ALTERANTIVE DISPUTE RESOLUTION – IT DOES MAKE SENSE

Often times, clients inquire as to why the litigation process is as lengthy as it is. The answer is not always a simple one. The time-frame within which an action is judicially resolved is a function of the court's caseload and the complexity of the matter being litigated. There are, however, avenues available to litigants in certain circumstances that will allow them to resolve their disputes more timely and in many cases more economically. The two most recognized methods of alternative dispute resolution ("ADR") are mediation and arbitration. This article will focus on the mediation process. Next month's newsletter will address the arbitration process and its nuances.

In many instances, parties to an agreement can contractually agree to submit any dispute that may arise to one or more forms of ADR. Parties' whose claims are not controlled by a contract can similarly agree to utilize ADR prior to or subsequent to the commencement of a formal court litigated matter in an effort to quickly and economically resolve their dispute. Finally, there are circumstances under which a judge presiding over a court litigated matter can "order" the parties to participate in the ADR process.

The two forms of ADR are commonly known as mediation and arbitration. Mediation is usually the first step in the ADR process although parties can agree to skip this option and proceed directly to arbitration. Parties who agree to submit their dispute to mediation will agree as to who the neutral mediator will be. This individual can be an attorney whom counsel for the litigants believes is best qualified to impartially provide an opinion as to the merits of the underlying dispute. In many written contracts, the parties will agree to select the mediator from one of several nationally respected mediation companies.

Procedurally, the mediation process is relatively straight forward. Once the parties mutually agree on a neutral mediator, the parties will be required to enter into a written mediation agreement with the mediator. In addition to the parties agreeing to equally bear the mediator's fee, the parties will be required to agree to, among other things, the confidentiality of the proceeding, that nothing disclosed during the mediation sessions will be used at trial (if the mediation process is unsuccessful) and that the mediator cannot be called by either party as a witness if the dispute proceeds to a court supervised process. Prior to the commencement of the mediation session, both parties will usually be required to provide the mediator with a confidential written mediation statement, the length of which depends on the complexity of the matter and the mediator's instructions. This pre-hearing submission will usually include a description of the parties, the underlying facts and circumstances of the dispute, the legal issues involved, the parties' respective strengths and weaknesses, the resolution of specific issues by the mediator that the parties believe would be beneficial in resolving the entire dispute and a history of any previous settlement efforts undertaken by the parties.

The mediation session can be held wherever the parties agree. Sometimes it can be held at the mediator's office or at the office of the attorney for one of the litigants. It is not uncommon at the beginning of a mediation session for the mediator to gather the parties in the same room for purposes of reviewing the "ground rules" and for allowing each party to make some opening remarks. At the conclusion of this "joint session", the mediator will separate the parties into different rooms. The

mediator will then conference separately with each party. The amount of time that the mediator conferences with each party can vary and can often be lengthy. It is not uncommon for parties to wonder why the mediator is spending so much time conferencing with the opposing side. It is during these private conferences that the mediator "goes to work". The mediator, needing to be very good listener, will allow the participants to tell their "side of the story". The mediator will provide the litigants with his/her view of the case, including an opinion as to the legal issues involved and the monetary value of the claim being asserted, where money damages are involved. This process continues until a) the conclusion of the agreed upon time for the mediation session, b) the parties have reached a resolution, or c) the mediator and the parties agree that a resolution cannot be achieved.

It is important to emphasize that without express permission from a party, the mediator will not share what was discussed during the private conference with the opposing side. The participants to the mediation need to feel comfortable discussing the matter openly and freely with the mediator. Simply stated, each individual in mediation needs to gain the mediator's trust and vice versa. Once that trust is established, the hope is that the parties will be more amenable to looking at their dispute from a different perspective.

What makes mediation an attractive alternative to the court system is that the process is not binding. The parties are free to accept or reject the mediator's recommendation. In some written agreements, mediation might be a required precursor to proceeding to a binding arbitration process. Where no written agreement controls the dispute, the parties are free to proceed with commencing a formal court action or can agree to submit their claim to binding arbitration.

Mediation can be a very productive ADR mechanism, the results of which depend on the effectiveness of the selected mediator and the parties' willingness and desire to resolve their dispute quicker and more economically. If you have any questions about ADR and/or litigation in general, please feel free to contact me, 315-477-6222 or cjaffe@scolaro.com.

NYCourts.gov - The Office of Alternative Dispute Resolution – The NYS Unified Court System is committed to promoting the appropriate use of mediation and other forms of alternative dispute resolution(ADR) as a means of resolving disputes and conflicts peacefully.

ADR Staff work with judges, court administrators, and bar leaders throughout New York State to design appropriate dispute resolution programs that respond to the needs of local communities and courts. They also work closely with non-profit organizations in administering the state-wide Community Dispute Resolution Centers Program, which provides a community-based forum to resolve disputes that might otherwise become civil, family and criminal court cases.

Find a Community Dispute Resolution Center Near You