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LAW GROUP'S TIPS & ADVICE Mediation and arbitration provide alternative means of resolving disputes



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REAL ESTATE FEATURE

Making use of alternative ways of resolving civil disputes is critical to the administration of civil justice these days. In both California and Nevada, state budget cuts have affected funding to the court systems. Many counties have been forced to close court rooms which previously had been used to hold trials for civil disputes. Additionally, the United States Chamber of Commerce (which is not a government entity despite the official sounding name) has operated as a special interest group funded extensively by large corporations and insurance companies. For years, this organization has heavily financed an assault on individuals and small businesses by helping to place judges who are indebted to their interests once in office.

Mediation and Arbitration are two processes used outside of the court system where civil disputes can often be resolved.

Mediation is a process where parties to a civil dispute use a neutral person to facilitate negotiations in an effort to reach an agreed upon resolution. Almost all civil cases settle at mediation or from follow up discussions. In the 1980s Bruce Edwards, now a managing partner of JAMS which is one of the largest providers of mediators in the country, took a risk and began providing mediation services full time throughout the country. A major manufacturer of heavy equipment decided that trying to settle cases before trial might make sense to its bottom line in regard to risk exposure. Mr. Edwards traveled throughout the country trying out the new mediation process in an effort to resolve cases. From this successful program, legal professionals and corporations discovered the mediation process could be an effective means of resolving cases without the cost and extraordinary risks of civil trials. Today mediation is recognized as a necessary process to resolve civil disputes.

Most construction contracts have a provision requiring that any dispute arising out of the contract must go to mediation as a first step for resolution. If construction contracts do not include this clause, it should be added. The standard real estate purchase agreement in California requires contractual parties to go to mediation to attempt to resolve disputes arising out of a purchase agreement. In fact, if a party refuses to do so, they lose the right to collect attorneys' fees even if the person prevails at trial or arbitration.

Mediations typically follow a certain set procedure.

The parties decide on a person who will serve as the mediator. Then the parties pick a time and place for the mediation to take place and they submit a letter to the mediator setting out the facts as they see them. For negotiations to be effective, the parties and any decision maker for the parties must attend the mediation and participate in person. A very successful business man named Mr. Haig reminded me recently that for negotiations to be effective, the actual parties must spend time sitting at the same table expressing their views and reasoning behind their positions. Mediations should almost always include a "joint session" where the parties meet and talk and the mediator facilitates the conversation while keeping the exchange civil.

After the joint session, the parties typically break out to separate rooms to talk with the mediator privately and discuss ways in which the dispute can be resolved. The mediator then performs a form of shuttle diplo-

macy between conference rooms to attempt to bring the parties to make a deal. Another key to the process is that all communications at mediation are confidential

and in California, what is discussed during mediation is absolutely inadmissible for any purpose in a judicial proceeding.

Ideally, at the end of the mediation the parties will have reached an agreement and resolved most if not all of the disputes between them. Next week we will discuss arbitration which is much less helpful for consumers and ultimately worse for the civil justice system. ■

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This article was written by attorney Glen Van Dyke of the Van Dyke Law Group, which has offices in Truckee, Eldorado Hills, San Francisco and Las Vegas. Van Dyke has represented thousands of residential and commercial property owners and homeowners' associations in the resolution of disputes. For more information call 877-868-7013 or visit www.vandykelawgroup.com.