

RAISING THE BAR

A DECATO LAW OFFICE NEWSLETTER

ISSUED October 13, 2009 (this issue written by Renée A. Harvey)

Published the second week of each month

Issue #2009-10

Is Mediation the Right Choice for You?

Our firm has represented clients in the court room for over 35 years. What you may be surprised to learn is that our firm also helps clients in the conference room.

Now, during these times of economic stress, it is even more important that parties use the right legal strategies. An adversarial process is not always the best option. It is an inflexible process. Mediation often allows clients to obtain outcomes they cannot get in court. It is a flexible process. Therefore, mediation may be best defined by what it is not.

It is NOT LITIGATION. Litigation is an adversarial process by which conflicting parties present and argue their positions to an individual, usually a judge. A formal, adjudicatory process.

It is NOT NEGOTIATION. Negotiation is a process by which conflicting parties resolve matters by holding discussions, bartering and arriving at a mutual agreement; this process is often conducted through representatives. Typically, an adversarial and competitive process.

It is NOT PSYCHOTHERAPY. Psychotherapy is the treatment of mental and emotional disorders or maladjustments through the use of techniques designed to encourage communication of conflicts and insight into problems. The goal of psychotherapy is internal psychological change or interpersonal behavioral change.

So, what exactly is Mediation then?

MEDIATION IS a non-adversarial process in which a neutral third party acts to encourage and help disputing parties reach mutually acceptable decisions and agreements. By resolving disputes in mediation, the parties determine for themselves what is important and what the outcome of the situation will be. Therefore, **MEDIATION IS** your process – the decisions are yours – it is the only forum in which you have complete control over the decision making and outcome.

There are five basic principles of the mediation process:

First, the mediation process is entirely voluntary and non-binding. The parties may leave the session at any time and for any reason, or no reason, and nothing can be imposed on them. The mediator does not have the power to render a decision or to force the parties to accept a settlement.

Second, the mediation process requires full disclosure. Therefore, it is essential that the parties

share all the pertinent information pertaining to the dispute, and that each party personally tell their story and be heard by the other party. If the parties listen carefully, they can begin to understand the differences in their perceptions of the events which led to the dispute, and then consider their different positions on important issues. It is during this time that the parties often begin to understand how difficult it would be for a judge, jury or third party to make a decision on those issues.

Third, the mediation process provides an expectation that the ultimate agreement will be fair. The voice and interests of both parties are equally important. The mediators should encourage parties to seek legal counsel to advise them as to the mediated agreement. The mediators should also encourage parties to seek other professional advice regarding any personal issues which emerge during mediation.

Fourth, the mediation process is private and confidential. Sessions are typically held in a private office or meeting room, and no public record is made of the proceedings. Any form of communication generated during mediation is normally inadmissible as evidence, and only a finalized and signed mediated agreement may be used in a contested proceeding.

Fifth and last, the mediator must maintain impartiality. The mediator has an equal and balanced responsibility to assist each party, and cannot favor the interests of any one party over the other. It is the mediator's role to ensure that the parties reach agreements in a voluntary and informed manner.

Studies indicate that parties entering into voluntary agreements through mediation are far more likely to honor the commitments made in the agreements than they are with judicially imposed resolutions. However, the mediation process is only as successful as the willingness of the parties to participate in good faith to reach a settlement; and a good mediator will work with the parties until he or she determines that a settlement cannot be reached. Through mediation, parties avoid the "win-lose" and "lose-lose" outcomes associated with litigation. In other words, the parties who "win" often find the overall time, energy and money associated with the litigation has resulted in a large cost and loss to them. Those who lose in litigation feel even worse about the outcome. Mediation can spare parties from all of this so that they can move forward from disputes efficiently and effectively.

Therefore, seeking out the services of mediators before filing a lawsuit can result in dramatic cost savings. Not only is mediation less expensive than litigation, it saves time because it thrives on direct input and immediate feedback, rather than filtering through attorneys and the judicial system. It is often better situated to help clients achieve their goals because it relies on the parties for the outcome – the result is an arrangement that has been agreed upon by the parties themselves, possibly with provisions for unanticipated future events which would otherwise require a return to the court room.

Mediation offers some creative solutions to problems that have or will arise as a result of these unprecedented economic times. If the conference room sounds like a better alternative to you than the court room, call us. Decato Law Office can answer your questions regarding mediation and help you determine whether the process is right for you.