands and appreciates that they have had an opportunity to give the mediator equivalent information from the very beginning.

We are aware that some mediators believe that it is best to know as little as possible about the matter to be mediated to prevent the possibility of mediator bias. Again, this will be a matter of individual mediator preference, but in our experience preparation on the issues set forth in this form can be critical in laying the groundwork for a robust mediation. As we have noted above, however, it is important to attempt to collect the information from all parties.

This form is aimed at individuals and small businesses approaching mediators or mediation organizations on their own behalf. Complex business disputes involving parties represented by attorneys are highly likely to require, among other things, more extensive pre-mediation preparation by the parties and mediator regarding the information/documents relevant to and legal aspects of the dispute once an Agreement to Mediate is signed, including the preparation of pre-mediation position papers for the mediator. The basic issues set forth below will still need to be discussed and collected as part of the initial intake process at an appropriate level of detail depending on the sophistication of the parties.

INSTRUCTIONS:

WHAT IS MEDIATION? [insert your or your organization's description; the following is one of many options] The purpose of the mediation process is to assist individuals or businesses to work together to negotiate a resolution of a dispute that is acceptable to each of them and that they believe is better than no agreement or alternative ways of resolving their dispute, such as litigation. It is voluntary – it can be ended by any of the participants at any time -- and non-binding, unless, of course, each side agrees to enter into an agreement to settle their dispute as a result of participating in mediation. The mediator is not serving as a lawyer for either side; he or she is a neutral, impartial participant helping the parties to communicate and identify their important needs and interests and reach an agreement. We will also agree to keep the mediation confidential. Mediation has the potential to be a quick and cost-effective way of resolving disputes and preserving relationships. More information about the process can be found at _____ [insert mediator or organization website, links to videos about mediation such as ABA/Suffolk University materials, etc.]

FILL OUT THIS FORM TO REQUEST MEDIATION. Please fill out this form to request mediation. The information will help the mediator understand basic issues about you and, as relevant, your business and the dispute. Filling out the form does not require you to go to mediation. You will not be committed to mediate or to pay fees until you and the other person or business agrees to mediate by signing an Agreement to Mediate. If we go forward with the mediation, the mediator [our organization] will charge fees in accordance with our fee schedule [which is attached] [is available on _____]. We generally recommend that the parties share the fees equally. You can find an Agreement to Mediate [Answer depends whether your form is online, you are meeting in person, or speaking over the phone.] After you fill out this form, we can usually get started within one week. Getting started might include some preparation by each party (finding documents, talking to the mediator

individually about the dispute) before actually starting the mediation. We will also want the other parties involved in this dispute to fill out this form so that we have similar information from both of you before we start.

LEGAL ADVICE: It is important that you are able to make informed choices about how you deal with your dispute. As noted above, we do not give legal advice to our mediation clients. If you think that you need to talk to a lawyer about your legal rights before or during the mediation, we strongly encourage you to do so.

PART I: IDENTIFY THE PARTIES AND DESCRIBE THE DISPUTE. The first part of the form gives us contact information about you, a short description of the problem, and contact information about the other person or business involved in the dispute. If the dispute is already in court or in an arbitration or other legal process and you have been sent to mediation, it is very important that you let us know. It is also important to know whether or not you or the other party have retained a lawyer to help you with the dispute.

PART II: YOUR PRIOR EXPERIENCE WITH MEDIATION OR ARBITRATION/LITIGATION. It will help us structure the process to know whether or not you have had previous experience with mediation, arbitration or litigation. Only very general information is required.

PART III: SPECIAL ISSUES INVOLVING THE PARTIES: In this Section we ask about language, hearing, mobility, capacity, safety or any other issues that you believe may affect the ability of the potential participants to participate in the mediation.

PART IV: THE DISPUTE AND YOUR DESIRED RESULT. In this Part, we will be asking you to tell us about the details of the dispute and your desired result.

PART 1: IDENTIFY THE PARTIES AND DESCRIBE THE DISPUTE

<p>ABOUT YOU</p> <p>If you have a lawyer representing you in connection with this dispute, please list their information:</p>	Name:	
	Phone number:	
	Email address:	
	Mailing address:	
	Lawyer's name:	
	Lawyer's Phone number:	
	Lawyer's email address:	
	Lawyer's mailing address:	
<p>ABOUT THE OTHER PARTY</p> <p>(Please fill in any information you have. If you don't have the information, just write "I don't know.")</p> <p>0 The other party has a lawyer but I do not know their contact information</p> <p>0 I do not know whether or not</p>	Name:	
	Mailing address:	
	Phone number:	
	Email address:	
	Lawyer's name:	
	Lawyer's Phone number:	

<p>the other party has a lawyer</p>	<p>Lawyer's email address:</p>	
	<p>Lawyer's mailing address:</p>	
<p>If you are the first person to contact the mediator, have you contacted the other company (person or company) about using a mediator to resolve this case, or do you need us to do this?</p>	<p><input type="checkbox"/> I have not contacted the other party. Please contact them for me.</p> <p><input type="checkbox"/> I have contacted the other party and they are not sure they want to mediate or don't want to. Please contact them for me.</p> <p><input type="checkbox"/> I have contacted the other party and they seem willing to mediate. Please contact them for me.</p> <p><input type="checkbox"/> I will contact the other Party (for the first time)</p> <p><input type="checkbox"/> I will try once more to contact the other party and encourage them to mediate.</p> <p><input type="checkbox"/> I have already agreed with the other Party to try to use mediation to resolve this case.</p> <p><input type="checkbox"/> I am the other party and I have agreed to mediate the dispute.</p>	
<p>CASE STATUS:</p> <p>If a court case has been filed by you or the other side, please fill out this section.</p> <p>IMPORTANT – IF A CASE HAS BEEN FILED WE NEED TO SEE A COPY OF THE COMPLAINT AND ANY OTHER PUBLIC COURT DOCUMENTS YOU HAVE.</p> <p>DO NOT SEND ANY CONFIDENTIAL DOCUMENTS OR PRIVILEGED MATERIALS FROM YOUR ATTORNEY. IF YOU HAVE ANY QUESTIONS OR CONCERNS ABOUT THIS ISSUES, PLEASE CONTRACT YOUR ATTORNEY</p>	<p>NAME OF COURT: _____</p> <p>CASE #: _____</p> <p>NAME OF CASE: _____</p> <p>NEXT HEARING DATE: _____</p> <p>LAST HEARING DATE: (If a hearing has already occurred, please use this space describe what happened.)</p> <p>RELIEF REQUESTED:</p> <p>Money/Damages: _____</p> <p>Non-monetary relief (injunction, other): _____</p>	

Please tell us what the issue is; you should check all that apply

[NOTE: EXPAND THIS LIST AS BROADLY AS POSSIBLE; consider use of separate appendices for each type of dispute to collect specific information (are children are involved in a divorce, etc.)]

- divorce/separation
- elder care
- other family law issues
- parent/student-teacher issue
- student relationships in school
- other school-related issues
- contract issue (such as breach of contract)
- other (please list)
- business issues (partnership, shareholders)
- neighbor dispute
- landlord/tenant
- condo/cooperative association
- consumer complaint (with a retailer or vendor, for example)

PART II: TELL US YOUR PRIOR EXPERIENCE WITH MEDIATION AND LITIGATION

1. Have you ever been in a mediation before?
2. If the answer to 1 is yes, what, in general, was the subject of the mediation?
3. If the answer to 1 is yes, what was your view of the process? Do you have any concerns about the process?
4. Have you ever been involved in a litigation?
5. If yes, what, in general was the subject of the litigation?

[NOTE: CONSIDER THE EXTENT TO WHICH THE REMAINDER OF THE INFORMATION ON THIS FORM SHOULD BE MEMORIALIZED IN WRITING]

PART III: SPECIAL ISSUES INVOLVING THE PARTIES

[NOTE: Consider developing separate appendices more fully to address the issues below]

1. Will you or the other party need English language translation assistance during the mediation? If so, what language(s)? Will someone be able to attend the mediation who can translate for you?
2. Do any of the parties have any special needs that will need to be accommodated during the mediation (hearing, sight, mobility issues, etc.)?
3. Are there any capacity issues that may arise in connection with the participants (ability to understand, etc.)?
4. Do you have any safety concerns involving the potential participants in the mediation?

Sample communication for “convening” communication (letter, email or phone) to a party who has not yet agreed to mediate

Prepared by Conna Weiner
www.connaweineradr.com

Dear:

My name is _____. I am [a neutral mediator who helps parties try to resolve their disputes amicably] [with a mediation organization called _____ that can supply neutral mediators to help parties resolve their disputes amicably].

I have been contacted by _____. He/she would like to try to have us assist in resolving a dispute involving [both of you] [your business]. I understand that the dispute concerns _____ [brief description agreed to with the person who called you.] [He/she also told me that a court case has been filed.] Although _____ told me a little bit about the dispute, I am a neutral party and it is not my role to take sides or serve as any party’s lawyer. If you agree to mediate, it is [my] [our] job to help you and _____ communicate and try to come up with an agreed solution or settlement that works for [both][all] of you.

If you have a lawyer representing you in this dispute, you should let me know right away, and let him or her know that I have contacted you. They will probably want to get in touch with me themselves, but that is up to you.

Mediation can be a very helpful and cost-effective process, giving parties the potential to resolve their problems more quickly and more cheaply than they could in court or otherwise. You may know what mediation is, but, as I have explained a bit already, the key features of the process are as follows:

1. Mediation is Voluntary and Non-Binding: You have to agree to participate (and both of you will need to sign a short agreement showing that you have agreed to participate). I have no authority to force you to agree to anything. It is a non-binding process. If you can’t reach an agreement that works for both of you, then we will end the mediation. (If you do reach it an agreement, it will be enforceable under applicable law.) We can end the mediation at any time for whatever reason if you want to do this.

2. The mediator is impartial: It is not our job to take sides. We listen to each of you and try to help you come up with an amicable resolution or settlement. We work hard to give all parties “equal time” to share their perspective on the dispute.

3. The mediator is not anyone’s lawyer or counselor; you should seek legal advice if you need it: [I am a lawyer,] [Some of our mediators our lawyers] but a

mediator will not give any party legal advice. We want you to have the tools you need to decide how to resolve your issues. I strongly encourage you to consult a lawyer about any legal issues or questions that you may have, and parties with attorneys representing them in a dispute almost always have those attorneys participate in the mediation. You should also consider any other professional advice that you may need, such as insurance coverage, counseling, etc.

4. **Confidential:** The agreement to mediate will require both sides to keep the mediation confidential, and many laws may protect the confidentiality of the mediation as well [be as strong as your state law permits; recall that federal law is not as clear].

You can read more about my [my organization's] experience and background on [my] [our] website at _____. [For mediation providers: Once you have agreed to mediate, we will share with you information about the individual mediators or mediators who will be assigned to your case. You may realize that you know them or have some other conflict with using a particular mediator, and if you feel uncomfortable, we will offer you alternative choices.] You can read more about mediation at _____ [include links to videos that your organization may have put together or other resources about the mediation process.]

I [My organization] charge[s] _____ per hour [insert appropriate fee schedule] for mediation sessions. [We charge a nominal fee of _____ for consulting about the mediation process.]¹ These fees are shared by the parties unless otherwise agreed by both of you.

I would be happy to answer any additional questions or address any concerns that

¹ This may make it difficult to secure agreement. If it is important to seek compensation for your time in connection with the convening process, then that arrangement, for some nominal amount, should be made with the party that has called you to request the mediation. Whatever the case, it is key to be absolutely clear about when fees will be charged and how much.

you may have about mediating these issues, and it could be helpful to hear a little about your perspective on the issues. I could do this with you alone; it is often very helpful, though, to have a joint teleconference with the other parties about the mediation process to ensure we are aligned. I can set that up.²

If, however, you already know that you would like to mediate, [**letter:** I would ask that you let me know by sending me an email letting me know that and then filling out, signing and sending to me the attached intake form and agreement to mediate as soon as you can.][**phone:** I will send you an intake form and an agreement to mediate, and you should fill those out and return them to me as soon as you can. My contact information is below.]

[Name, address, email, telephone of mediator or mediation provider]

[Consider who should be copied?]

cc: Requesting Party
Recipient's counsel, if any

² Mediators need to be careful to distinguish conversations about whether or not to mediate from the beginning of the mediation itself. An agreement to mediate should be signed as soon as possible if the conversation is turning into a mediation.

DISCLOSURES OF MEDIATOR [NAME]

CASE # [XXX]

Consistent with the MODEL STANDARDS OF CONDUCT FOR MEDIATORS (AAA and ABA), the Disclosure Requirements for Mediators serving on AAA cases, and the AAA Rules applicable to this case, I make the following disclosures. By making any general or specific disclosure below I do not ascribe, or intend to ascribe, any level of significance to the fact disclosed, or to suggest that the disclosure might conceivably affect my neutrality or impartiality. Rather, the following disclosures are made to apprise the parties and their representatives of facts which in my judgment it is appropriate to disclose. Any concerns relating to these disclosures, or any subsequent disclosures I may make, should be handled as provided below in Section V.

The disclosures made in this document are based on my review of the papers or other information provided to me by the AAA as of this date, and such review of my and my employer's records and files as to me seemed necessary and appropriate.

I. Conclusion

I have no disclosures specific to this case. I do not regard any of the following disclosures as constituting either a conflict of interest or raising an appearance of fairness issue requiring me to decline my appointment in this case. I am confident that I can carry out my duties as a neutral and impartial mediator.

II. General Disclosures and Limitations

A. Mediation Rate: [XXX] per Hour. Study time, pre-mediation conference(s) and post-mediation follow-up are billed at hourly rate. Travel and accommodations, if required, at actual cost. No charge for travel time except for case related work. Cancellation fee: 100% of payment is due if cancellation is within 2 working days of commencement of mediation; 50% of payment is due if cancellation is within 5 working days of commencement of mediation. Cancellation fees apply only to schedule in-person sessions and not to telephone sessions.

B. Current and Prior Employment: [This section should contain a complete CV.]

C. Nature of Disclosures

[COMMENT: LANGUAGE FOR PAST LAW FIRM WORK] If I am aware of any direct or indirect professional or personal connection of any kind or any potential conflict of interest or appearance of fairness issue related to any former client or any law firm listed above, I will disclose it below. I do not, however, have access to client records from firms with which I was previously associated, and thus will not be disclosing any matters relating to my work at those firms unless they occur to me; if they do, they will be disclosed below; if recollected later, I will make a supplemental disclosure.

[COMMENT: LANGUAGE FOR PAST CORPORATE EMPLOYMENT] If I am aware of any or indirect professional or personal connection of any kind or potential conflict of interest or appearance of fairness issue related to any current or former client, employee, supplier, contractor,

subcontractor, attorney or other person or entity arising from my work with [XXXX – Company Name], I will disclose it below. If I become aware of any such relationship at any time during the course of the proceedings, I will make a supplemental disclosure.

[COMMENT: LANGUAGE FOR CURRENT ACTIVITIES] If I am aware of any or indirect professional or personal connection of any kind or potential conflict of interest or appearance of fairness issue related to any current or former client, employee, supplier, contractor, subcontractor, attorney or other person or entity arising from my work with [XXX], or any other entity for which I provide services, I will disclose it below. If I become aware of any such relationship at any time during the course of the proceedings, I will make a supplemental disclosure.

- D. Professional Associations:** Both as a result of the foregoing and my active involvement over the years in activities of professional associations and organizations, I am professionally and personally acquainted with hundreds of lawyers both in the [XXX] metropolitan area and nationally. Organizations to which I belong include the following: **[COMMENT: LIST INCLUDED BY WAY OF EXAMPLE]** [the American Bar Association (ABA) Forum Committee on the Construction Industry (Division Memberships: Dispute Avoidance & Resolution, Contract Documents, and Project Delivery Systems), ABA Section on Dispute Resolution (Executive Committee, Leadership Council, and the following Committees: Arbitration, Mediation, Collaborative Law, Women in Dispute Resolution (co-chair), Membership (Chair)), ABA Litigation Section, ABA Section of Environment, Energy and Resources and the Law Practice Management Section (ABA Women Rainmakers)), the Virginia State Bar Association [Construction Law Section and Joint Alternative Dispute Resolution Committee], the Fairfax County Bar Association [ADR Section], the District of Columbia Bar Association, and the Women’s Bar Association of DC.]

Although I will separately disclose specific personal and/or professional associations with counsel in this matter (and/or their law firms), you should assume that over the years I have may have had – as advocate or as neutral mediator or arbitrator – cases in which other lawyers in their respective law firms have been involved.

- E. Social Media:** I have a Linked-In account. I approve most requests to link, and neither actively solicit (beyond what the software automatically does), nor remove endorsements, and do not maintain a database of all these professional contacts and connections. Accordingly, the existence of a link or endorsement on my account does not indicate type or depth of relationship other than an online professional connection, similar to connections in professional organizations. I do not have a Facebook account. I have created a Twitter account, but am not an active user.
- F. Prior ADR Matters:** I am asked to serve as an arbitrator or mediator, both in connection with matters assigned by or through a service provider (e.g., AAA) and privately. *While I will disclose in any subsequent mediation or arbitration involving any party to this case, its counsel or its counsel’s law firm that I have been appointed, am serving or have served in a prior case involving that party, counsel or law firm, I will not disclose to the parties in this case any subsequent appointment or service.*

III. Disclosures Related to Family

To the best of my knowledge, there is no connection between any member of my immediate family and any party, counsel, witness and or other person or entity involved in this case that would create a potential conflict of interest or appearance of fairness issue. The following information is provided solely for the purpose of allowing the parties to this proceeding and their counsel to satisfy themselves of the same. My son is a consultant at the [XXX]; my eldest daughter is an screenwriter with [XXX], my youngest daughter is a student at [XXX].

IV. Specific Disclosures

Parties & Counsel: To the best of my knowledge, I have no specific relationship or connection, current or former, direct or indirect with any party, counsel, witness and or other person or entity involved in this case that would create a potential conflict of interest or appearance of fairness issue.

V. Dealing with Concerns Over Disclosures/Limitations on Disclosures

Counsel, and/or any party not represented by counsel, are asked to share these disclosures with their clients and with anyone else expected to participate in the mediation. The parties and their counsel are asked to promptly bring to my attention and to the attention of the other Party, in writing, any relationships of which they are aware that I have not disclosed above and any concerns they may have regarding any of the disclosures made, either in this document or subsequently. Any such concerns will be promptly addressed, in writing, by the Mediator.

Dated: [XXXX]

signature



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