

## **PHIL CUTLER, MEDIATOR**

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### **General Information About Our Mediation**

#### **Business Terms**

Unless we agree otherwise, you will be charged \$400/hr (my normal hourly rate) for my mediation services, including time spent in the mediation conference as well as time spent in preparation and for any follow-up that I believe is warranted. I will absorb routine “costs” (fax, photocopying, etc.) up to \$50 in the aggregate. (If our mediation is to be conducted outside of Seattle, we will have discussed any likely additional costs prior to confirming the mediation.)

For a normal two-side dispute in which each side is represented by a single set of lawyers, a “full day” mediation is likely to run \$5,200 or so; total cost for a “half-day” mediation will be in the \$2,800 range. (If your dispute involves multiple parties, with different lawyers representing them, we will have discussed special business terms prior to confirming the mediation.) Unless you agree otherwise, each “side” in a dispute is responsible for one-half of my mediation fees and for depositing that amount with me prior to the mediation. If you’ve booked this as a full day mediation, each side’s deposit share will be \$2,600; if booked as a half-day mediation, each side’s deposit share will be \$1,400. Checks should be made payable to Cutler Nylander & Hayton IOLTA Trust Account. I have no cancellation fee for mediations, but you will be billed – and responsible – for any time I spend prior to receiving notice of cancellation.

At least one half of your side’s deposit share should be delivered to me with your side’s signed copy of the Private Mediation Agreement (see below); the other half may be brought in on the day of our mediation. You may, if you wish, send in a check for the entire amount of your share with your side’s signed copy of the Private Mediation Agreement. Your deposits will be held in my firm’s trust account pending completion of the mediation and billing. If there's money left over, you'll get a refund; if more is needed, you'll be billed for the difference.

#### **Mediation Agreement, ADR Profile and Disclosures**

I either enclose with this memo a copy of my ADR profile or have provided it to you previously. A copy is also available on our firm’s website ([www.cnhlaw.com/adr-services](http://www.cnhlaw.com/adr-services)). I also enclose, or have previously provided you with, any “disclosures” I feel are important to make – both general and specific. Please review both documents and share them with your clients. Each side

must sign the Private Mediation Agreement. A copy is enclosed with this memo, or has been provided to you previously.

### **Mediation Date, Time and Place**

When I confirm your mediation reservation, I will advise you of the date and start-time, which will be set with your concurrence. I will be prepared to go as long that day as long as mediation dynamics indicate that continuing is likely to be productive; I will expect you and your client representatives to do the same.

The mediation will take place in our offices. We're in the Second & Seneca Bldg (now also known as "Safeco Center"), 1191 Second Avenue, Seattle. Come to the 18th floor (Garvey Schubert reception desk).

### **Parking**

Parking (no-host and at typically exorbitant downtown Seattle rates) is available in our building. Enter the parking garage from either Seneca Street or Spring Street; park in any "Visitor" space (spaces are available – see orange signs – beginning on Level B). Take the elevator to the building lobby, then take the first elevator bank to the 18th floor.

### **Lunch**

For full day mediations, we will take a lunch break around noon-time. So as not to unduly disrupt mediation dynamics, one side will ordinarily take its lunch break while I continue to work with the other side. You may, if you wish, call ahead (*e.g.*, Ingallina's, Specialties, etc.) and have sandwiches for your side delivered to our office; we'll make sure they're delivered to you. There are a variety of sandwich/deli shops (*e.g.*, Melange Market on the Plaza Level of 1201 Third Avenue, Rex's Deli on 2<sup>nd</sup> Avenue) in the immediate vicinity of our office if you'd prefer to go out. If you'd prefer a sit-down restaurant, McCormick & Schmick's is close-by (1<sup>st</sup> and Spring), as is The Brooklyn (2<sup>nd</sup> and University).

### **Client Representatives**

I expect each side to have a client representative attending in person with full authority to settle the dispute, including the authority to modify previously authorized settlement limits. The only exception would be a settlement that requires the approval of a board of directors or similar governing body, and cases in which an insurance company will be contributing part or all of the cost of settlement. In the former case, your client representative's attendance will constitute a representation that he or she will recommend any settlement provisionally agreed-to. In the latter case, while I prefer to have an insurance company representative present in-person, if that person cannot attend in person you should be sure to have him or her available by telephone for consultation throughout our mediation conference – including after-hours if necessary.

If, as sometimes happens, your client needs to discuss settlement terms with another "advisor" –

for instance, a close family member or another executive – you should be sure that the person whose input may be needed will either be present in-person or will be available by telephone throughout our mediation conference, including after-hours if necessary.

I recommend that each side advise the other of its expected client representative; if you have concerns over the other side's person, I will expect you to discuss that concern with the other side. If you are unable to resolve those concerns, please let me know.

### **Preparing Your Client for Mediation**

It is very important that you spend time with your client representative before the mediation and prepare him or her for what will take place. I will undoubtedly want to engage your client representative in conversation regarding the dispute and how it might be resolved. He or she needs to have an understanding not only of the mediation process but of the risks of continued litigation and acceptable settlement parameters. Please share with your client representative the attached memo describing the mediation process.

### **Mediation Materials**

I'd like your mediation materials about a week before our mediation so I have time to review and digest them, and discuss with you your and your client's views on the most appropriate format for our mediation. Your materials need not be as formal as a court pleading. I prefer them in letter form. I'd like to receive two letters from you, as outlined below.

#### ***Main Mediation Letter***

Your main mediation letter will be most helpful in putting me in a position to help you resolve the dispute if it is no more than 10 pages and addresses all liability and damage issues. While I prefer that you craft a mediation letter specifically for our mediation conference, if you wish to use one or more briefs in the case instead, I ask that you give me a short letter highlighting the main points (like an executive summary of a long report). I encourage you to be judicious in attaching "exhibits" to your mediation letter and only submit other papers to the extent they are necessary to understand your position. Remember that the more paper you give me, the longer it will take for me to digest their content – and the more of your (and your opponent's) money I will be spending. Unless you tell me otherwise, I will expect each side to share with the other its main mediation letter.

#### ***Confidential Letter***

I like each side to give me a separate, "mediator's-eyes-only" letter – considerably shorter, say 3 pages – addressing mediation "drivers" and impediments to a mediated settlement. Information concerning your side's impression of what is really driving the dispute or affecting settlement (*e.g.*, pending or threatened summary judgment motions; personalities; a principal's personal involvement in the dispute (especially a client representative's involvement); a party's interest in causing an opponent to expend substantial resources in litigation; competitive factors,

etc.) and of the consequences to your side – and to the opposing party – if the dispute is not settled, a recap of the history of settlement discussions to date, and your estimate of attorneys’ fees and costs – both to date and through trial or arbitration – is very helpful to me. I will not – without your permission – disclose to the other side the contents of your confidential letter, at least as coming from you, though I will feel free to discuss concepts generally with the other side.

### ***Delivering your Mediation Materials***

As long as your mediation materials are not voluminous, unwieldy or data intensive (more than 2MB), I prefer that you send them to me by email, [philcutler@cnhlaw.com](mailto:philcutler@cnhlaw.com), with a copy to my paralegal Amylyn Riedling, [amylyn@cnhlaw.com](mailto:amylyn@cnhlaw.com). If you mail or have your materials delivered, please send them to me at 1191 Second Avenue, 18<sup>th</sup> floor, Seattle WA 98101.

### **Mediation Confidentiality and My Role as Mediator**

A copy of an agreement regarding role of the mediator and mediation confidentiality is posted on my firm’s website ([www.cnhlaw.com/adr-services](http://www.cnhlaw.com/adr-services)). I will circulate a copy at the mediation and will expect all participants – lawyers and clients – to sign it.

### **Mediation Format**

Unless you tell me that having both sets of clients in the same room together for any reason is problematic and inadvisable, we will begin our mediation with a joint meet-and-greet administrative session. There are things I like to tell the parties and their lawyers about myself, the mediation process and what we will be doing that day that are best said once, so everyone hears the same thing.

I’ll phone each side (separately) after I’ve read your materials to discuss the most appropriate format for the mediation and whether either of you believe a substantive joint session (where the lawyers and/or clients address their opposite number and discuss the key issues in dispute from their perspective) at the commencement would be productive. I generally find that substantive joint sessions at the commencement of a mediation lead to positional bargaining and are therefore unproductive, but I invite your comments on the most appropriate format for our mediation; you know the players and the dynamics better than I. This is not to say that a substantive joint session won’t be productive later in the mediation day and I reserve the option of calling one if I feel such a session will be productive.

Ordinarily, most of our mediation day will be spent in caucus, where I confer with one side and then the other.

I wrote an article several years ago on mediation practice pointers and use it myself when representing clients in mediation. It’s available on our firm’s website ([www.cnhlaw.com/adr-services](http://www.cnhlaw.com/adr-services)). Use it as you see fit.

## **Settlement – Wrapping up the Mediation**

Experience has taught me (and I'm sure you too) that if the mediation results in a settlement (full or partial), the terms of that settlement need to be reduced to writing and the parties need to sign off on the document. Please be prepared to draft a settlement agreement for execution by the client representatives at the end of our mediation. I'm perfectly comfortable with a handwritten settlement agreement, but if you prefer to have a "pretty" typewritten document, please bring a laptop with at least the basic format of a settlement agreement loaded onto it. You can then email it to me; I'll have it printed off for everyone to review and sign.

*Rev. June 2012*