MEDIATION BOOTCAMP OUTLINE

A. Brief Historical Background of Mediation

a. During the 1980s in California, increased use of courts for civil disputes created a log jam in the courts.

b. In 1986, California enacts Trial Delay Reduction Act and establishment of "Fast Track" system (never worked and was largely abandoned by most courts)

c. Same year, the legislature enacts Alternative Dispute Resolution Act (B&P Code §465, et. seq.)

i. The goal of the Act is the creation of a state-wide system of locally funded programs which provided dispute resolution services (primarily conciliation and mediation) to county residents. The purpose of these services was to assist in resolving problems informally and function as alternatives to more formal court proceedings.

d. The Acts were intended to speed the processing of cases, and to use mediation, as a means of clearing cases that were mired in the Court system

e. In the 1990's, California added Rules of Court 3.870 -3.898, and then in 1997, amended the Evidence Code to add §§1115-1128, effectively codifying among other things, that mediations are strictly confidential.

f. By the 2000's, mediations became commonplace in trial courts, appellate courts and at all levels of Federal courts.

B. Mediation and Settlement Conferences

a. Mediation vs. Settlement Conference

i. Provisions in Evidence Code DO NOT APPLY to Settlement Conferences. Cal. Evid. Code §1117(b)

ii. Settlement Conferences are mandatory; mediations are voluntary.

1. ***Jeld Wen v. Superior Court* (2007) 146 Cal. App. 4th 536**

b. Key protected elements of mediations – Cal Evid. Code §1119

i. No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

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

c. Mediation is on-going, and confidentiality preserved, even if not in a formal session, unless (1) a party terminates it in writing, or (2) the mediator does so in writing, or (3) 10 calendar days pass without any communication between the mediator and the parties.

i. Evid. Code §1125.

d. Lawyers cannot be sued for mediation-related malpractice or misconduct in light of the mediation confidentiality statutes.

i. *Cassel v. Superior Court* (2011) 51 Cal.4th 113

ii. However, now the lawyer must disclose this to the client in writing and obtain the client's informed written consent prior to any mediation being scheduled

1. **Evid. Code §1129**

C. When to Mediate?

a. **Pre-litigation vs. later in litigation**
   i. **Have a discussion with opposing counsel to ascertain the other party's expectations**

b. **You have to know the case in order to assess when mediation is appropriate**
   i. **Spend the time upfront to understand your case so you can properly advise your client on liability and damages**

c. **Mediation as a tool for early discovery**
   i. **Limited value – most opposing counsel will give you the information that hurts your case**

D. How to Prepare for Mediation

a. **Selection of mediator**
   i. **Reputation**
   ii. **Experience**
   iii. **Subject Matter expertise**

b. **In person or remote – a mediator's perspective**

c. **Anticipate roadblocks to resolution and alert mediator *before* the mediation session**
   i. **Coverage problems**
   ii. **Difficult client**
   iii. **Difficult carrier**
   iv. **Exposure beyond policy limits and the need for personal counsel**

d. **Understand the "why"**

e. **Who should attend and why?**

   i. **Is there insurance?**
      1. **Does the policy require the insured's consent?**
         a. **Most, if not all, LPL, EPL and D&O policies require insured consent to settle**
      2. **If consent is required and you are representing the defendant, get consent from the client to within the policy limits *before* the mediation**
      3. **Claims professionals are essential**

   ii. **Plaintiff being present is essential!**

f. Mediation Briefs

- **i. Put the time into your brief and provide the information – good and bad – regarding the case.**
- **ii. Focus on the key issues and the evidence supporting the same; do not get bogged down on collateral, non-essential issues**
- **iii. This is your opportunity to educate the mediator about your case**

g. If you have not provided the key documents as exhibits to your brief, bring them with you to the mediation or have them available to share with the mediator if doing the mediation remotely

h. Preparing Your Client for Mediation

- **i. Explain what mediation is and is not. It is confidential settlement discussions; it is not a trial.**
- **ii. Manage expectations – do not over promise. Be realistic.**
- **iii. Understand your case, and more importantly, the other sides case.**

i. Working with mediator

- **i. You should be talking to the mediator in the days/weeks leading up to mediation.**
- **ii. Use mediator as sounding board. Sometimes what sounds good in your head doesn't sound so good when you actually say it out loud.**
- **iii. Understand the mediator is there to help you resolve the case. This is the time to be forthright and not withhold information from the mediator**
    1. **The mediator will be able to use information in a confidential manner – good and bad – to best position the case for resolution**

j. Trust the process

- **i. Be patient**

k. You need to be able to trust the mediator

- **i. For a successful mediation, both parties and their counsel need to feel confident that the mediator is working for everyone's best interests**
- **ii. if you don't trust the mediator, you've got the wrong one. Be as open and honest as you can. A good mediator wants and needs more information than less. There may be information that you can provide that may be meaningless to you but is invaluable to the mediator.**
- **iii. Remember that the mediator has only as much information as you and opposing counsel have provided. He or she has not lived the case as long as you have**

iv. **The mediator has no dog in the fight**

l. **Lay out the terms by which you will resolve the case from the outset**

i. **Key terms, other than standard settlement terms, such as confidentiality or non-disparagement, should be discussed from the beginning**
ii. **Easiest way to tank a settlement**

m. **Settlement Agreements and Releases**

i. **Come to the mediation with a draft Settlement Agreement and Release**
1. **Don't want parties to change their mind after the mediation**
2. **Do not expect that the mediator will draft the agreement for you**
ii. **If you do not have a draft Settlement Agreement and Release at the time of the mediation, prepare a Memorandum of Understanding setting forth the essential terms of the agreement reached so there is evidence of an agreement**

SPEAKERS

Bill Munoz
Freeman Mathis & Gary LLP
Bill.Munoz@fmglaw.com

Peter Linn
ADR Services, Inc.
plinn@adrservices.com

Courtney O'Brien
Oakland City Attorneys' Office
cobrien@oaklandcityattorney.org

_____,	)	CASE NO.
Plaintiff(s),	)	
vs.	)	STIPULATION FOR SETTLEMENT AND MUTUAL RELEASE OF CLAIMS
	)	(Code Civ. Proc. §664.6)
_____,	)	
Defendant(s).	)	
_____	)	

This case having come on for voluntary mediation on _____, it is hereby stipulated by the undersigned parties that the matter is deemed settled pursuant to the following terms and conditions:

1. Defendant(s) _____ shall pay to Plaintiff(s) _____ the sum of $_____ as a full and complete settlement a full and complete settlement of all claims giving rise to the parties' dispute, including any claims or causes of action, known or unknown, related to or arising out of the claims or causes of action asserted. All parties agree that this settlement is final and binding on the parties and their heirs, successors and assigns, and accept this settlement with the knowledge that all parties will be barred from proceeding against any person or entity in the future regarding any claims or causes of action related to this matter.

2. Other Terms:

_____

_____

_____

3. Each party will bear their own attorneys' fees and costs.

4. The parties stipulate that this settlement *does not* constitute and shall not be deemed as an admission of liability, including any act, omission, or damages of any party.

5. In order to effectuate the above-specified terms of settlement, the parties further agree to the following:

a. If a court action is pending, Plaintiff(s)/Cross-Complainant(s) will execute a request for dismissal of the action with prejudice to be filed after all settlement documents have been signed and a proper request has been submitted asking the Court to retain jurisdiction to enforce the settlement pursuant to Code of Civil Procedure section 664.6; and

b. The undersigned expressly acknowledges and agrees that this settlement and mutual release is intended to extinguish all claims of every type, including those known and unknown and those suspected and unsuspected, without regard to whether they are now

known or suspected, even if those claims may materially affect the undersigned's decision to enter into this release. This is a full and final mutual release, and the undersigned expressly waives any right under Civil Code section 1542, which provides:

"A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY."

Although it is possible that the undersigned may discover new or additional damages or injuries, this release is intended to include all claims against all settling parties and to extinguish all obligations in favor of the undersigned arising from the dispute(s) at issue.

6. This Stipulation for Settlement may be enforced pursuant to Code of Civil Procedure section 664.6. Pursuant to Evidence Code section 1123, the parties acknowledge that this agreement is exempt from the confidentiality provisions of Evidence Code section 1152, et seq., and is admissible in evidence to enforce the settlement. In any proceeding to enforce this settlement agreement, the prevailing party shall be entitled to recover reasonable attorneys' fees and costs incurred therein.

7. The parties do ____ / do not_____ intend to prepare a more formal agreement of settlement and mutual release which shall include the material terms of this stipulation. Although the parties may contemplate entering into a more formal agreement, failure to execute such formal agreement shall not affect this Stipulation, which shall remain in full force and effect.

8. This Stipulation for Settlement is intended to be fully and formally binding and enforceable and is effective this _____ day of _____, 20____. It contains the entire understanding and agreement between the parties concerning the resolution of all disputes between them and has been executed without reliance on any promise, representation or warranty not contained herein. *A copy of this agreement may be used in lieu of the original for all purposes*.

9. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, but all such counterparts shall together constitute one and the same Agreement. Each party agrees that this Agreement and any other documents to be delivered in connection herewith may be electronically signed, and that any electronic signatures appearing on this Agreement or such other documents are the same as handwritten signatures for the purposes of validity, enforceability, and admissibility. Emailed photographs of signatures shall also be valid as originals.

The Parties, by their signatures below, have executed this Agreement and agree to be bound by it.

_____	_____
Plaintiff (print name)	Signature

Counsel for Plaintiff (print name)	Signature
Defendant (print name)	Signature
Counsel for Defendant (print name)	Signature
Plaintiff (print name)	Signature
Plaintiff (print name)	Signature
Defendant (print name)	Signature
Defendant (print name)	Signature

California Evidence Code

Division 9. Evidence Affected or Excluded by Extrinsic Policies

Chapter 2. Mediation

§ 1115. Definitions

For purposes of this chapter:

(a) "Mediation" means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.

(b) "Mediator" means a neutral person who conducts a mediation. "Mediator" includes any person designated by a mediator either to assist in the mediation or to communicate with the participants in preparation for a mediation.

(c) "Mediation consultation" means a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator.

§ 1116. Effect of chapter

(a) Nothing in this chapter expands or limits a court's authority to order participation in a dispute resolution proceeding. Nothing in this chapter authorizes or affects the enforceability of a contract clause in which parties agree to the use of mediation.

(b) Nothing in this chapter makes admissible evidence that is inadmissible under Section 1152 or any other statute.

§ 1117. Application of chapter

(a) Except as provided in subdivision (b), this chapter applies to a mediation as defined in Section 1115.

(b) This chapter does not apply to either of the following:

(1) A proceeding under Part 1 (commencing with Section 1800) of Division 5 of the Family Code or Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

(2) A settlement conference pursuant to Rule 3.1380 of the California Rules of Court.

§ 1118. Oral agreements

An oral agreement "in accordance with Section 1118" means an oral agreement that satisfies all of the following conditions:

(a) The oral agreement is recorded by a court reporter or reliable means of audio recording.

(b) The terms of the oral agreement are recited on the record in the presence of the parties and the mediator, and the parties express on the record that they agree to the terms recited.

(c) The parties to the oral agreement expressly state on the record that the agreement is enforceable or binding, or words to that effect.

(d) The recording is reduced to writing and the writing is signed by the parties within 72 hours after it is recorded.

§ 1119. Written or oral communications during mediation process; admissibility

Except as otherwise provided in this chapter:

(a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

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

§ 1120. Evidence otherwise admissible

(a) Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.

(b) This chapter does not limit any of the following:

(1) The admissibility of an agreement to mediate a dispute.

(2) The effect of an agreement not to take a default or an agreement to extend the time within which to act or refrain from acting in a pending civil action.

(3) Disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute.

§ 1121. Mediator's reports and findings

Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with Section 1118.

§ 1122. Communications or writings; conditions to admissibility

(a) A communication or a writing, as defined in Section 250, that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if either of the following conditions is satisfied:

(1) All persons who conduct or otherwise participate in the mediation expressly agree in writing, or

orally in accordance with Section 1118, to disclosure of the communication, document, or writing.

(2) The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, or orally in accordance with Section 1118, to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.

(b) For purposes of subdivision (a), if the neutral person who conducts a mediation expressly agrees to disclosure, that agreement also binds any other person described in subdivision (b) of Section 1115.

§ 1123. Written settlement agreements; conditions to admissibility

A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if the agreement is signed by the settling parties and any of the following conditions are satisfied:

(a) The agreement provides that it is admissible or subject to disclosure, or words to that effect.

(b) The agreement provides that it is enforceable or binding or words to that effect.

(c) All parties to the agreement expressly agree in writing, or orally in accordance with Section 1118, to its disclosure.

(d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

§ 1124. Oral agreements; conditions to admissibility

An oral agreement made in the course of, or pursuant to, a mediation is not made inadmissible, or protected from disclosure, by the provisions of this chapter if any of the following conditions are satisfied:

(a) The agreement is in accordance with Section 1118.

(b) The agreement is in accordance with subdivisions (a), (b), and (d) of Section 1118, and all parties to the agreement expressly agree, in writing or orally in accordance with Section 1118, to disclosure of the agreement.

(c) The agreement is in accordance with subdivisions (a), (b), and (d) of Section 1118, and the agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

§ 1125. End of mediation; satisfaction of conditions

(a) For purposes of confidentiality under this chapter, a mediation ends when any one of the following conditions is satisfied:

(1) The parties execute a written settlement agreement that fully resolves the dispute.

(2) An oral agreement that fully resolves the dispute is reached in accordance with Section 1118.

(3) The mediator provides the mediation participants with a writing signed by the mediator that states that the mediation is terminated, or words to that effect, which shall be consistent with

Section 1121.

(4) A party provides the mediator and the other mediation participants with a writing stating that the mediation is terminated, or words to that effect, which shall be consistent with Section 1121. In a mediation involving more than two parties, the mediation may continue as to the remaining parties or be terminated in accordance with this section.

(5) For 10 calendar days, there is no communication between the mediator and any of the parties to the mediation relating to the dispute. The mediator and the parties may shorten or extend this time by agreement.

(b) For purposes of confidentiality under this chapter, if a mediation partially resolves a dispute, mediation ends when either of the following conditions is satisfied:

(1) The parties execute a written settlement agreement that partially resolves the dispute.

(2) An oral agreement that partially resolves the dispute is reached in accordance with Section 1118.

(c) This section does not preclude a party from ending a mediation without reaching an agreement. This section does not otherwise affect the extent to which a party may terminate a mediation.

§ 1126. Protections before and after mediation ends

Anything said, any admission made, or any writing that is inadmissible, protected from disclosure, and confidential under this chapter before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends.

§ 1127. Attorney's fees and costs

If a person subpoenas or otherwise seeks to compel a mediator to testify or produce a writing, as defined in Section 250, and the court or other adjudicative body determines that the testimony or writing is inadmissible under this chapter, or protected from disclosure under this chapter, the court or adjudicative body making the determination shall award reasonable attorney's fees and costs to the mediator against the person seeking the testimony or writing.

§ 1128. Subsequent trials; references to mediation

Any reference to a mediation during any subsequent trial is an irregularity in the proceedings of the trial for the purposes of Section 657 of the Code of Civil Procedure. Any reference to a mediation during any other subsequent noncriminal proceeding is grounds for vacating or modifying the decision in that proceeding, in whole or in part, and granting a new or further hearing on all or part of the issues, if the reference materially affected the substantial rights of the party requesting relief.

§ 1129. Mediation Disclosure Notification and Acknowledgment

(a) Except in the case of a class or representative action, an attorney representing a client participating in a mediation or a mediation consultation shall, as soon as reasonably possible before the client agrees to participate in the mediation or mediation consultation, provide that client with a printed disclosure containing the confidentiality restrictions described in Section 1119 and obtain a printed acknowledgment signed by that client stating that he or she has read and understands the confidentiality restrictions.

(b) An attorney who is retained after an individual agrees to participate in the mediation or mediation consultation shall, as soon as reasonably possible after being retained, comply with the printed disclosure and acknowledgment requirements described in subdivision (a).

(c) The printed disclosure required by subdivision (a) shall:

(1) Be printed in the preferred language of the client in at least 12-point font.

(2) Be printed on a single page that is not attached to any other document provided to the client.

(3) Include the names of the attorney and the client and be signed and dated by the attorney and the client.

(d) If the requirements in subdivision (c) are met, the following disclosure shall be deemed to comply with the requirements of subdivision (a):

Mediation Disclosure Notification and Acknowledgment

To promote communication in mediation, California law generally makes mediation a confidential process. California's mediation confidentiality laws are laid out in Sections 703.5 and 1115 to 1129, inclusive, of the Evidence Code. Those laws establish the confidentiality of mediation and limit the disclosure, admissibility, and a court's consideration of communications, writings, and conduct in connection with a mediation. In general, those laws mean the following:

• All communications, negotiations, or settlement offers in the course of a mediation must remain confidential.

• Statements made and writings prepared in connection with a mediation are not admissible or subject to discovery or compelled disclosure in noncriminal proceedings.

• A mediator's report, opinion, recommendation, or finding about what occurred in a mediation may not be submitted to or considered by a court or another adjudicative body.

• A mediator cannot testify in any subsequent civil proceeding about any communication or conduct occurring at, or in connection with, a mediation.

This means that all communications between you and your attorney made in preparation for a mediation, or during a mediation, are confidential and cannot be disclosed or used (except in extremely limited circumstances), even if you later decide to sue your attorney for malpractice because of something that happens during the mediation.

I, _____ [Name of Client], understand that, unless all participants agree otherwise, no oral or written communication made during a mediation, or in preparation for a mediation, including communications between me and my attorney, can be used as evidence in any subsequent noncriminal legal action including an action against my attorney for malpractice or an ethical violation.

NOTE: This disclosure and signed acknowledgment does not limit your attorney's potential liability to you for professional malpractice, or prevent you from (1) reporting any professional misconduct by your attorney to the State Bar of California or (2) cooperating with any disciplinary investigation or criminal prosecution of your attorney.

[Name of Client]_____

[Date signed]_____

[Name of Attorney]_____

[Date signed]_____

(e) Failure of an attorney to comply with this section is not a basis to set aside an agreement prepared in the course of, or pursuant to, a mediation.

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NOTE: This disclosure and signed acknowledgment does not limit your attorney's potential liability to you for professional malpractice, or prevent you from (1) reporting any professional misconduct by your attorney to the State Bar of California or (2) cooperating with any disciplinary investigation or criminal prosecution of your attorney.

Date signed: _____ _____

[Name of Client]

Date signed: _____ _____

[Name of Attorney]