If you are involved in a dispute of any kind, whether in a business, employment, neighborhood, familial, or other context, or one is brewing, mediation may afford an effective means of resolving the issue, whether it has gotten to the lawsuit stage yet or not, or ever will, in a prompt, private, and cost efficient manner. This brochure is designed to answer some basic questions about that process.

WHAT IS MEDIATION?

Mediation is a non-binding, informal process in which an impartial, neutral third party (the mediator) helps disputants reach a voluntary resolution of a disagreement or lawsuit between them. The mediator does not impose a resolution upon the parties or decide who wins or who loses. Rather, the mediator's role is to facilitate discussion and communication between the parties, and to suggest alternatives, in an effort to find an acceptable resolution that all parties can agree to.

HOW DOES MEDIATION WORK?

Successful mediation depends on the good faith efforts of all participants and their joint determination to achieve resolution. The nature of the dispute determines the process, but generally mediation involves a mediator being selected by the parties (or the judge in cases of court-ordered mediation where the parties fail to agree on a mediator between themselves) and then one (or sometimes more) mediation sessions being conducted. Typically, the session opens with all parties meeting together, under the auspices of the mediator, and sharing with one another their respective views of the facts, controlling legal principles (where applicable), and the equities or the situation. Thereafter the parties split into separate caucuses and the mediator meets with each of them to discuss the dispute and explore ideas for resolution. The mediator goes back and forth between the caucuses, conveying information, positions, offers, and counter-offers until either a resolution or an insurmountable impasse is reached. If settlement is achieved, a binding, written agreement is prepared and signed by the parties memorializing the terms.

WHO MUST ATTEND THE MEDIATION PROCEEDING?

It is imperative that the decision-maker with full authority to settle the dispute attend the mediation session. Although it is sometimes possible to have someone participate by telephone, prospects for successful resolution are diminished considerably when the ultimate decision-maker is not present in person to see and listen to the other party and opposing lawyer and to engage in eyeball-to-eyeball discussions with the mediator. Most court-ordered mediations require personal attendance by all named parties and all ultimate decision-makers.

HOW LONG DOES MEDIATION TAKE?

There is no fixed answer to this question, but most mediations require one full day. Occasionally an additional mediation session or sessions may be required, especially in cases involving multiple parties or where the initial session reveals additional information to be needed for a case to be properly evaluated. Smaller cases with fewer complexities can frequently be mediated in three to five hours. It is important that the participants set aside adequate time for the mediation to occur fully and without pressures from the clock.

HOW MUCH DOES MEDIATION COST?

Mediation fees vary depending on the size of the case, the number of parties, the anticipated length of the mediation session, and the experience and qualifications of the mediator. This is an issue which should be discussed with the prospective mediator at the time the mediation session is scheduled.

WHO PAYS FOR THE MEDIATION?

Ordinarily the parties share the cost of the mediation, with each party paying one-half (or its proportionate share in multiple party cases). Occasionally one party offers or agrees to pay the entire mediation fee, but that is relatively uncommon. In some court-ordered mediations, the mediator's fee may be taxed against one party as a "cost of court," but not all jurisdictions concur that mediation costs are taxable costs.

ARE MEDIATION PROCEEDINGS CONFIDENTIAL?

Yes. By statute and court rules, court order in most court-ordered mediations, and signed agreement used by most mediators, communications made during a mediation proceeding are confidential and protected from disclosure. They cannot be be offered into evidence in a trial between the parties, and a mediator cannot be called to testify as a witness to anything said during a mediation session. Mediation proceedings are not open to the public or non-party observers. They are not tape-recorded or transcribed.

WHAT ARE THE ADVANTAGES OF MEDIATION?

Mediation saves time and money. It can avoid the inconvenience and strain of attending trial or other court appearances or lengthy and unnecessary litigation. By concluding in agreement rather than judgment, mediation can frequently preserve relationships and allow parties to continue to do business of have other activities together. Most importantly, mediation affords an opportunity for the parties to reach a resolution which is acceptable to them, rather than one imposed upon them involuntarily by the judgement of a court, jury, or arbitrator. Successful mediation substitutes a known outcome for the uncertainties of a jury verdict or other court-imposed judgment.

ARE THERE CASES OR DISPUTES WHICH ARE MORE DIFFICULT TO RESOLVE THROUGH MEDIATION?

Cases where there is an unresolved dispositive legal question which both sides are virtually certain will be decided in their favor or cases where punitive damages are the main element of a claim often present especially daunting challenges, even for the most experienced mediators. In addition, where key information is not yet known by one party or the other, successful mediation may be much

more difficult than in cases where both sides have sufficient information upon which to base a settlement decision.

WHEN IS THE BEST TIME TO MEDIATE?

The best time to mediate a case is usually either very early on (that is, before suit is filed or shortly thereafter, before substantial legal fees have been incurred by either side), or just before trial, after the case is fully developed, and the reality of judgment is imminent. Disputes can, however, be mediated successfully at any time, including months before a trial setting (when costs of litigation are still relatively modest compared to what they will soon grow to) or even just after a jury returns a verdict or while a case is on appeal.

HOW IS THE MEDIATION PROCESS INITIATED?

Whether the Court orders a mediation or the parties agree to one, both parties need to select a mediator and agree on a time and place for the mediation (typically, the mediator's office).

HOW DO YOU SELECT A MEDIATOR?

Ask others who have mediated similar disputed. A good mediator should be experienced, trained as a mediator, impartial and neutral, patient and tactful, understanding and empathetic, open-minded and flexible, positive and nonjudgmental, and creative. He or she should possess good questioning skills and techniques, an ability to listen and communicate effectively, and a good sense of humor. Knowledge of the law in the particular area involved in a specific dispute may be useful, but is by no means indispensable.

WHAT IS AN APPROPRIATE RESOLUTION IN MEDIATION?

Resolution of most cases requires *compromise.* All parties must sacrifice something of value to achieve a negotiated solution. More often than not, resolution involves a settlement which neither party likes completely, but both parties are willing to accept to avoid the uncertainties, delay, inconvenience, and costs of trial or continued litigation or disagreement.

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