

International Institute for
Conflict Prevention & Resolution

CPR PROCEDURES & CLAUSES

Mediation Procedure



CPR[®]

International Institute
for Conflict Prevention
& Resolution

CPR

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ABOUT CPR

The International Institute for Conflict Prevention & Resolution (formerly the CPR Institute for Dispute Resolution) is a membership-based nonprofit organization that promotes excellence and innovation in public and private dispute resolution, serving as a primary multinational resource for avoidance, management, and resolution of business-related disputes.

CPR Members – General counsel and senior lawyers of Fortune 500 organizations as well as partners in the top law firms around the world. It is a committed and active membership, diligently participating in CPR activities and serving on committees.

The CPR 1,000 – 1,000 of the highest quality arbitrators and mediators, with specialization in over 17 practice areas and industries. As part of CPR's nomination process, we check not only the suitability, but the availability of all neutrals nominated, as well as disclose any conflicts of interest up front.

CPR Pledge Signers – More than 4,000 operating companies have committed to the Corporate Policy Statement on Alternatives to Litigation®. Moreover, better than 1,500 law firms have signed the CPR Law Firm Policy Statement on Alternatives to Litigation®, including 400 of the nation's 500 largest firms. This Pledge has been invaluable in bringing disputing parties to the negotiating table.

CPR's Commitment – As we celebrate 25 years of achievement, we continue to dedicate the organization to providing effective, innovative ways of preventing and resolving disputes affecting business enterprises. We do so through leadership and advocacy, and by providing comprehensive resources such as information, training, consultation, neutrals, and networking for business, the judiciary, government, and other institutions.

Mediation Procedure

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Please note that the Mediation Commentary is an integral part of the CPR Mediation Procedure. The *CPR Mediation Procedure and Commentary* is available at www.cpradr.org along with the CPR Mediation Analysis Screen (2001) and other useful ADR resources.

INTRODUCTION

The most widely used ADR process, mediation is a process in which a third party neutral — a mediator — meets with the disputing parties and actively assists them in reaching a settlement.

Mediation is private and confidential, flexible and informal. Typically, it is concluded expeditiously at moderate cost. The subject matter can be complex or simple, the stakes large or small, the number of parties few or many. The process typically is far less adversarial than litigation or arbitration, and therefore less disruptive of business relationships. Since other options are not foreclosed if mediation should fail, entering into a mediation process presents few risks.

Frequently cited advantages of mediation include:

- Substantial cost savings
- Promptness of resolution
- Creative, business-driven solutions
- Control over the outcome
- Preservation of business relationships
- Privacy and confidentiality

The procedure set forth below can be incorporated by reference in the dispute resolution clause of a business agreement or in a submission agreement entered into after a dispute has arisen (see Form annexed to the procedure). The procedure is suitable for transnational disputes as well as for disputes between U.S. parties.

CPR CLAUSES

Abbreviated Clauses for Standard Business Agreements

Negotiation Clause

The parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement promptly by negotiation between executives.

Mediation Clause

The parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement promptly by confidential mediation under the [then current] CPR Mediation Procedure [in effect on the date of this Agreement], before resorting to arbitration or litigation.

Mediation with Arbitration, if Necessary

The parties shall endeavor to resolve any dispute arising out of or relating to this agreement by mediation under the CPR Mediation Procedure. Unless the parties agree otherwise, the mediator will be selected from the CPR Panels of Distinguished Neutrals. Any controversy or claim arising out of or relating to this contract or the breach, termination or validity thereof, which remains unresolved 45 days after appointment of a mediator, shall be settled by arbitration by [a sole] [three] arbitrator(s) in accordance with the CPR Rules for Non-Administered Arbitration, and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof.

Arbitration Clause

Any dispute arising out of or relating to this contract, including the breach, termination or validity thereof, shall be settled by arbitration by [a sole] [three] arbitrator(s) in accordance with the CPR Rules for Non-Administered Arbitration, and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof.

For detailed ADR clauses for business agreements, see *A Drafter's Guide to CPR Dispute Resolution Clauses*.

THE CPR MEDIATION PROCEDURE

(Revised and effective as of April 1, 1998)

1. Agreement to Mediate

The CPR Mediation Procedure (the "Procedure") may be adopted by agreement of the parties, with or without modification, before or after a dispute has arisen. The following provisions are suggested:

A. Pre-dispute Clause

The parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement promptly by confidential mediation under the [then current] CPR Mediation Procedure [in effect on the date of this Agreement], before resorting to arbitration or litigation.

B. Existing Dispute Submission Agreement

We hereby agree to submit to confidential mediation under the CPR Mediation Procedure the following controversy: (Describe briefly)

2. Selecting the Mediator

Unless the parties agree otherwise, the mediator shall be selected from the CPR Panels of Neutrals. If the parties cannot agree promptly on a mediator, they will notify CPR of their need for assistance in selecting a mediator, informing CPR of any preferences as to matters such as candidates' mediation style, subject matter expertise and geographic location. CPR will submit to the parties the names of not less than three candidates, with their resumes and hourly rates. If the parties are unable to agree on a candidate from the list within seven days following receipt of the list, each party will, within 15 days following receipt of the list, send to CPR the list of candidates ranked in descending order of preference. The candidate with the lowest combined score will be appointed as the mediator by CPR. CPR will break any tie.

Before proposing any mediator candidate, CPR will request the candidate to disclose any circumstances known to him or her that would cause reasonable doubt regarding the candidate's impartiality. If a clear conflict is disclosed, the individual will not be proposed. Other circumstances a candidate discloses to CPR will be disclosed to the parties. A party may challenge a mediator candidate if it knows of any circumstances giving rise to reasonable doubt regarding the candidate's impartiality.

The mediator's rate of compensation will be determined before appointment. Such compensation, and any other costs of the process, will be shared equally by the parties unless they otherwise agree. If a party withdraws from a multiparty mediation but the procedure continues, the withdrawing party will not be responsible for any costs incurred after it has notified the mediator and the other parties of its withdrawal.

Before appointment, the mediator will assure the parties of his or her availability to conduct the proceeding expeditiously. It is strongly advised that the parties and the mediator enter into a retention agreement. A model agreement is attached hereto as a Form.

3. Ground Rules of Proceeding

The following ground rules will apply, subject to any changes on which the parties and the mediator agree.

(a) The process is non-binding.

- (b)** Each party may withdraw at any time after attending the first session, and before execution of a written settlement agreement, by written notice to the mediator and the other party or parties.
- (c)** The mediator shall be neutral and impartial.
- (d)** The mediator shall control the procedural aspects of the mediation. The parties will cooperate fully with the mediator.
 - i.** The mediator is free to meet and communicate separately with each party.
 - ii.** The mediator will decide when to hold joint meetings with the parties and when to hold separate meetings. The mediator will fix the time and place of each session and its agenda in consultation with the parties. There will be no stenographic record of any meeting. Formal rules of evidence or procedure will not apply.
- (e)** Each party will be represented at each mediation conference by a business executive or other person authorized to negotiate a resolution of the dispute, unless excused by the mediator as to a particular conference. Each party may be represented by more than one person, e.g. a business executive and an attorney. The mediator may limit the number of persons representing each party.
- (f)** Each party will be represented by counsel to advise it in the mediation, whether or not such counsel is present at mediation conferences.
- (g)** The process will be conducted expeditiously. Each representative will make every effort to be available for meetings.
- (h)** The mediator will not transmit information received in confidence from any party to any other party or any third party unless authorized to do so by the party transmitting the information, or unless ordered to do so by a court of competent jurisdiction.
- (i)** Unless the parties agree otherwise, they will refrain from pursuing litigation or any administrative or judicial remedies during the mediation process or for a set period of time, insofar as they can do so without prejudicing their legal rights.

- (j) Unless all parties and the mediator otherwise agree in writing, the mediator and any persons assisting the mediator will be disqualified as a witness, consultant or expert in any pending or future investigation, action or proceeding relating to the subject matter of the mediation (including any investigation, action or proceeding which involves persons not party to this mediation).
- (k) If the dispute goes into arbitration, the mediator shall not serve as an arbitrator, unless the parties and the mediator otherwise agree in writing.
- (l) The mediator may obtain assistance and independent expert advice, with the prior agreement of and at the expense of the parties. Any person proposed as an independent expert also will be required to disclose any circumstances known to him or her that would cause reasonable doubt regarding the candidate's impartiality.
- (m) Neither CPR nor the mediator shall be liable for any act or omission in connection with the mediation, except for its/his/her own willful misconduct.
- (n) The mediator may withdraw at any time by written notice to the parties (i) for serious personal reasons, (ii) if the mediator believes that a party is not acting in good faith, or (iii) if the mediator concludes that further mediation efforts would not be useful. If the mediator withdraws pursuant to (i) or (ii), he or she need not state the reason for withdrawal.

4. Exchange of Information

If any party has a substantial need for documents or other material in the possession of another party, or for other discovery that may facilitate a settlement, the parties shall attempt to agree thereon. Should they fail to agree, either party may request a joint consultation with the mediator who shall assist the parties in reaching agreement.

The parties shall exchange with each other, with a copy to the mediator, the names and job titles of all individuals who will attend the joint mediation session.

At the conclusion of the mediation process, upon the request of a party which provided documents or other material to one or more other parties, the recipients shall return the same to the originating party without retaining copies.

5. Presentation to the Mediator

Before dealing with the substance of the dispute, the parties and the mediator will discuss preliminary matters, such as possible modification of the procedure, place and time of meetings, and each party's need for documents or other information in the possession of the other.

At least 10 business days before the first substantive mediation conference, unless otherwise agreed, each party will submit to the mediator a written statement summarizing the background and present status of the dispute, including any settlement efforts that have occurred, and such other material and information as the mediator requests or the party deems helpful to familiarize the mediator with the dispute. It is desirable for the submission to include an analysis of the party's real interests and needs and of its litigation risks. The parties may agree to submit jointly certain records and other materials. The mediator may request any party to provide clarification and additional information.

The parties are encouraged to discuss the exchange of all or certain materials they submit to the mediator to further each party's understanding of the other party's viewpoints. The mediator may request the parties to submit a joint statement of facts. Except as the parties otherwise agree, the mediator shall keep confidential any written materials or information that are submitted to him or her. The parties and their representatives are not entitled to receive or review any materials or information submitted to the mediator by another party or representative without the concurrence of the latter. At the conclusion of the mediation process, upon request of a party, the mediator will return to that party all written materials and information which that party had provided to the mediator without retaining copies thereof or certify as to the destruction of such materials.

At the first substantive mediation conference each party will make an opening statement.

6. Negotiations

The mediator may facilitate settlement in any manner the mediator believes is appropriate. The mediator will help the parties focus on their underlying interests and concerns, explore resolution alternatives and develop settlement options. The mediator will decide when to hold joint meetings, and when to confer separately with each party.

The parties are expected to initiate and convey to the mediator proposals for settlement. Each party shall provide a rationale for any settlement terms proposed.

Finally, if the parties fail to develop mutually acceptable settlement terms, before terminating the procedure, and only with the consent of the parties, (a) the mediator may submit to the parties a final settlement proposal; and (b) if the mediator believes he/she is qualified to do so, the mediator may give the parties an evaluation (which if all parties choose, and the mediator agrees, may be in writing) of the likely outcome of the case if it were tried to final judgment, subject to any limitations under any applicable mediation statutes/ rules, court rules or ethical codes. Thereupon, the mediator may suggest further discussions to explore whether the mediator's evaluation or proposal may lead to a resolution.

Efforts to reach a settlement will continue until (a) a written settlement is reached, or (b) the mediator concludes and informs the parties that further efforts would not be useful, or (c) one of the parties or the mediator withdraws from the process. However, if there are more than two parties, the remaining parties may elect to continue following the withdrawal of a party.

7. Settlement

If a settlement is reached, a preliminary memorandum of understanding or term sheet normally will be prepared and signed or initialed before the parties separate. Thereafter, unless the mediator undertakes to do so, representatives of the parties will promptly draft a written settlement document incorporating all settlement terms. This draft will be circulated, amended as necessary, and formally executed. If litigation is pending, the settlement may provide that the parties will request dismissal of the case. The parties also may request the court to enter the settlement agreement as a consent judgment.

8. Failure to Agree

If a resolution is not reached, the mediator will discuss with the parties the possibility of their agreeing on advisory or binding arbitration, "last offer" arbitration or another form of ADR. If the parties agree in principle, the mediator may offer to assist them in structuring a procedure designed to result in a prompt, economical process. The mediator will not serve as arbitrator, unless all parties agree.

9. Confidentiality

The entire mediation process is confidential. Unless agreed among all the parties or required to do so by law, the parties and the mediator shall not disclose to any person who is not associated with participants in the process, including any judicial officer, any information regarding the process (including pre-process exchanges and agreements), contents (including written and oral information), settlement terms or outcome of the proceeding. If litigation is pending, the participants may, however, advise the court of the schedule and overall status of the mediation for purposes of litigation management. Any written settlement agreement resulting from the mediation may be disclosed for purposes of enforcement.

Under this procedure, the entire process is a compromise negotiation subject to Federal Rule of Evidence 408 and all state counterparts, together with any applicable statute protecting the confidentiality of mediation. All offers, promises, conduct and statements, whether oral or written, made in the course of the proceeding by any of the parties, their agents, employees, experts and attorneys, and by the mediator are confidential. Such offers, promises, conduct and statements are privileged under any applicable mediation privilege and are inadmissible and not discoverable for any purpose, including impeachment, in litigation between the parties. However, evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable solely as a result of its presentation or use during the mediation.

The exchange of any tangible material shall be without prejudice to any claim that such material is privileged or protected as work-product within the meaning of Federal Rule of Civil Procedure 26 and all state and local counterparts.

The mediator and any documents and information in the mediator's possession will not be subpoenaed in any such investigation, action or proceeding, and all parties will oppose any effort to have the mediator or documents subpoenaed. The mediator will promptly advise the parties of any attempt to compel him/her to divulge information received in mediation.

FORM

CPR Model Agreement for Parties and Mediator*

Agreement made _____, _____
(date)

between _____

represented by _____

and _____

represented by _____

and _____
(the Mediator)

A dispute has arisen between the parties (the "Dispute"). The parties have agreed to participate in a mediation proceeding (the "Proceeding") under the CPR Mediation Procedure [as modified by mutual agreement] (the "Procedure"). The parties have chosen the Mediator for the Proceeding. The parties and the Mediator agree as follows:

A. Duties and Obligations

1. The Mediator and each of the parties agree to be bound by and to comply faithfully with the Procedure, including without limitation the provisions regarding confidentiality.
2. The Mediator has no previous commitments that may significantly delay the expeditious conduct of the proceeding and will not make any such commitments.
3. The Mediator, the International Institute for Conflict Prevention and Resolution (CPR) and their employees, agents and partners shall not be liable for any act or omission in connection with the Proceeding, other than as a result of its/his/her own willful misconduct.

*This form assumes that the mediator is affiliated with a firm. If that is not the case, delete paras. C.3., D.2. and references to the mediator's firm in paras. B.1. and C.1.

B. Disclosure of Prior Relationships

1. The Mediator has made a reasonable effort to learn and has disclosed to the parties in writing (a) all business or professional relationships the Mediator and/or the Mediator's firm have had with the parties or their law firms within the past five years, including all instances in which the Mediator or the Mediator's firm served as an attorney for any party or adverse to any party; (b) any financial interest the Mediator has in any party; (c) any significant social, business or professional relationship the Mediator has had with an officer or employee of a party or with an individual representing a party in the Proceeding; and (d) any other circumstances that may create doubt regarding the Mediator's impartiality in the Proceeding.
2. Each party and its law firm has made a reasonable effort to learn and has disclosed to every other party and the Mediator in writing any relationships of a nature described in paragraph B.1. not previously identified and disclosed by the Mediator.
3. The parties and the Mediator are satisfied that any relationships disclosed pursuant to paragraphs B.1. and B.2. will not affect the Mediator's independence or impartiality. Notwithstanding such relationships or others the Mediator and the parties did not discover despite good faith efforts, the parties wish the Mediator to serve in the Proceeding, waiving any claim based on said relationships, and the Mediator agrees to so serve.
4. The disclosure obligations in paragraphs B.1. and B.2. are continuing until the Proceeding is concluded. The ability of the Mediator to continue serving in this capacity shall be explored with each such disclosure.

C. Future Relationships

1. Neither the Mediator nor the Mediator's firm shall undertake any work for or against a party regarding the Dispute.
2. Neither the Mediator nor any person assisting the Mediator with this Proceeding shall personally work on any matter for or against a party, regardless of specific subject matter, prior to six months following cessation of the Mediator's services in the Proceeding.

3. The Mediator's firm may work on matters for or against a party during the pendency of the Proceeding if such matters are unrelated to the Dispute. The Mediator shall establish appropriate safeguards to insure that other members and employees of the firm working on such matters unrelated to the Dispute do not have access to any confidential information obtained by the Mediator during the course of the Proceeding.

D. Compensation

1. The Mediator shall be compensated for time expended in connection with the Proceeding at the rate of \$_____, plus reasonable travel and other out-of-pocket expenses. The Mediator's fee shall be shared equally by the parties. No part of such fee shall accrue to CPR.
2. The Mediator may utilize members and employees of the firm to assist in connection with the Proceeding and may bill the parties for the time expended by any such persons, to the extent and at a rate agreed upon in advance by the parties.

_____ Party _____ Party

by _____ by _____
Party's Attorney Party's Attorney

_____ Mediator



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