

MEDIATION—MEDIATION AGREEMENT

AGREEMENT, dated _____, 19____ between
_____ and _____

WHEREAS, the parties are presently [engaged in arbitration] [involved in a dispute] relating to _____;
and

WHEREAS, the parties desire to attempt to settle their dispute through nonbinding mediation with the assistance of Edward J. Costello as mediator (the "Mediator");

NOW, THEREFORE, the parties hereby mutually agree as follows:

1. **Impartiality of the Mediator.** The parties and their counsel represent and warrant that they have made a diligent effort to determine all prior contacts between them and the Mediator, and all such contacts have been disclosed to counsel for the opposing party and the Mediator. The parties acknowledge that the Mediator is impartial and cannot act as advocate, representative, or counsel for either party and has no authority to make binding decisions, impose settlements, or require concessions by either party, it being understood and agreed that any agreements which may be reached between the parties as a result of the mediation process shall be embodied in a separate written agreement between the parties prepared with the assistance of their respective counsel.
2. **Caucuses and Conferences.** The parties understand and agree that, in connection with the mediation process, the Mediator may meet in confidential "caucus" sessions separately with each party. The Mediator will treat as confidential and refrain from disclosing to the other party or its counsel any information which any party or its counsel requests be so treated. The Mediator may, at the request of either party or on his own initiative, conduct any conference pursuant to this Agreement by telephone, facsimile transmission, or other means of communication.
3. **Confidentiality, Immunity, and Indemnification.** To enable the parties to discuss all aspects of their dispute freely and to enable the Mediator effectively to assist the parties in reaching a voluntary resolution of their dispute, the parties agree as follows:
 - a. Conferences and discussions which occur in connection with mediation services provided pursuant to this Agreement shall be deemed settlement discussions, and nothing said or disclosed, nor any document produced, which is not otherwise independently discoverable, shall be offered or received as evidence or used for impeachment or for any other purpose in any current or future litigation, or arbitration, regardless of what law may apply to such proceeding.
 - b. The Mediator shall have the same common-law immunity as judges and arbitrators from suit for damages or equitable relief and from compulsory process to testify or produce evidence based on or concerning any action, statement, or communication in or concerning the mediation conducted pursuant to this Agreement.
 - c. The parties understand that there is no attorney-client relationship between the Mediator and any party to this Agreement, and each party acknowledges that it will seek and rely on legal advice solely from its own counsel and not from the Mediator.
 - d. The parties agree, on behalf of themselves and their attorneys, that none of them will call or subpoena the Mediator in any legal or administrative proceeding of any kind to produce any notes or documents related to his mediation services or

to testify concerning any such notes or documents or his thoughts or impressions. If any party attempts to compel such testimony or production, such party shall be liable for and shall indemnify the Mediator for any liabilities, costs, and expenses, including attorney fees and lost professional time, which he may incur in resisting such compulsion.

4. **Participation of Parties.** At the request of the Mediator, each party shall have a corporate officer or representative, in addition to its counsel, in attendance at the mediation sessions who will have full power and authority to negotiate and conclude a binding settlement of the dispute on behalf of such party.
5. **Fees and Expenses.** The fee for the Mediator's services hereunder shall be computed at the rate of \$5000.00 per day for time spent in connection with the mediation, and one-half of the fees and expenses of the Mediator shall be paid by each party.
6. **Benefit of Agreement.** This Agreement shall inure to the benefit of and be binding upon the parties hereto, and the Mediator shall be deemed a third party beneficiary hereof.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date hereinabove first written.

COUNSEL

PARTY

COUNSEL

PARTY

Comment: This form is somewhat elaborate, but it gets the job done. I am not certain what "inure to the benefit of ... the parties" adds. To whose benefit will an agreement inure, if not the parties? Note that the mediator's compensation and how it is to be allocated are covered here as well. It also might be useful as a "sales" tool for persuading a reluctant party to begin mediation. On the other hand it might be way too long to be included in a yet-to-be-negotiated business contract.