

Med-Arb Agreement

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Overview – What is Med-Arb. When parties agree to participate in the Med-Arb process, they combine the Mediation and Arbitration processes into a hybrid process for the purpose of compromising, settling or resolving disputed claims: **a)** first by use of a voluntary **Mediation/Facilitation** format, but if all matters are not resolved by agreement; **b)** the parties will proceed promptly into an **Arbitration** format to deal with those unresolved issues.

The final result of Med-Arb is a binding decision which includes the voluntary agreements achieved during the mediation/facilitation phase and the binding decisions made by the Neutral as Arbitrator during the arbitration phase.

There are substantial differences in the ethical and professional relationships between the Neutral and the parties in a Mediation/Facilitation engagement, and the same parties in an Arbitration engagement. In a Mediation/Facilitation engagement, the parties are encouraged to be open and candid, often sharing confidential information or settlement positions, recognizing that mutual agreement of the parties is required in order to resolve the matter as a binding settlement. Depending on the use of joint or separate caucus sessions with the parties, the Neutral may have discussions with one side that are intentionally not shared with the other. The parties can continue in Mediation / Facilitation as long as they are productive, or either party may unilaterally withdraw or cease discussions at any time and return to their litigation schedule. The Model Standards of Conduct for Mediators recognizes the voluntary nature of mediation and the necessity of self-determination by each party during all aspects or phases of the process, including satisfaction with the continued neutrality of the mediator. By definition, Mediation is voluntary and a settlement must be agreed upon by the parties without coercion.

At the other end of the spectrum, Arbitration is compulsory (after the parties agree to arbitrate), the outcome is determined by a third party, and the resulting award is legally binding. During the course of a typical Arbitration engagement, there is a strict code of conduct restricting any ex parte communications between the Neutral and any party. This restriction is a matter of due process, assuring each party that they are aware of all information or evidence conveyed to the Arbitrator, and have an opportunity to cross examine or challenge the information during the Arbitration phase. This restriction is also in place to reinforce the impartiality of the neutral as Arbitrator. In arbitration there are also a number of important, procedural choices that have become accepted as standard

components of commercial arbitration proceedings, such as choosing the rules to be followed, the amount, or limits on discovery and the form of the award. These are all typical issues that would be addressed if the matter started as an Arbitration case, but often get lost if the matter begins in a Mediation framework, and then transitions into the Arbitration phase.

It is therefore a challenge to combine the **Mediation** process and the **Arbitration** process into a single proceeding, while preserving the integrity and expected procedural benefits of each separate process. This challenge is met by making disclosures, requesting consents and offering each party the opportunity to opt-out, or opt-in at key Decision Points.

There are a number of choices or alternatives that are set forth throughout this Agreement, and the parties are requested to review and initial each of these separate elections. Some of the choices or alternatives should be addressed at the beginning, which form initial basic commitments of the parties to the binding nature of the Arbitration phase of the Med-Arb process. There are other choices that should only be made during the transition from the **Mediation** phase to the **Arbitration** phase of the Med-Arb process, as these are the choices that recognize the importance of the concept of self-determination, while providing a structure to finalize the Arbitration phase that produce the binding Award.

As a quick overview, the major Decision Points deal with the following topics:

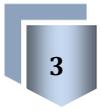
- Decision Point 1. Agreement on exclusive joint sessions or joint and caucus sessions during Mediation phase.
- Decision Points 2 & 3. Procedures for selecting the Neutral in the Arbitration phase.
- Decision Points 4 & 5. Agreement on additional discovery, evidence at time of transition from Mediation to Arbitration phase.
- Decision Points 6 & 7. Agreements on form of Arbitration Award, and agreed upon limits on award, such as Hi-Lo or Last Offer.



Executing this Med-Arb Agreement. This Med-Arb Agreement can be reviewed and executed prior to the Mediation/Facilitation Hearing if the parties know in advance that they want to use the Med-Arb process. In that event, this agreement will guide the parties through several opt-in/opt-out decision points or options and obtain the necessary agreements by the parties as the Hearing transitions through the Facilitative/Mediation Hearing to the ground rules for the Arbitration phase.

If the parties are not sure if they want to engage in a Med-Arb Process at the beginning of Mediation, this Med-Arb Agreement can be used as a tool to educate parties of the many issues that they will face going from Mediation to Arbitration. If the parties are not successful at the later stages of Mediation, they will hopefully have some confidence in making a

thoughtful decision about engaging directly into an Arbitration phase to bring finality to the dispute, either with the same Neutral, or with a new Arbitrator.

 **Description of Mediation/Facilitation Phase of Proceedings.** The Med-Arb process will begin with a voluntary, non-binding Mediation/Facilitation phase. The purpose of the Mediation/Facilitation phase is to attempt to compromise, settle or resolve disputed claims between and or among the parties. The mediator's/facilitator's role is to act as a Neutral party for the purpose of assisting the parties to resolve these claims on terms that are agreed upon by both sides. The parties acknowledge that the Neutral is not acting as an attorney or advocate for any party and that any recommendations or statements by the Neutral do not constitute legal advice by the Neutral. The parties acknowledge that they have been advised to seek and are relying on the advice of their own counsel in connection with any settlement or other agreement.

 **Confidential Nature of Mediation/Facilitation Proceedings.** In order to encourage communications designed to facilitate settlement of disputed claims, the parties agree that all proceedings in connection with this mediation/facilitation, including pre-hearing activities shall be subject to this Agreement and applicable provisions of Michigan law including MCR 2.411, and MRE408 of the Michigan Rules of Evidence as well as applicable Federal Rules of Civil Procedure and FRE 408 if conducted for a case filed in Federal Court. These rules provide that anything said, or any statement made or document prepared or submitted in the course of the Mediation/Facilitation may not be used in any other court proceeding. Evidence that the parties have entered into a written settlement agreement during the course of the Mediation/Facilitation may be disclosed and is admissible to the extent necessary to enforce the settlement.

 **Confidential Communications.** In connection with the Mediation/Facilitation process, if either party has information that is considered too sensitive to present to the other side, you may agree to present this confidential information to the Neutral on a confidential "for mediator/facilitator's eyes only" basis, until the time, if at all, that a party is prepare to disclose the information. The Neutral may be able to use this information to facilitate settlement, without specifically disclosing the information. Should the matter proceed to the Arbitration phase, the Neutral is under no obligation to disclose information obtained in confidence to the other side, but will use his best efforts to disregard or discount the information for the purposes of an Arbitration award. The parties agree to be mindful of the confidential disclosures that they may make during the Mediation/Facilitation phase of the proceedings, accepting and consenting that the mediator/facilitator may also be the Arbitrator should the matter proceed to the Arbitration phase.



Option on Joint Session and Private Caucus. The process of Mediation/Facilitation commonly involves joint sessions with the parties, as well as private meetings or caucuses with each side separately. The private sessions are a valuable and effective part of the process. Since an Arbitration phase will follow if the parties are not able to agree on all disputed issues, and the Neutral will be making binding decisions on those unresolved issues, it is important that the parties acknowledge and agree in advance on the format that will be used. The parties are requested to review and select one of the following alternatives for the Mediation/Facilitation phase:

DECISION POINT 1.

IF POSSIBLE, THIS CHOICE SHOULD BE MADE AT THE BEGINNING OF THE MEDIATION PHASE.

- Alternative 1:** Prior to or during the course of the Mediation/Facilitation, the Neutral is authorized to conduct **both joint and separate communications** and or meetings (often referred to as Caucuses) with the parties and or their counsel; should the matter proceed to the Arbitration phase, the Neutral is under no obligation to disclose information obtained in confidence, but will use his best efforts to disregard or discount it for the purposes of an arbitration award;

Initials of Party:

Initials of Party:

or

- Alternative 2:** The Neutral will only meet with the parties and or their counsel in a **joint session** were each side is present to hear all communications with the Neutral. The Neutral will not meet with either party separately unless both parties agree.

Initials of Party:

Initials of Party:



Conclusion or Termination of Mediation/Facilitation Phase. If the Mediation/Facilitation phase results in a voluntary settlement of all terms in dispute, the Neutral will assist the parties in documenting the settlement. At the option of the parties, and with the consent of the Neutral, the settlement terms may be incorporated as a binding Award of the Arbitrator.

Respecting the importance of self-determination in a Mediation/Facilitation process, at any time during the Mediation/Facilitation phase either party may request the Neutral to conclude the Mediation/Facilitation phase of the Med-Arb process. The Neutral may also determine on his or her own initiative that there is no further purpose to be served by continuation of the Mediation/Facilitation phase of the process, in which case the Neutral will terminate and declare the Mediation/Facilitation phase ended, and the Arbitration phase of the proceedings will promptly commence.

List of Issues Resolved and Unresolved. Upon the conclusion or termination of the Mediation/Facilitation phase, the parties will agree in writing on the list of issues that have been resolved, if any, and the terms thereof, as well as a list of the remaining unresolved issues.

No Ex Parte Communication on Termination of Mediation. After the Mediation/Facilitation phase is concluded, if issues on the list remain unresolved, no further ex parte communications with the Neutral will be permitted except for administrative and scheduling discussions pertaining to the Arbitration phase of this Agreement.



Arbitration Proceedings. Unless all of the issues presented in the contested matter have been resolved by settlement resulting from the Mediation/Facilitation phase of these proceedings, the Med-Arb process will be followed as soon as practical by an Arbitration phase, which will decide those issues not agreed upon by the parties during the Mediation/Facilitation phase (the list of unresolved issues to be decided in the Arbitration phase will be agreed upon by the parties as provided in Paragraph 7, **Conclusion or Termination of Mediation/Facilitation Phase**).

DECISION POINT 2.

Selection of Neutral. The parties have several options available for the selection of the Arbitrator for the Arbitration phase. The parties are requested to review the following choices, and agree on one of the following alternatives:

THIS CHOICE MAY BE MADE AT THE BEGINNING OF THE MEDIATION / FACILITATION SESSION, OR AT THE COMMENCEMENT OF THE ARBITRATION PHASE.

Alternative 1: Notice of Resignation of Neutral. If, as a consequence of having acted as Mediation/Facilitation, the Neutral develops doubts as to his ability to remain impartial during the Arbitration phase, he has an obligation to notify the parties of his intent to resign, in which event the Arbitrator will be selected in accordance with Alternative 4 under Paragraph 8, **Arbitration Proceedings**.

or

Alternative 2: Same Neutral. The parties agree to proceed with the same Neutral that presided during the Mediation/Facilitation phase as the Arbitrator. The parties waive any objection that the Arbitrator has also acted as a Mediation/Facilitation as a basis for challenging the Arbitrator or any awards which the Arbitrator may make. Notwithstanding that the parties agree at this stage to use the same Neutral, at the conclusion of the

Initials of Party:

Initials of Party:

Mediation/Facilitation phase, either party may request the designation of a Different Neutral (see details under Decision Point 4, below).

or

- Alternative 3: Different Neutral Designated.** The parties agree that the Neutral that presided during the mediation/facilitation phase **will not** act as arbitrator for the arbitration proceedings, and agree to the following individual to act as arbitrator for the arbitration phase of these proceedings. Name of Arbitrator selected: _____.

Initials of Party:

Initials of Party:

or

- Alternative 4: Different Neutral to be Determined.** The parties agree that the Neutral that presided during the Mediation/Facilitation phase **will not** act as arbitrator for the Arbitration proceedings. The parties will agree upon a Neutral to act as Arbitrator within 15 days after the conclusion of the Mediation/Facilitation phase of the proceedings. If the parties cannot agree on a Neutral to act as Arbitrator, the Neutral serving as the Mediator/Facilitator shall submit a list of not less than 5 prospective Arbitrators to the parties and will administer a strike and rank method to produce the designated Arbitrator, permitting each party to strike one candidate from the list.

Initials of Party:

Initials of Party:

DECISION POINT 3.

THE FOLLOWING CHOICE MAY ONLY BE MADE IF: a) ALTERNATIVE 2 (SAME NEUTRAL) IS SELECTED ABOVE, AND b) IMMEDIATELY AT THE BEGINNING OF THE ARBITRATION PHASE; OTHERWISE CHOICE IS WAIVED.

Right to Demand new Neutral. If the parties previously designated the selection of the Arbitrator in accordance with **Alternative 2** above (the Arbitrator will be the same Neutral that conducted the Mediation/Facilitation phase of the proceedings), the parties nonetheless reserve the right, immediately at the conclusion of the Mediation/Facilitation phase, that **either party may request in writing** that a separate Neutral be appointed to serve as Arbitrator during the Arbitration phase, to be selected in accordance with **Alternative 3 or 4**, above. If the parties do not exercise this right immediately, they waive their right to request the appointment of a separate Neutral under this paragraph.

DECISION POINT 4.

THE FOLLOWING CHOICE MAY BE MADE AT THE BEGINNING OF THE ARBITRATION PHASE.

Evidence for Arbitration. If the hearing proceeds under **Alternative 2**, above (same Neutral), the **parties may waive their rights to introduce additional evidence** and the Neutral may proceed immediately after argument to render an Arbitration award based on the record of documents received and exchanged between the parties during the

mediation/facilitation phase, or the parties may stipulate to introduction of additional evidence.

- Alternative 1: No Additional Evidence Required.** The parties waive their right to introduce additional evidence, and after argument, the Arbitrator may immediately, or as soon thereafter as practical, render an Arbitration award. Initials of Party: _____
Initials of Party: _____

- Alternative 2: Additional Evidence to be Submitted.** If the parties do not waive their rights to introduce additional evidence, or if the Arbitrator is selected under **Alternative 3 or 4** above, the parties may present additional evidence and the Arbitrator will schedule the Arbitration Hearing as promptly as practical. Initials of Party: _____
Initials of Party: _____

DECISION POINT 5.

THIS CHOICE MAY BE MADE AT THE BEGINNING OF THE ARBITRATION PHASE.

Additional Discovery. The parties have options on the form and amount of additional discovery to provide evidence or testimony to be presented for the Arbitration phase of the Med-Arb process. The Arbitration phase will be conducted in accordance with the following options agreed upon by the parties. If the parties do not agree on one of the options, the Arbitrator will make a determination after discussion with the parties and consistent with the Arbitration Rules in effect:

- Option 1: No Additional Discovery Necessary.** The parties have participated in extensive pretrial discovery, and no further discovery will be permitted for the Arbitration hearing phase. Initials of Party: _____
Initials of Party: _____

or

- Option 2: Additional Discovery.** The parties may agree on limited additional discovery prior to the Arbitration hearing phase, to be conducted in an expedited fashion. The proposed discovery plan shall be promptly submitted to the Arbitrator and the parties agree that the Arbitrator may impose further limits or restrictions on discovery consistent with the objective of expeditious and fair resolution of the dispute. Initials of Party: _____
Initials of Party: _____

 **Arbitration Rules,** The Arbitration phase shall be governed by the Commercial Arbitration Rules of the American Arbitration Association, and the Michigan Revised Uniform Arbitration Act, which are incorporated herein by reference, except as modified by this Med-Arb agreement. The award of the arbitrator may be enforced in any court of competent jurisdiction.

Schedule for Award. Unless otherwise agreed by the parties, within 7 days after the close of the Arbitration hearing phase, the arbitrator will issue an award.

DECISION POINT 6.

Form of Award. The Arbitrators' decision shall provide either a Standard Award, or a Reasoned Award, incorporating the reasoned basis for the resolution of each dispute and for any award consistent with the evidence and testimony. Each form of Award will incorporate the terms agreed upon by the parties during the mediation/facilitation phase.

THIS CHOICE MUST BE MADE AT THE BEGINNING OF THE ARBITRATION PHASE.

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|--------------------------|--|-----------------------------|
| <input type="checkbox"/> | Option 1. Standard Award selected by the parties. | Initials of Party:
_____ |
| | or | Initials of Party:
_____ |
| <input type="checkbox"/> | Option 2. Reasoned Award selected by the parties. | Initials of Party:
_____ |
| | | Initials of Party:
_____ |

DECISION POINT 7.

Options to Place Limits on Arbitration Award. The parties may exercise a number of alternatives relating to the nature of the award issued by the Arbitrator. The choices below may be selected at the beginning of the Mediation Phase, in which case the Option will be controlling on the Arbitrator and the parties, or may be agreed upon by the parties at the conclusion of the mediation/facilitation phase of the proceedings and prior to the issuance of the Arbitration award:

IF EITHER CHOICE IS MADE AT THE BEGINNING OF THE MEDIATION PHASE IT IS CONTROLLING, THEREAFTER CHANGE POSSIBLE ONLY BY MUTUAL AGREEMENT.

- | | | |
|--------------------------|---|-----------------------------|
| <input type="checkbox"/> | Option 1: Hi-Low Boundaries. The Arbitrator will issue an award consistent with the evidence and testimony; however, either prior to, or at the close of the Arbitration hearing, the parties may agree to establish "Hi-Low" boundaries for the Arbitration award, in which the parties set limits on the monetary award of the Arbitration proceeding for those issues presented to the Arbitrator. The parties' "Hi-Low" boundaries must be sealed and submitted to the Arbitrator prior to the time established for the issuance of the Arbitrator's award. The final arbitration award issued by the Arbitrator will reflect the Hi-Low parameters, and incorporate the terms agreed upon by the parties during the mediation/facilitation phase. | Initials of Party:
_____ |
| | or | Initials of Party:
_____ |

- **Option 2: Final Offer.** The Arbitrator will issue an award consistent with the evidence and testimony; however, the parties agree the Arbitrator must choose between the parties' best monetary offers. This is customarily referred to as "Baseball" or "final offer" Arbitration. Promptly after the close of the Arbitration hearing, each party's "Final Offer" must be sealed and submitted to the Arbitrator. The final arbitration award issued by the arbitrator will reflect the selected "final offer" and will incorporate the terms agreed upon by the parties during the mediation/facilitation phase.

Initials of Party:

Initials of Party:



Enforcement of Arbitration Award.

The award of the arbitrator may be enforced in any court of competent jurisdiction. If no post award proceedings under MCR 3.602(J), (K), or (N) are taken and the award is paid within 20 days of its rendition, at the option of the parties, this matter may be finally resolved by a full and final release and order of dismissal rather than the entry of a judgment.



Neutral's Services and Compensation. The parties will compensate the following services:

A. Neutral's Administrative & Pre-Hearing Services. The Neutral's services shall include organizing and conducting the Med-Arb Pre-Hearing Conference Meeting or telephone conference calls, scheduling the mediation/facilitation portion of the Med-Arb hearing, review of briefs and other written materials submitted for the mediation/facilitation hearing phase, preparation for the mediation/facilitation portion of the hearing, participation in pre-hearing telephone commences or meetings with the parties, as well as travel to the hearing and follow-up conference calls relating to the completed mediation/facilitation.

For complex matters, when the circumstances warrant, the Neutral prefers to meet with counsel and/or parties, if practical, before the scheduled mediation/facilitation phase hearing. This face to face meeting accomplishes several objectives: 1) The Neutral develops a sense of the party's position and can explore strategies and underlying needs or requirements that aid in conducting the mediation/facilitation phase (particularly important when lack of trust underlies the dispute); 2) The Neutral can explore the techniques that are likely to be beneficial in conducting the mediation/facilitation hearing, such as preference of each party to caucus, plenary session, facilitative or evaluative styles of the Neutral. This meeting can also explore interest in opening discussion on issues or remedies outside the scope of the current litigation; 3) The Neutral uses a problem solving approach to mediation/facilitation, and the Pre-Hearing meeting serves to explore the competing interests of the parties without the time constraints that exist on the day of the mediation/facilitation hearing; 4) The Neutral develops an important rapport with the client to convey the message that the Neutral's role is to assist each party in arriving at the decision that best serves their interests. This session is an important first step in establishing a relationship of trust and confidence that the Neutral will be diligent in assisting the parties as they arrive at the proper resolution to the dispute.

The services above described as the **Neutral's Administrative & Pre-Hearing Services**, and are billed on an **Hourly Fee** basis, at the rate of \$395/hr.

B. Neutral's Mediation/Facilitation Hearing Services. The Neutral's Services for attendance and participation at the mediation/facilitation hearing or conference will be compensated on an **Hourly Fee** basis, plus reimbursement for actual costs or expenses incurred, if approved in advance by the parties. The Neutral's billable hourly rate is \$395. **Minimum compensation** for Neutral's Hearing Services shall be six hours.

C. Neutral's Arbitration Hearing Services. The Neutral's Services for organizing, scheduling and participation at the arbitration phase hearing, as well as the preparation of the arbitration award, will be compensated on an **Hourly Fee** basis. The Mediator's billable hourly rate is \$395.

D. Neutral's Post Hearing Services. At the request of all parties, the Neutral may provided additional services to further the settlement of the matter. The additional services will be billed on an hourly rate of \$395/hr.

The Neutral will promptly submit an accounting for services to each attorney of record, which shall be payable upon receipt of the invoice. Unless otherwise agreed, the fees will be shared equally by the parties.



Conflict of Interest; Disclosures; Waiver. The Neutral has made a reasonable effort to learn and has disclosed to the parties: (a) all business or professional relationships the Neutral has had with the parties or their law firms within the past three years; (b) any financial interest the arbitrator has in any party; (c) any significant social, business or professional relationship the Neutral has had with an officer or employee of a party or with an individual representing a party in the arbitration; and (d) any other circumstances that may create doubt regarding the Neutral's impartiality in the mediation or arbitration. Each party and its law firm has made a reasonable effort to learn and has disclosed to every other party and the Neutral any relationships of a nature described in the preceding paragraph not previously identified and disclosed by the Neutral. The parties and the Neutral are satisfied that any relationships disclosed pursuant to this paragraph will not affect the Neutral's independence or impartiality. Notwithstanding any such relationships, the parties have chosen the Neutral to serve in the mediation / arbitration, waiving any claim based on such relationships, and the Neutral agrees to so serve. The Neutral has submitted an Arbitrator Disclosure to the parties pursuant to the Rules and the Code of Ethics for Arbitrators promulgated by the American Arbitration Association, and the Neutral affirms that none of these disclosures, or any other factors would limit his ability to be impartial, fair and objective as a mediator/arbitrator in the proceeding.



Exclusion of Mediator/Facilitator/Arbitrator Testimony and Limitation of Liability. The Neutral shall not be subpoenaed or otherwise compelled to testify in any proceeding relating to the subject matter of the mediation/facilitation/arbitration and shall not be required to provide a declaration or finding as to any fact or issue relating to the mediation/facilitation/arbitration proceeding or the dispute which is the subject of the proceedings. The Neutral, and any documents and

information in his possession will not be subpoenaed in any proceeding and all parties will oppose any effort to have the Neutral or documents subpoenaed and will jointly and severally indemnify and hold the Neutral harmless from costs associated with asserting this position.



Counterpart Execution; Binding on Representatives. This Agreement may be executed in any number of counterparts which when taken together shall constitute one fully executed Agreement. This Agreement when so executed shall inure to the benefit of and be binding on the undersigned parties as well as their lawyers, respective representatives or other persons they have caused to be present during these mediation/facilitation and arbitration proceedings.

Neutral Jerome F. Rock (P27317) /s/ _____ Date:
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Attorney for Plaintiff / Claimant /s/ _____ /s/ _____ Date:
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Attorney for Defendant / Respondent /s/ _____ /s/ _____ Date:
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Plaintiff / Claimant /s/ _____ /s/ _____ Date:

Defendant / Respondent /s/ _____ : /s/ _____ Date:
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