M E M O R A N D U M

TO : Client Representatives

FROM : Philip E. Cutler, Mediator

RE : Information Concerning our Upcoming Mediation

<u>TO COUNSEL</u>: Please give a copy of this memorandum to the client representative(s) who will accompany you to our mediation conference. It explains mediation and the procedures which will be followed. Thank you.

WHAT IS MEDIATION?

Mediation is a <u>process</u>. The mediator attempts to facilitate an out-of-court settlement between the parties by building upon areas of common agreement and by challenging the parties and their lawyers to think critically about the case, potential outcomes, and the business and other risks which attend continued pursuit of the lawsuit.

WHY ENGAGE IN MEDIATION?

Litigation is an expensive process. It is costly to clients not only directly, in terms of the money expended on lawyers' fees and litigation costs, but also indirectly: clients must devote significant time and energy to prosecution (or defense) of the case. In the business context, this diversion of effort from "the business" of the business is expensive. In all contexts, litigation is often emotionally draining as the parties must relive the dispute, even tedious details of it, with unrelenting frequency. Too, what a judge (or arbitrator) or jury may do with your dispute is often uncertain: you may win, but you also may lose – or not "win" as much as you hoped for. Moreover, court proceedings, and their outcomes, are public. While arbitrations are less public, the arbitrator's award becomes a matter of public record when the winning party seeks to enforce it by court judgment. Finally, litigation is often an unsatisfactory way to resolve a dispute and achieve closure to it.

Mediation is an effort to settle a dispute, privately and outside of the glare of the publicity which attends public court proceedings. Most importantly, the parties retain control of the manner in which the dispute is resolved – if the dispute goes to arbitration or trial, the parties surrender control to the arbitrator or judge, who will decide the dispute for them and impose whatever result he or she deems appropriate under the evidence presented and the law as applied.

In mediation, there are no losers, only winners. If the mediation results in a settlement of the dispute, both sides save the expense, uncertainty and disruption of continued litigation and trial. Even if the mediation fails to produce a settlement, both sides have the satisfaction of having at least tried to resolve the dispute out-of-court, have had many of the fundamental premises of their case tested by an independent third party, and have learned something about how the other party evaluates and values the case.

MEDIATION IS DIFFERENT FROM ARBITRATION

Both mediation and arbitration are forms of "alternative dispute resolution" – ADR. However, the purpose of mediation is very different from arbitration, as is the function of the independent neutral who is involved in each process.

Mediation

In mediation, the services of an independent neutral...the mediator...are employed to assist the parties in *negotiating settlement of a dispute*.

The mediation process is confidential; no information disclosed to the mediator during the mediation process may be revealed outside the mediation setting (or even to the opposing side without consent).

Although all parties are expected to come to the mediation prepared to negotiate in good faith, mediation is an entirely voluntary undertaking; no party is required to agree to a settlement. The terms of any settlement reached are decided and agreed-upon by the parties (most often with advice and counsel of their attorneys), not the mediator.

The mediator is not a judge and does not function like a judge. Nor is the mediator your lawyer. While the mediator may, in the course of the mediation, give the parties and their lawyers his or her opinion or best judgment, based on experience, as to some aspect of a matter or issue in dispute, the mediator does not decide who is right and who is wrong, nor does the mediator "decide" any of the issues in the dispute. There is no "loser" in a mediation.

If a settlement of the dispute results, it is because the parties decided that a settlement on the terms agreed-to was more advantageous, overall, than the continued expense and uncertainty of litigation. Unless the parties decide to publicize the terms of the settlement, those terms remain confidential.

Arbitration

The purpose of arbitration is to *decide a dispute* privately using the services of an independent, neutral decision-maker...the Arbitrator.

While arbitration is voluntary in the sense that parties must have agreed at some point to submit a dispute to arbitration, once arbitration has been selected as the dispute resolution mechanism, no party may unilaterally withdraw from the process without consequence.

Although the arbitrator is not a judge, he or she functions in much the same manner as does a judge and determines whether or not a claim should be allowed and, if so, in what amount or under what circumstances. The arbitrator receives "evidence" and decides the facts and the law, ultimately making an "award." There is a "winner" and a "loser," oftentimes with attendant publicity about, and financial or other consequences to, who won and who lost. The arbitrator's award is most often final and binding.

The arbitration process is more confidential than a court proceeding. However, while the arbitration hearing is "closed" (members of the public are not ordinarily admitted, nor is any public record kept of the proceeding), the arbitration award, once filed, becomes a matter of public record.

An arbitration award may generally be filed in court and, once approved by the court, becomes a judgment with the same force and effect as a judgment which results from a trial.

This is a Mediation

The proceeding for which I have been retained is a mediation. My job is to assist you and your lawyer in negotiating an agreeable settlement of the dispute in which you are involved. I will not "decide" the case.

More information about our mediation conference and how it will be conducted follows.

MORE INFORMATION ABOUT OUR MEDIATION CONFERENCE

It is important that you have a clear understanding about what will happen in our mediation conference. Here are some things to bear in mind as you prepare for it:

1. As indicated above, a mediation is really a settlement conference, albeit a more structured conference than one involving only the parties and their lawyers. While the parties and their counsel are expected to come to the mediation prepared to negotiate in good faith, no settlement will be unilaterally imposed by me, nor will any party be required to agree to a settlement. If a settlement results from our mediation, it will be because you (the lawyers and client representatives) concluded that the terms of the settlement agreed upon are preferable to continuing the litigation.

Our mediation conference and the materials that are submitted in connection with it are confidential and/or privileged from disclosure, although neither confidentiality nor privilege is absolute. *See* CR 39.1(a)(6) [Local Rules, U.S. District Court, Western District of Washington], RCW chapter 7.07 [the Uniform Mediation Act] and Rules M-11 and M-12 [AAA Commercial Mediation Rules], one or more of which will apply to our mediation. The text of each is reproduced at the end of this memo. Your lawyer can explain which mediation confidentiality rules apply to our mediation.

As the mediator, I am not ordinarily permitted to divulge to others – including the judge or arbitrator assigned to the case – what goes on in our mediation sessions, and I will respect that confidentiality. Similarly, the parties and their counsel, as well as others present at the mediation conference (such as expert witnesses, insurance company representatives, etc.), are expected to observe the confidentiality of the process and may not ordinarily divulge to the judge or arbitrator assigned to the case – what goes on in our mediation sessions. Matters which are divulged to me in our confidential mediation sessions, or by the lawyers in any "confidential/mediator's- eyes-only" mediation memorandum will remain confidential and I shall not disclose such matters without consent except as permitted or required by statute, case law or rule. To have it any other way would run counter to the purposes of a mediation, which can only be achieved if the parties and their lawyers can speak, to me and to each other, candidly and freely.

To reinforce the concept of mediation confidentiality, I will ask all persons participating in our mediation conference to sign a confidentiality agreement.

Also, while I am a lawyer I am not "your" lawyer – and I am not acting as a lawyer in our mediation. I will not provide you with legal advice during the mediation and you should not look to me for legal advice.

I have asked your lawyer (and your opponent's lawyer) to provide me with two mediation memos.

The first is a distillation of the essence of the facts which underlay your dispute and a recap of applicable legal principles. It will also include a section dealing with damages and other relief requested. This memo is ordinarily shared with your opponent (and your opponent's memo with you).

The second is a confidential memo, for my eyes only, which gives me the history of settlement negotiations in this case, your current settlement position and other pertinent information. It is not shared with your opponent or your opponent's lawyer. I have asked your lawyer to also give me in this confidential memo (i) an estimate of the legal fees and costs incurred by you to date and a good faith estimate of the amount of trial time and additional expense required to try this case to conclusion if the case is not settled, (ii) the "other" consequences to you (and your opponent) if a settlement is not negotiated in the near future, and (iii) any particular business or settlement concerns or objectives which would assist me in helping

craft a settlement of your dispute. It is strictly for my benefit as I prepare for the mediation.

I will not share either of these papers with the judge or arbitrator (if any) assigned to this case and your lawyer (and your opponent's lawyer) should not do so either.

5. While I will discuss with counsel after receipt of their mediation memoranda the mediation format to be used in this case, I generally begin a mediation with a joint session at which all parties and counsel are present. Ordinarily, our joint session is limited to administrative and procedural matters; occasionally, I will ask the parties or their lawyers to share their perspective on the dispute with their opposite number. If I do not do so, it is because I feel that we will make more progress in mediation by proceeding immediately to caucuses with each side; I have found that frequently a "substantive" joint session makes it more difficult to achieve settlement because each side leads off with positional bargaining – something that is often contrary to conciliation and settlement. Nonetheless, you may expect that I will have familiarized myself with the key facts of your dispute, both by reading your and your opposition's mediation memoranda and exhibits carefully and by a pre-mediation conference or telephone conference with the lawyers. After our joint session, I usually separate the parties into different rooms, meet privately with each side, and begin what former U.S. Secretary of State Henry Kissinger popularized as "shuttle diplomacy".

6. As in any negotiation, each offer (and each response to an offer) sends a message. I encourage you and your lawyer to think realistically and critically about the "message" your offers or responses to the other side's offers communicates. At a minimum, that message should be that your side is sincerely interested in finding a resolution of the dispute that makes sense for all parties.

7. During the mediation I may confer privately with your lawyer, or ask his or her permission to confer privately with you. I may do the same with your opposition. Even where we do not begin the mediation with a "substantive" joint session, I may call everyone together during the mediation day if I think that doing so will help expand the parties' understanding of issues or positions.

8. I do not regard it as appropriate for me – as mediator – to browbeat parties or their lawyers into settling their dispute. On the other hand, there is no reason why your dispute cannot be resolved in mediation if you – and the other party – are sincerely interested in negotiating a settlement that makes sense for all parties. I will do my best to make certain that you and your lawyer give due consideration to litigation risks and costs – in mediation we often refer to this as "reality-checking" – and that both of you have the necessary information to make informed decisions both about settlement and about continuing the litigation.

9. If by good fortune, happenstance, my skill, or the lawyers' or their clients' willingness to compromise we reach a settlement at the mediation, I will ask that the lawyers reduce the

main points of the agreement to a writing which I will expect the attending client representatives to initial or sign. Whether this memo is a binding memorialization of the terms of settlement will be decided by mutual agreement at the mediation conference, although where all parties are represented by counsel I generally suggest that it be binding – and the lawyers generally concur. I will leave it to the lawyers to draft more formal settlement documents, if they desire to do so, but I will remain available after the mediation to resolve any disputes which might arise.

10. If the initial mediation session does not produce a settlement, I may continue the mediation for a time to allow all concerned to sort out their opponent's position or rethink their own positions. We may or may not reconvene in person. Alternatively, if I think that another form of dispute resolution might be beneficial to the settlement process, or if I have particular settlement ideas, I may make suggestions to him or her in that regard. I will ask that your lawyer provide you with a copy of any such suggestions.

11. Lastly, if you have any questions or concerns about our mediation, I encourage you to share them with your lawyer – and I encourage your lawyer to bring them to my attention, if appropriate, so that I may address them.

Revised August 1, 2010

MEDIATION CONFIDENTIALITY

Text of CR 39.1(a)(6), Local Rules W.D. Wash.; Rules M-11 and M-12, AAA Commercial Mediation Rules (2003 Ed.); and RCW Chapter 7.07

CR 39.1(a)(6), applicable to Rule 39.1 mediations in cases pending in the U.S. District Court for the Western District of Washington, provides:

> ***Confidentiality.*** Except as otherwise required by law or agreed by the litigants, or otherwise provided by this rule, all ADR proceedings under this rule, including communications, statements, disclosures and representations made by any party, attorney, or other participant in the course of such proceeding, shall, in all respects, be confidential, and shall not be reported, recorded, placed in evidence, disclosed to anyone not a party to the litigation, made known to the trial court or jury, or construed for any purpose as an admission or declaration against interest. No party shall be bound by anything done or said during such proceedings conference unless a settlement or other agreement is reached.

Rules M-11 and M-12, AAA Commercial Mediation Rules (2003 ed.) also address mediation confidentiality in mediations conducted pursuant to those rules:

RULE M-11 Privacy

> Mediation sessions are private. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the mediator.

RULE M-12 Confidentiality

> Confidential information disclosed to a mediator by the parties or by witnesses in the course of the mediation shall not be divulged by the mediator. All records, reports, or other documents received by a mediator

while serving in that capacity shall be confidential. The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum.

The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding:

a. views expressed or suggestions made by another party with respect to a possible settlement of the dispute;

b. admissions made by another party in the course of the mediation proceedings;

c. proposals made or views expressed by the mediator; or

d. the fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

RCW chapter 7.07, Washington's version of the Uniform Mediation Act, also restricts lawyers, party representatives and the mediator from disclosing matters occurring in the mediation:

Please see attached copy of the Uniform Mediation Act, effective January 1, 2006.
See especially: RCW 7.07.030, -.040 and -.050 ("privilege")
RCW 7.07.060 (mediator "reports" to a tribunal);
and RCW 7.07.070 ("confidentiality")