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THE BENEFITS OF MEDIATION

By Darryl J. Horowitz

As litigation becomes more expensive, clients look to more cost-effective means of resolving their disputes. This requires an evaluation of alternative dispute resolution, otherwise known as ADR. Alternative dispute resolution includes non-court alternatives such as negotiations, mediations, arbitrations, mini trials, and early neutral evaluation. Courts have recognized the benefits of ADR in virtually every court in the state. The federal courts have also adopted ADR programs.

Prior issues of this newsletter have explained the various types of ADR ("ADR: What It Is and Why You Should Consider Using It" and "The Pros and Cons of Arbitration"). This article will discuss the benefits of mediation and why it can be used as an effective alternative to litigation.

What is Mediation?

Mediation is the use of a neutral third party to help the parties arrive at a negotiated settlement. Unlike arbitration, where the neutral third party listens to evidence and renders a binding award, a mediator does not render any decision and, in most instances, will not even render an opinion on the merits of your case unless such an evaluation is requested.

Benefits of Mediation

The benefits of mediation depend on the intent of the parties to want to resolve their

dispute. There is no guaranty of success, but, in the large majority of instances in which the parties want to settle, mediation is useful in helping each side see the other side's position and why compromise is in the parties' best interests. Mediation is most often used in family law disputes where virtually every contested dissolution action is referred to a mediator before the parties can proceed to trial. Mediation has also been effective in personal injury disputes where liability is not necessarily an issue, but the damages are in dispute. It can also be quite effective where liability is questionable. Mediation is becoming more and more accepted in business litigation cases as well, because it allows the parties to fashion a resolution which may even permit the parties to continue to do business together in the future.

One of the greatest benefits of mediation is the flexibility that is given to the parties. First, parties can select a mediator with a background in the particular area in which they have their dispute. Thus, where parties are involved in a construction defect matter, they can select an attorney with experience in construction litigation. They may even select a contractor who may have been trained as a mediator, who oftentimes can quickly understand the nuances of the construction dispute. The mediator can then rely on past experience to determine how best to fashion a settlement.

Second, mediation is confidential. Both

federal and California state law provide that settlement negotiations, including those in mediation, are confidential. California has gone so far as to codify the confidentiality of any communications in mediation. California courts have further held that mediators cannot be compelled to testify about the events in a mediation should the settlement break down. This confidentiality often allows the parties to be more frank and divulge more information than otherwise might be the case in simple face-to-face negotiations, knowing that their communications will be kept in confidence.

Third, the parties are in control. In negotiations, a settlement generally occurs only where parties believe they are on equal footing. In most negotiations, however, one party believes that they have a superior bargaining position or higher moral imperative than the other, which often prevents a settlement from occurring. In litigation and arbitration, the parties give up all power to a third party who renders a decision, which neither party may be happy with once it is issued.

Fourth, mediation allows the parties to shape a "win-win" solution. Although courts or arbitrators will sometimes fashion a remedy which may benefit both parties, that is most often not the case. Should a matter proceed to trial, the court will usually decide a winner and a loser. The loser, unhappy with the decision, will often prolong the agony of the dispute by appealing an adverse decision, thereby increasing the anxiety, cost, and risks of litigation.

In mediation, the parties are free to fashion whatever result they desire. Although this often means compromise on the part of one party or the other, the compromise is generally more beneficial than proceeding to trial.

In addition, mediation provides finality. As mentioned above, a decision in litigation or arbitration does not necessarily mean an end to the dispute. It may, in fact, promote additional animosity, which prevents the parties from attending to their normal occupation. Remember, every minute spent with your lawyer means that you are unable to work at

your chosen occupation. Litigants are thus forced to not only pay their attorneys, but they also lose the benefit of their time, thus incurring a "lost opportunity cost" that can never be recovered.

Why Use a Mediator?

It would seem that parties should be able to sit down together and resolve virtually any dispute in which a mediator would be used. Although we generally recommend that parties attempt to work together in negotiating a resolution without hiring attorneys, that is often difficult to achieve. One party, who feels slighted, is offended by the other party's refusal to acknowledge the offended party's position and vice versa. This often leads to an escalation of the dispute to the point where one party feels that the only way to achieve redress is to file and prosecute a lawsuit. Lawyers sometimes compound the problem by taking steps to aggressively litigate their client's position regardless of its merits, rather than working to resolve the dispute. This leads to a further escalation of the dispute when letters are sent that only inflame passions.

Trained mediators recognize the parties' trigger points, which can help to de-escalate a dispute. Mediators are also trained in facilitating discussions between parties, which allows them to see not only the other party's position, but also the benefits of a settlement.

Although the mediator generally will not render an opinion on the merits of the case, the mediator will use his experience and training to explain the benefits of settlement, risks of litigation, expense of litigation, and, equally important, expense of an adverse verdict. These facilitated discussions often allow the parties to reach the conclusion that litigation is no longer beneficial and a settlement is in the best interests of all parties.

Our Experience

We have significant experience in mediations. Attorneys in our firm serve both as neutrals/mediators, as well as representing parties in mediation. It has been our

experience that in the vast majority of cases (over 80%), parties who come into the mediation process with an open mind and a true desire to resolve their case, often settle their case. Examples of successes at mediation include:

- The negotiation of the buyout of one brother by another in a family-owned business. The two brothers had worked together for many years in building up the company, only to find that they could no longer get along. Although the corporation's bylaws set forth the manner in which one party could be bought out, those provisions would only be triggered if one party wanted to be bought out. The other option was to file a suit to dissolve the corporation. Before a lawsuit was even filed, a mediator worked with the two parties in fashioning a buyout.
- We resolved a home purchase dispute. In this action, our clients entered into a buy-sell agreement to buy a tract home. At the time of the walk-through, our clients noted several areas that required repair before they would accept occupancy of the home. Upon further inspection, water damage and mold were located inside the home and the builder was asked to repair the mold damage. The builder, however, tried to rescind the purchase and sale agreement while our clients wished to force the builder to close the transaction. Using a mediator, the parties accepted a settlement that allowed the builder to keep the house and our clients were able to use the monies received from the builder to buy a new home.
- In a real estate dispute in which our client refused to close escrow due to a mis-communication of a counter-offer, a mediator helped the parties fashion a settlement in which the property was ultimately sold and escrow closed, with the buyer receiving virtually the same net proceeds as the buyers would have

received in the original transaction. The mediator negotiated a reduction in the broker's commission that contributed additional funds to the buyers' net proceeds while assuring the buyers that the property would close on time so that the loan the buyers had obtained would be properly funded.

- Remediation of the Purity Oil Sales Superfund site located in Fresno was resolved by a complex mediation. Purity Oil Sales was an oil recycling facility located in Fresno. The site ultimately became an environmental hazard and the EPA designated the site as a Superfund site. The EPA then sued every party who allegedly sold oil or allowed oil to be collected by Purity Oil. Several hundred potentially responsible parties were named in the lawsuit and the matter was marching towards litigation when a mediator was hired. Working with the EPA and all parties, the mediator was able to fashion a remedy in which the various suppliers to Purity Oil were tiered based on the amount of oil contributed to the site. The more oil provided, the more reparations would be paid to the EPA. Conversely, the less oil supplied, the less money contributed to the settlement. After many months, a settlement was ultimately reached which avoided a protracted and expensive trial.

Is Mediation Right In Every Case?

Mediation may not resolve every case, but it is our experience that mediation always provides some benefit. Even if the case does not settle, a litigant will generally learn facts that otherwise would not have been discovered except through expensive discovery. Even where mediation is unsuccessful, a mediator can help the parties fashion a discovery plan to lessen the costs of discovery. Moreover, if mediation is not successful the first go-around, parties are often able to settle a case at the second or third day of mediation. This is because mediation is a process of facilitating

discussions that result in negotiated settlements.

As the well-known cliché states, time generally heals all wounds; the longer a lawsuit proceeds, the more likely a party is willing to consider settling because, in many instances, the party recognizes that a settlement is often worth more than the risk of an adverse verdict through litigation. Thus, although some cases will have to proceed to trial because of the divergent attitudes in the value of a case or in the facts underlying the case (i.e., each party has a different understanding of the facts), mediation is helpful in the large majority of cases.

Conclusion

Mediation is but one tool that litigators have to help you resolve your dispute. It often, however, is the most effective method, as it puts **you** in charge of how to best resolve your case.

Attorneys at Coleman & Horowitz, LLP,

have extensive experience in mediation, both in representing parties and serving as neutrals. If you have any questions on whether mediation is right for you, please feel free to call us.

This article was prepared by Darryl J. Horowitz, a litigation partner at Coleman & Horowitz, LLP, emphasizing business, construction, real estate and banking litigation, commercial collections, casualty insurance defense, insurance coverage, and alternative dispute resolution. He is a member of the Fresno County Bar Association, the American Bar Association, the Association of Business Trial Lawyers, the Commercial Law League of America and the California Creditors Bar Association. Mr. Horowitz serves as an arbitrator privately, FINRA Dispute Resolution and for the Fresno and Madera County Superior Courts. He also serves as a mediator privately and is certified as a mediator for the Fresno County Superior Court. If you have any questions regarding the subject of this article, please contact Mr. Horowitz at (559) 248-4820, or by e-mail at dhorowitz@ch-law.com.

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