ANNOTATED AGREEMENT TO MEDIATE ("AGREEMENT")

Educational Only – Get Independent legal Advice

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Case Name: _____ Number: _____

Mediation is a process in which a Mediator assists and facilitates two or more parties to a controversy in reaching a mutually acceptable resolution of the controversy and related process issues.[i] It includes joint and individual communications, as well as related communications that involve the Mediator after the mediation process is terminated.[ii] You make the decisions with Your informed consent. The Mediator will not force You to decide or make one for You. Unless mediation is mandatory, You may suspend or end the process at any time, as may the Mediator.[iii]

A. Your Role: Every party, attorney, and person who participates, except the Mediator, is a "Participant"[iv] ("You" or "Your"). You agree to (1) participate fully, (2) listen without interruption, (3) speak candidly, (4) keep an open mind, (5) act respectfully, (6) explore workable options, (7) negotiate in good faith, (8) come with full authority to decide, and (9) not electronically record anything or serve process.[v]

B. Mediator's Role: I ("Mediator") will tell You about any potential conflicts of interest that may raise a reasonable question about my impartial regard.[vi] You have retained me solely as Your Mediator (independent contractor)—not as Your attorney, judge, arbitrator, counselor, or other professional.[vii] I recommend You seek independent legal and professional advice throughout the process and before You sign any agreement, including this one.[viii] My role is to help You have an open discussion, fully explore the issues, and consider the possibilities. I use several mediation approaches/styles (e.g., facilitative, evaluative, and hybrid) and I raise factual, legal, and practical considerations (e.g., options, proposals, impressions, etc.) even if not raised by one or more of the parties.[ix] I may help with a settlement agreement, but only as a scrivener.[x] I am bound by the Oregon Rules of Professional Conduct (Bar Rules) and I am guided by the Oregon Mediation Association Core Standards of Mediation Practice (OMA Standards). Information about me is at ICMresolutions.[xi]

C. Confidentiality: It is particularly important because it encourages people to be candid. Mediation communications are confidential (secret), non-discoverable (not to be used in a court process), and inadmissible (as evidence). ("Confidential"/"Confidentiality.")[xii] Mediation communications include all communications of any kind or nature between or among some or all of the Participants until a written settlement agreement is signed, or the mediation ends by written notification by a party or the Mediator to all the parties and the Mediator.[xiii] (Remaining parties may continue to mediate.)[xiv] No Participant will subpoena or otherwise request the Mediator to testify or disclose any mediation communications. Each Participant intends for the communications to be Confidential.[xv] If a public body or state agency is participating, it will tell us if its rules are different before any substantive communications are made to anyone.[xvi]

Oregon law applies except where inconsistent with this Agreement,[xvii] which applies retroactively to when any party first contacted the Mediator. *Some Agreement provisions intentionally depart from or clarify current statutory and case law.* [xviii] The confidentiality statute is here, ORS 36.220 to 36.236. It says generally:[xix]

1. Each party may not disclose mediation communications with anyone not present, except Your spouse, attorney, doctor, therapist, clergy, etc.—that is, any person with a legal privilege, which is not waived by mediating.[xx]

2. You may also communicate with **those listed here** if they first agree orally to abide by this Agreement as though they were a signatory to it: _____.[xxi]

3. I will not share what was said or seen if You specifically tell me not to do so.[xxii]

4. I retain the right not to testify or produce documents and You agree not to ask me to testify or give information even if one of the exceptions applies.[xxiii]

5. I have Your permission to dispose of any mediation communications and records.[xxiv]

D. Nonconfidential Communications and Exceptions to Confidentiality:

1. This Agreement is enforceable and not Confidential, unless You agree differently in writing that all or part of its terms are Confidential. Substantive settlement terms that are being developed as part of a package settlement agreement ("Interim agreements") are Confidential and unenforceable unless You agree differently in writing. Procedural agreements during the process (e.g., civil procedure matters) and the final package settlement agreement are enforceable and not Confidential unless You agree differently in writing.[xxv]

2. Mediation communications may be disclosed

(a) to the extent necessary to enforce, modify, or set aside a settlement;

(b) in any dispute (e.g., malpractice or ethics complaint) between a party and the Mediator;

NOTE: Oregon law limits Mediator liability unless the act or omission was made or done in bad faith, with malicious intent, or in a manner exhibiting a willful, wanton disregard of the rights, safety, or property of another.[xxvi]

(c) ___ **(Check if NOT applicable)** in any dispute (e.g., legal malpractice or ethics complaint) involving a party or the party's attorney (or both); or

(d) if all parties agree in writing.[xxvii]

3. Information that was already known, or information that existed before the mediation but was not prepared for it, and public records are not Confidential.

4. I may do the following:

(a) report requested information in a court or program case;

(b) provide information for statistical purposes;

(c) disclose case details for purposes of getting advice; and

(d) share confidential information for research, training, or educational and learning purposes; and

(e) tell appropriate persons information about child abuse, elder abuse, or threats to cause injury of any kind.[xxviii]

5. Although I will not share mediation communications You tell me are Confidential, You give me permission to use my sole judgment in sharing other communications to facilitate settlement.[xxix]

E. Fee: Fees for all mediation services will be charged at $ X per hour and they include preparation, all communications, mediating, and all other activities reasonably necessary to help resolve the controversy or issues related to it, plus my out-of-pocket costs. Each party will be responsible for an equal pro-rata share (or mutually agreed upon share) of the fee and costs. The lawyer representing a party is personally responsible for the client's Mediator's fees and costs. Balance is due upon receipt of the invoice, and there is a one percent compounded interest per month on unpaid balance. There is a $ Y per party cancellation fee within 14 days of scheduled mediation.[xxx]

F. Other Provisions: This Agreement is enforceable, and it includes the standard contract provisions generally found in the legal community where the mediation is held for this type of dispute unless specifically addressed in this Agreement. These standard provisions include the following: Oregon law; local venue; severability; survivability; binding effect; notice provisions; legal representation; actual authority to bind; no admissions; doubtful and disputed claims; each party responsible for own taxes; hold harmless; indemnification and defense; equitable and injunctive relief available; signed and assembled counterparts same effect as one original; integration; merger; mutually written; number; gender; caption; and execute necessary documents—plus attorney fees and costs to prevailing party for breach, including payment for my time, attorney fees, and all costs including court costs.[xxxi]

I will decide all confidentiality disputes in my sole discretion, which will usually favor the preservation of confidentiality. The terms of this Agreement will remain in force after termination of the mediation.[xxxii]

G. Questions or Concerns: Please raise them before signing this Agreement.[xxxiii]

H. Signatures: We each agree to the above terms. …

[Add Signature Block for All Parties, Participants, and Mediator]
[Date]

Training Annotations and Author Commentary – Not Part of the Agreement When Used in Practice. Make your own choices about these provisions. Get Independent legal advice.

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[i] The document generally uses statutory definitions. NOTE: Using the terms "I" and "You" was an intentional attempt at a conversational voice to set a more exploratory tone and minimize legalese.

[ii] Adds to statutory definition to include post-mediation communications with the mediator because these are becoming more common and the language deals with the confidentiality issues in advance.

[iii] The three sentences introduce Self-Determination and Informed Consent, two important aspects of mediation. *See* OMA Core Standards I–II.

[iv] Outlines the roles of the various people in attendance and refers to them collectively as "Participants" for convenience. This also attempts to solve problems where the statute refers to "parties" when it should be broader for confidentiality purposes.

[v] Designed to remind Participants of their responsibilities so there is full disclosure and Informed Consent.

[vi] A reminder to the mediator and participants that conflicts of interest should be disclosed and permission to proceed given upfront.

[vii] Broader than "not your lawyer" because not all mediators are lawyers, and the parties, however misguided, may see our role as broader than it actually is.

[viii] Good practice and required by the Oregon Rules of Professional Conduct.

[ix] The Oregon Rules of Professional Conduct require lawyers to outline their "role" and is otherwise good practice. *See also* OJD Court-Connected Mediator Qualification Rules.

[x] Required by the Oregon Rules of Professional Conduct and otherwise good practice.

[xi] Required by the OJD Court-Connected Mediator Qualification Rules and is otherwise good practice.

[xii] More accessible language for participants.

[xiii] Intended to draw a brighter line than *Alfieri v. Solomon*, 358 Or 383, 365 P3d 99 (2015).

[xiv] Intended to address this situation upfront so the remaining parties may continue mediating without signing a new Agreement to Mediate. A related issue is when parties are added to a mediation in cases where a party has withdrawn. In such cases, put understandings in writing about the confidentiality issues when a new party is added without another withdrawing.

[xv] Included to establish participant intent surrounding confidentiality in case there is a dispute or litigation over meaning. See also Section F, stating that the mediator decides confidentiality issues, and endnote xxxii.

[xvi] Practice Tip: Be on high alert if a participant is part of the executive branch of state government. The rules are different. Also, be aware that the confidentiality rules in federal matters are different, so do not use Oregon statutory language, which people often do because they think they can if the mediation takes place in Oregon.

[xvii] This choice was made to provide generally for more confidentiality and to clarify areas where the law is ambiguous or subject to alternative interpretations. This language is an example of full disclosure and Informed Consent. Other mediators and the participants may have different preferences, which should be reduced to a signed agreement to mediate.

[xviii] Important even though the statute says the mediation begins with the first contact, if you want to deviate from the statute. This is designed to make all changes apply retroactively, not just those found in the statute. For example, some mediation programs say they must disclose things like child abuse, but that is not true unless the mediator is a mandatory reporter. That is fine if the program wants to make that a rule for all of its mediators, but it needs to be spelled out and should apply retroactively.

[xix] Designed to be more user-friendly language and provides full disclosure to the actual laws, a customer service, if you will.

[xx] More user-friendly language. Added the nonwaiver language because this argument came up in a post-mediation dispute.

[xxi] There is reason to believe participants breach confidentiality because they talk with folks they should not. This is a reminder there is a way to do this legitimately. It also adds the additional safeguard of having the recipient of mediation communications agree, at least orally, to maintain confidentiality.

[xxii] The addition of this provision is controversial to many. It gives and takes away confidentiality at the same time. As a practical matter, there is reason to believe that mediators do this regularly because they are being hired to use their best judgment and it would be over burdensome to get permission to disclose every item when many of the things said in caucus are not really secret. The present choice was to be clear about it and get the participants' Informed Consent.

[xxiii] Designed to clearly state the Mediator has an independent right under the statute not to disclose mediation communications. Some mediators have made disclosures they thought they had to make because both parties agreed. That is not true and inconsistent with Impartial Regard.

[xxiv] A general good practice for running a mediation business, but be aware of the malpractice statutes of limitation, tax issues, and agreements with public bodies that generally have a longer file-retention policy (e.g., public records) that you contractually agree to when you sign their personal-services contracts. The fact that they give you permission to do it does not mean you should or have to.

[xxv] This language requires exceptions to be in writing to minimize misunderstandings down the road. The sentence on "interim" agreements was added to proactively manage that dynamic, which can be problematic if not attended to in advance.

[xxvi] Full disclosure about mediator "immunity" is a good practice.

[xxvii] This is to raise and address the *Alfieri* decision. The OSB Ethics Committee is considering whether lawyers must address the issue of limiting their liability to a client pursuant to Oregon RPC 1.8(h).

[xxviii] Allows for more mediator disclosure. Subsection (D) is important when the mediator finds himself or herself in a bind.

[xxix] See endnote xxii.

[xxx] It is good business practice to be clear that the mediator is paid for his or her work. Attorneys for parties should be responsible for the professional services they contract for on behalf of their client.

[xxxi] This is the catchall paragraph that balances topic inclusion with brevity. It is far from bulletproof, but at least something is in place if there is a problem down the road.

[xxxii] Designed to increase the chances that confidentiality is maintained especially in light of *Alfieri*, etc.

[xxxiii] Reinforces full disclosure, Informed Consent, and Self-Determination.