

HOW MEDIATION CAN WORK

Mediation is a method of resolving disputes other than using the traditional adversarial court system. Mediation can be used effectively to resolve a whole host of disputes, including contract disputes, partnership disagreements, small business and family business disputes, employment matters, inter-corporate and intra-corporate disputes, and even disputes between multi-national corporations.

In the traditional adversarial proceeding, the litigant and his lawyer want one thing--- to win. Even if the case is settled, the litigant wants to get as much as he can and give as little as he can. By contrast, in mediation, the parties are not pitted against one another in a "War of the Roses" like setting. Likewise, the mediator is no one's advocate, but a neutral, who believes in the self-determination of her clients to resolve their own disputes. Mediation is, moreover, entirely voluntary. Through a process of guided negotiation and joint problem solving, the parties, working together with the mediator, create options in order to reach a mutually acceptable solution.

Mediation has a number of advantages over the traditional adversarial system. The parties retain control of their own dispute. They do not surrender authority over their businesses/partnerships/practices to attorneys, judges, experts or even to the mediator. **Rather, they properly reserve that authority to themselves.** Consequently, they are not left feeling victimized by an overburdened Court system very much out of their control.

How many times have you heard of a Court-imposed solution which did not answer the parties' needs? As mediation is flexible, that simply doesn't happen in mediation. Solutions can be tailor-made to meet the parties' particular needs.

How many times have you heard of a case dragging on in the Court system for years? That doesn't happen in mediation. Mediation usually moves faster and more efficiently than litigation.

How often have you heard of excessive litigation costs? That too does not occur in mediation. Mediation is cheaper and more cost effective. Yet, the quality of the results obtained from mediation are frequently superior. That is because, barring illegality and basic unfairness, the mediator can work with the parties to create what they perceive is a good, fair and reasonable "fit" for them.

Mediation of commercial disputes is especially useful where individuals or companies have enjoyed a business relationship and would like to continue that profitable relationship. A company manufacturing a particular product (or service) and the buyer of that product (or service) share major common interests. Invariably, they want that relationship to continue and flourish, not die because of a bitter, protracted and costly lawsuit.

In litigation, parties can, and do, avoid each other. They don't have to speak. They don't have to meet. How often have I heard a client relate that the other party has suddenly refused to speak directly to him, suggesting: "have your lawyer talk to my lawyer"? What's worse, sometimes, the attorneys follow suit. This naturally makes a bad case worse. In mediation, the parties

cannot avoid each other. The principals, accompanied by their attorneys, meet with the mediator in regular sessions where they remain responsible for their own decisions.

Mediation is **fact** oriented. The mediator usually sets the agenda and helps determine what factual information must be obtained before the parties can work on resolving issues. Over a finite number of structured mediation sessions, the mediator guides and assists the parties in defining, dealing with and resolving the issues between them.

Experts can, and are, engaged in mediation. For example, if the technical know-how of an engineer, an accountant, or an appraiser is needed, with the mediator's guidance, the parties retain the appropriate expert to perform specific and necessary technical, or other, tasks.

Mediation is **future** oriented. As the mediation itself proceeds, and fact-finding is completed, the mediator helps the parties define the issues in dispute and create options to resolve them. Sometimes, to aid in this process, the mediator meets separately, or caucuses, with each of the parties and his attorney. Caucusing is useful to clarify information, probe and/or uncover additional facts, help each party understand better the other's point of view or the weaknesses of their own case and break impasses so as to move the dispute toward resolution. Along a continuum, the parties move from positions of self-interest to mutual interest to genuine bargaining, which leads them to an agreement.

An additional benefit of mediation relates to the desired continuation of the business relationship. Simply put, parties to a mediated agreement have a better chance at working out future problems. Court imposed decisions have less chance of surviving future disagreements. Moreover, when a case has to be tried and decided by judge (or jury), this frequently sounds the death knell of any prior productive business relationship between the parties.

Many business owners have had negative experiences when bringing contract, or other matters, in dispute to court. Consequently, the mediation alternative should be carefully considered whenever a business dispute arises. Mediation is certainly a most useful tool to resolve disputes without a lawsuit or a trial.

To find out more about how mediation may work for you and your business, plan on attending the first ever Bergen County Bar Association "ADR DAY", scheduled for Saturday, March 16, 1996 from 1:00 to 3:30 p.m. at the Bergen County Justice Center, 10 Main Street, Hackensack, New Jersey. ADR DAY will feature workshops and programs for the public on alternative dispute resolution, including a workshop geared especially for the small business owner. For further information about ADR DAY, or how mediation can work for you, contact Bonnie Blume Goldsamt, Esq. (at 201- 87-1622), or Renate E. Kiersey, Esq. (at 201-342-1197), Co-chairs of the Bergen County Bar Association's Alternative Dispute Resolution Committee.

ADVANTAGES OF MEDIATION

- **The parties retain control of their dispute**
- **Higher quality results**
- **The business relationship of the parties is preserved and possibly enhanced**
- **PLUS, most times it's**

- **More flexible**
- **Quicker**
- **More efficient, and**
- **Cheaper.**