



Online CLE

# Fantasies and Nightmares: Mediation Clauses in Contracts

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## Chapter 3

# Fantasies and Nightmares: Mediation Clauses in Contracts—Tips on Whether to Include Them and How to Draft Them

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# Are Mandatory Mediation Clauses Enforceable?

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The question whether mandatory mediation clauses in contracts are enforceable may seem academic. What's the point in trying to enforce an agreement to mediate, when mediation is essentially a voluntary process? From the opposite perspective, what's the point in resisting mediation when our courts require us to engage in a settlement conference or other dispute resolution process before trial? In recent years, however, courts across the nation have become increasingly willing to enforce agreements to mediate, and the effect is sometimes outcome-determinative. Plaintiffs in particular must tread carefully around mandatory mediation clauses at the peril of missing a statute of limitations, losing an opportunity for injunctive relief, or having meritorious claims dismissed after lengthy and expensive litigation. Mediation clauses can engender their own satellite litigation, which is unfortunate when the purpose of including them in contracts usually is to promote early and efficient resolution of disputes. This article will explain the legal basis for enforcing mandatory mediation clauses in contracts, point out some procedural problems, and make recommendations for contract drafting and legislative reform to avoid protracted litigation over the enforcement of mediation clauses.



## The Legal Basis for Enforcing Mediation Clauses – in General

Unlike the enforcement of arbitration clauses, the enforcement of mediation clauses is generally a matter of state law. The Federal Arbitration Act (FAA), 9 USC §§ 1-16, which requires courts to enforce agreements to arbitrate disputes, does not apply to mediation. *Advanced Bodycare Solutions, LLC v. Thione Int'l, Inc.*, 524 F3d 1235, 1238-41 (11th Cir 2008); *but cf Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F3d 1205, 1207-09 (9th Cir 1998) (holding that FAA does apply to *non-binding arbitration* because the process still involves submission of a dispute for a decision by a third party). The states are therefore free to decide whether and how they will enforce agreements to mediate.

Enforcement of an agreement to mediate is a matter of contract law. The issue may arise as a claim for specific performance of the contract, *Martin v. Howard*, 784 A2d 291 (RI 2001), or as a defense of failure of condition precedent, *Bill Call Ford, Inc. v. Ford Motor Co.*, 48 F3d 201, 207-08 (6th Cir 1995). Damages generally are not available because there is no certainty that mediation will result in a settlement. *Martin*, 784 A2d at 302. With regard to the defense of failure of condition precedent, courts consider whether the contract at issue requires a party to initiate mediation *before* filing an action in court for relief. *Santana v. Olguin*, 208 P3d 328 (Kan App 2009) (holding that trial court properly dismissed claim for failure of condition precedent, rather than directing parties

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to participate in mediation). Sometimes courts avoid dismissal by interpreting the contract to require a party to participate in mediation *only if* the other party demands it. *Millsboro Fire Co. v. Const. Mgmt. Svc., Inc.*, C.A. No. 05C-06-137, 2009 WL 846614, at \*5 (Del Super March 31, 2009). Courts frequently also consider whether the party seeking to enforce a mediation clause has waived its right to do so by participating in litigation. *Harting v. Barton*, 6 P3d 91, 94-96 (Wash App 2000); *1930-34 Associates, L.P. v. BVF Const. Co., Inc.*, 2005 No. 0908, 2006 WL 1462932 (Pa Com Pl May 22, 2006).

**The Law of Mediation in Oregon**

There are no published cases in Oregon addressing the enforceability of agreements to mediate. Oregon has a Uniform Arbitration Act (OUAA), ORS 36.600 et seq., which like the FAA, should not apply to mediation. See ORS 36.600(2) (defining “arbitrator” as a person “appointed to render an award”); *but cf. Solomon v. Progressive Cas. Ins. Co.*, 685 A2d 1073 (RI 1996) (stating that agreement to mediate could be enforced pursuant to Rhode Island’s arbitration statute, RI Gen Laws § 10-3-4).

Oregon does have a handful of statutes specific to mediation. ORS 36.100 states a policy in favor of *encouraging* and *assisting* parties to resolve their disputes through mediation. Judges have the power to refer any civil dispute to mediation on their own initiative under ORS 36.185, or upon the stipulation of all the parties under ORS 36.190, but any party has the right to take the case out of mediation simply by filing an objection under ORS 36.185. *Cf. Kirschenman v. Superior Court*, 36 Cal Rptr 2d 166, 168 (Cal App 1994) (holding that courts in California have no authority to enforce oral agreement to mediate, based on in-court stipulation of the parties’ attorneys, because California statutes allow parties to revoke their consent to participate in mediation).

A contractual agreement to mediate could be considered a stipulation to mediate under ORS 36.190, since that statute allows the stipulation to occur “at any time prior to trial.” ORS 36.190(1). If so, then mediation clauses are not enforceable in Oregon because courts cannot require participation in mediation once a party has objected. However, courts may decide that the mediation statutes were not intended to apply to contractual agreements to mediate, in which case they would simply enforce mediation agreements pursuant to general principles of contract law.

A more nuanced middle position is possible. One could take the view that Oregon courts have authority to refer cases to mediation – whether on the basis of a pre-dispute mediation agreement or a stipulation reached during litigation – but cannot compel continued participation in mediation. In other words, Oregon courts will not probe whether a party has participated in mediation in good faith. This interpretation is appealing because it harmonizes the policies reflected in the Oregon mediation statutes with the contract law approach to mediation agreements.

**Procedural Perils**

Enforcement of a mediation agreement under traditional contract law principles can have serious consequences. If a party is found to have failed to participate in mediation, as a condition precedent to seeking relief in court, that party may be barred from seeking emergency injunctive relief.

The parties may engage in months of litigation only to have the claims dismissed for failure to mediate, after summary judgment or trial, or even after an appeal. See, e.g., *Bill Call Ford, Inc. v. Ford Motor Co.*, 48 F3d 201, 207-08 (6th Cir 1995) (upholding grant of summary judgment to defendant on warranty claim because participation in dispute resolution process provided in contract

was condition precedent to filing suit); *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F2d 326 (7th Cir 1987) (same).

While it may seem that parties can avoid these perils by complying with their mediation agreements, which should be a simple matter, it is not always so easy. For one thing, a party may not even be aware that a mediation agreement applies to the dispute. In business relationships, it is common for parties to have multiple contracts over time with different dispute resolution provisions. Also, the process of initiating mediation and selecting a mediator can take time and effort, especially when the other side is dragging its feet. Such delays can put a party in jeopardy of missing the statute of limitations. Delays in getting mediation started also can cause damages to escalate in situations when injunctive relief is needed.

The FAA and the OUAA have gone a long way toward eliminating such procedural perils in the enforcement of arbitration agreements. Both provide that the court may stay litigation while the parties comply with a duty to arbitrate. 9 USC § 3; ORS 36.625(6). Both provide a procedure for enforcement of an arbitration agreement by motion to compel, which allows the issue to be resolved early in the case. 9 USC §§ 4, 6; ORS 36.625(8). Both provide for interlocutory appeal if the trial court denies a motion to compel arbitration, which ensures a conclusive determination of this procedural issue before the merits of the case are presented. 9 USC § 16; ORS 36.730(1)(a). The Oregon Supreme Court recently held that interlocutory appeal is not only available but is the exclusive means of challenging a trial court’s denial of a petition to compel arbitration, pointing out the solid practical reasons for requiring an immediate appeal. *Snider v. Production Chemical Mfg., Inc.*, 348 Or 257 (2010). Finally, the OUAA expressly addresses the issue of

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## Mediation Clauses

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emergency injunctive relief, allowing parties to an arbitration agreement to seek provisional remedies in court in certain circumstances, and the federal courts have generally followed the same approach despite the lack of a comparable express provision in the FAA. ORS 36.630; Uniform Arbitration Act, § 8, *cmt.* 1, 7 ULA 1, 34-35 (revised 2000) (noting that five of six circuit courts to address this issue have allowed provisional relief).

Without similar procedures for enforcement of agreements to mediate, there is nothing to prevent a defendant from alleging the failure to mediate as an affirmative defense in its answer and then taking a wait-and-see approach, relying on the defense later only if the plaintiff seems likely to prevail on its claims. It is counterintuitive, but a defense based on the failure to mediate can be more dangerous than a defense based on the failure to arbitrate.

### Suggestions for Reform

Mediation clauses are put in contracts with the best of intentions. Early resolution of disputes through negotiation and mediation is often the best outcome for everyone involved. But the clauses themselves can engender disputes, adding to the overall cost of litigation and distorting the outcome. We can promote mediation, while avoiding spin-off litigation about mediation, by improving our contracts and our legislation.

For those drafting contracts, avoid making mediation a *condition precedent* for a party to obtain relief for a breach of the contract. In other words, do not state that the parties must participate in mediation before seeking relief in court. Instead, provide for an optional mediation process. The fact that it is included in the contract will serve to encourage the parties to consider mediation in the event of dispute, particularly if the process for initiating mediation and selecting an arbitrator is spelled out. If mandatory mediation is desired, the contract can

be drafted to require participation in mediation *only if* one party initiates the process. Mediation may be initiated before or after a claim is filed in court, and the parties may seek relief in court while mediation is in process.

For those who do want to make mediation a condition precedent to obtaining relief in court, it is important to consider issues such as the possible need for emergency provisional relief and tolling of the statute of limitations during mediation. Drafters should be as clear as possible in describing the scope of the clause, including expressly addressing what types of disputes will be subject to the mediation requirement. They also should specify the manner of initiating mediation, how the mediator will be selected, and whether mediation must be completed within a certain time. Vague mediation clauses make it difficult for parties to determine what exactly they must do before they are free to seek relief in court. Dispute resolution clauses that incorporate both mediation and arbitration require even more care in drafting.

As for statutory reform, the simplest way to avoid litigation over mediation would be to amend ORS 36.185 to .200 to make clear that those sections apply to *pre-dispute* mediation agreements as well as stipulations made after a case is filed and, further, that they provide the *only* mechanism for enforcing mediation agreements in a pending case. In other words, a party would not be able to obtain dismissal of a claim based on the opposing party's failure to mediate. Such an amendment would in effect limit what parties can agree to in their mediation clauses. This approach is consistent with the OUAA, which provides a number of procedures that parties may not vary in their arbitration agreements, including that an application for relief under the arbitration act "must be made by petition to the court." ORS 36.615(2) (a). Since the mediation statutes cur-

rently apply only to pending cases, they could also be amended to expand the mediation referral process to make it available to disputants who do not yet have a case pending in the court.

Another way to promote mediation, without resorting to the heavy penalty of dismissal of claims, is to give greater weight to dispute resolution efforts in the award of attorney fees. ORS 20.075 already lists "the diligence of the parties in pursuing settlement of the dispute" among the factors the court should consider in awarding attorney fees pursuant to a statute. Drafters of contracts could provide that the prevailing party may recover its attorney fees only if it made reasonable efforts to use the mediation process provided in the contract to resolve the dispute.

### Conclusion

Mandatory mediation provisions in contracts can cause more trouble than they are worth. At best, they bring parties to the negotiating table, where the outcome depends on how interested the parties really are in achieving a settlement. At worst, they serve as fodder for procedural jockeying, which complicates the litigation. Before including a mediation clause in a contract, think about what may happen if the parties fail to initiate mediation before going to court. With careful drafting, you may be able to steer clear of the worst unintended consequences. □

### Endnote

- 1 The author was recently involved in a case in which her client obtained an important award on a contempt motion, with substantial attorney fees, and then had to defend that award on appeal against an argument that she had not complied with a mediation clause. While the defense was ultimately rejected by the Court of Appeals, it put a substantial award at risk for over a year and added to the cost of the litigation.





### Sample Mediation Clauses from ADR Service Providers

#### Arbitration Service of Portland, Inc.

**Arbitration Required/Mediation First Option.** Any dispute or claim that arises out of or that relates to this agreement, or to the interpretation or breach thereof, or to the existence, validity, or scope of this agreement or the arbitration agreement, shall be resolved by arbitration in accordance with the then effective arbitration rules of (and by filing a claim with) Arbitration Service of Portland, Inc., and judgment upon the award rendered pursuant to such arbitration may be entered in any court having jurisdiction thereof. The parties acknowledge that mediation helps parties settle their dispute and any party may propose mediation whenever appropriate through Arbitration Service of Portland or any mediator selected by the parties.

[https://arbserve.com/pages/basic\\_arbmed\\_clause.htm](https://arbserve.com/pages/basic_arbmed_clause.htm)

#### American Arbitration Association

Parties can copy and paste this clause into their contracts.

*If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure.*

<https://adr.org/clauses>

#### International Institute for Conflict Prevention & Resolution, Inc.

##### *A. Pre-dispute Clause*

The parties shall attempt 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.

<https://www.cpradr.org/resource-center/model-clauses/mediation-model-clauses>

#### United States Arbitration & Mediation

In the event a dispute shall arise between the parties to this [contract, lease, etc.], the parties agree to participate in at least four hours of mediation in accordance with the mediation procedures of United States Arbitration & Mediation. The parties agree to share equally in the costs of the mediation. The mediation shall be administered by the offices of United States Arbitration & Mediation 500 N. Broadway, Suite 1800, St. Louis, MO 63102 (314) 231-4642.

Mediation involves each side of a dispute sitting down with an impartial person, the mediator, to attempt to reach a voluntary settlement. Mediation involves no formal court procedures or rules of evidence, and the mediator does not have the power to render a binding decision or force an agreement on the parties.

<https://usam.com/sample-mediation-clause/>

#### JAMS

1. The parties agree that any and all disputes, claims or controversies arising out of or relating to this Agreement shall be submitted to JAMS, or its successor, for mediation,

and if the matter is not resolved through mediation, then it shall be submitted to JAMS, or its successor, for final and binding arbitration pursuant to the clause set forth in Paragraph 5 below.

2. Either party may commence mediation by providing to JAMS and the other party a written request for mediation, setting forth the subject of the dispute and the relief requested.

3. The parties will cooperate with JAMS and with one another in selecting a mediator from the JAMS panel of neutrals and in scheduling the mediation proceedings. The parties agree that they will participate in the mediation in good faith and that they will share equally in its costs.

4. All offers, promises, conduct and statements, whether oral or written, made in the course of the mediation by any of the parties, their agents, employees, experts and attorneys, and by the mediator or any JAMS employees, are confidential, privileged and inadmissible for any purpose, including impeachment, in any arbitration or other proceeding involving the parties, provided that evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the mediation.

5. Either party may initiate arbitration with respect to the matters submitted to mediation by filing a written demand for arbitration at any time following the initial mediation session or at any time following 45 days from the date of filing the written request for mediation, whichever occurs first ("Earliest Initiation Date"). The mediation may continue after the commencement of arbitration if the parties so desire.

6. At no time prior to the Earliest Initiation Date shall either side initiate an arbitration or litigation related to this Agreement except to pursue a provisional remedy that is authorized by law or by JAMS Rules or by agreement of the parties. However, this limitation is inapplicable to a party if the other party refuses to comply with the requirements of Paragraph 3 above.

7. All applicable statutes of limitation and defenses based upon the passage of time shall be tolled until 15 days after the Earliest Initiation Date. The parties will take such action, if any, required to effectuate such tolling.

<https://www.jamsadr.com/clauses/#Standard>

**Checklist of Considerations for Mediation Clauses in Contracts**

**Mandatory or Optional?**

- Condition precedent to filing claim (strongest)
- Required if a party requests, but may file claim anytime
- Explicit factor or condition in attorney fee clause
- Encouraged (weakest)

**Escape Valves and Off Ramps (if Mandatory)**

- Right to seek injunctive relief
- Tolling of statute of limitations and similar defenses
- Minimum required participation
- Minimum waiting period if process stalling

**Selection of Mediator**

- ADR service provider
- Court appointment
- Mutual agreement
- Preselected individual

**Check for Consistency**

- If using ADR service provider, its rules and initiation process
- If mediator to be court appointed, court rules and procedures
- Any other contracts between the parties—different ADR clauses?
- Oregon mediation statutes, ORS Ch. 36 (confidentiality, etc.)

