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	New Jersey Civil Complementary Dispute Resolution Newsletter	

LEMON LAW PILOT TO BEGIN IN JANUARY 2006

In June 2005, the Supreme Court approved a statewide pilot program that would allow counsel and *pro se* parties in “Lemon Law” cases (*N.J.S.A. 56:12-29 et seq.*) filed in the Superior Court to choose the complementary dispute resolution (CDR) modality to be used for the particular case. This pilot program will commence statewide on January 1, 2006 and apply to all Superior Court lemon law cases answered subsequent to that date.

Under the program, following the filing of the first answer, all counsel and *pro se* parties will be sent a notice providing them the opportunity to select whether the case should go to mediation pursuant to R. 1:40-4 and –6, non-binding arbitration pursuant to R. 4:21A *et seq.* or voluntary binding arbitration pursuant to guidelines approved by the Supreme Court and posted on the Judiciary’s Internet website at www.njcourtsonline.com. Failure to affirmatively choose a CDR modality will result in the case being referred to mediation no sooner than 90 days after joinder.

This newsletter discusses each of the CDR modalities available in this program.

MEDIATION

What is mediation?

Mediation is a dispute resolution process in which an impartial third-party – the mediator – facilitates negotiations among the parties to help them reach a mutually acceptable settlement. The parties, with the assistance of their attorneys, work toward a solution with which they are comfortable.

How is mediation different from other dispute resolution processes?

The major distinction of mediation is that a mediator does not make a decision about the outcome of the case. The parties, with the assistance of their attorneys, work toward a solution with which they are comfortable.

Who are the mediators?

A roster of mediators is maintained by the court system. It is posted on the Judiciary's Website at www.njcourtsonline.com. The roster includes experienced attorneys and other professionals who have expertise in lemon law and who have been trained and have been carefully screened and approved in accordance with the Rules of the Court. When a case is referred to mediation, the court usually will assign a mediator from among those on the roster. Parties have the opportunity to agree on a substitute mediator from the roster, or they may select any other individual they feel is suitable. Parties assigned to mediation shall share equally the fees and expenses of the mediator, after the initial three free hours. In cases covered under Court Rule 1:13-2(a) in which a party has been determined by the court to be indigent, the fees and expenses of the mediator will be waived. Any party may opt out of mediation after the mediator has expended three hours of service, which shall include the first mediation session, and which shall be at no cost to the parties.

How will mediation affect discovery?

Normally, discovery is not stayed during mediation. Occasionally, the Order of Referral to mediation may provide for a stay of formal discovery. This is done to maximize the potential benefits of mediation. Whether or not formal discovery is stayed, the mediator is authorized to facilitate the informal exchange of discovery materials needed to enhance the effectiveness of the mediation process.

What happens in mediation?

There are certain ground rules the mediator will ask participants to follow in mediation. The first, and most important, is that with a few exceptions covered in Court Rule 1:40-4(c), what goes on in mediation is confidential. That is, what is said in mediation cannot be discussed outside of the mediation process unless the parties consent. Prior to mediation, the mediator will schedule a telephone conference with counsel and pro se parties and will usually ask all sides to prepare a brief summary of the issues in dispute. Then, at the mediation session, the mediator will ask attorneys and litigants to make brief presentations about the issues from their own perspectives. After that, the mediator will help the parties to explore areas of possible compromise and to develop a solution that meets everybody's interests. Sometimes the mediator may meet with each side separately for a private discussion that might help move the parties toward a resolution. If an agreement is reached, the mediator will notify the court and a document will be prepared detailing the terms of the agreement. Thereafter, the mediator will notify the court that the case can be dismissed.

What are the roles of counsel and litigants in mediation?

The goal of mediation is to reach an amicable resolution. Attorneys and parties are required to make a good faith effort to cooperate with the mediator and engage in constructive dialogue toward this end. Attorneys should prepare their clients prior to mediation by explaining what will happen, and particularly what the roles of both attorneys and clients are. They also should agree on who will be the principal spokesperson in presenting the party's position (early in the mediation session). Throughout the process, attorneys act as advocates for their clients' interests. For example, attorneys may make brief opening summaries of the issues as they see them, but clients also should be given an opportunity to speak. In mediation, understanding is often promoted when the parties explain their positions directly to each other. When it comes to discussing terms of settlement, the litigants must play an active part, for it is their case and their settlement. During this process, attorneys should provide counsel on the advisability of settlement options, suggest options and be available for any other consultation with their clients.

What are some of the advantages of mediation?

Some advantages of mediation include:

- confidentiality;
- the result may benefit both or all sides and thus present a “win/win” solution;
- the outcome can be tailored to meet the unique needs of the case and the particular parties;
- specially trained mediators assist the parties in fashioning more creative solutions not customarily occurring with other CDR techniques; and
- mediation can be a more cost-efficient, less formal and more meaningful alternative to the traditional trial process.

What kinds of cases could benefit from mediation?

Mediation has been used successfully in a broad range of cases which exhibit characteristics such as: the parties have an ongoing business or personal relationship or have had a significant past relationship; communication problems exist between the parties; the principal barriers to settlement are personal or emotional; parties want to tailor a solution to meet specific needs or interests; cases involve complex technical or scientific data requiring particular expertise; the parties have an incentive to settle because of time, cost of litigation, or drain on productivity; the parties wish to retain control over the outcome of the case; or the parties seek a more private forum for the resolution of their dispute.

What if the case is not resolved in mediation?

Sometimes the parties are unable to reach agreement, or only agree on certain aspects of the dispute. If other aspects are still unresolved, the parties may agree to submit these to an expert for an opinion (binding or non-binding) or to use some other creative means to resolve the dispute. The case can also be returned to court,

and continue on track towards trial. Even in these cases, the mediation process may have helped the parties move toward an ultimate settlement.

NON-BINDING ARBITRATION

Arbitration is a process in which a dispute is submitted to experienced, trained and knowledgeable neutral attorneys or retired Superior Court Judges who hear arguments, review evidence and render a non-binding decision. It is less formal, less complex and often can be concluded more quickly than court proceedings.

Who are the arbitrators?

The arbitrators serving in this program are trained attorneys who have at least seven years of experience and knowledge in lemon law. Arbitrators are selected by the Assignment Judge on recommendation of the local bar association and are paid a per diem fee by the court for their services. Retired Superior Court Judges may also serve as arbitrators. Arbitrators are required to complete both initial training and continuing education every two years thereafter.

How does arbitration work?

All attorneys and all parties are notified of their date for an arbitration hearing. Before the scheduled hearing, each party shall exchange a statement of the factual and legal issues. Although attendance by each party or their attorney is required, all attorneys and parties are strongly encouraged to appear at the hearing.

The arbitrator or panel of arbitrators (the county may choose to operate the arbitration program using either single arbitrators or panels of two arbitrators) conducts the hearing during which each party presents its case. Parties are permitted to introduce exhibits and other relevant documentary evidence. The arbitrator or panel of arbitrators generally exercises the powers of the court in the management and conduct of the hearing.

After the hearing, the arbitrator or panel of arbitrators renders a non-binding decision and a written award. The decision is usually rendered on the day of the arbitration hearing in the presence of the participants.

What if I am not satisfied with the arbitration award?

A party who is not satisfied with the arbitration award can reject the award and get a trial by filing a notice called a “demand for a trial *de novo*” with the court and serving it upon all parties within 30 days of the filing of the award. The court is very strict in enforcing the 30-day time limit. The effect of not filing the demand for trial *de novo* is that the award, whether a monetary award or a dismissal, can be converted into a judgment.

A party requesting a trial *de novo* must pay a trial *de novo* fee to the New Jersey State Treasurer. Under certain circumstances if the requesting party does not improve its position significantly at trial, it may also be liable to pay other reasonable costs, including attorney fees of the other party up to \$750 and witness costs up to \$500 after the trial is concluded.

What are the advantages of arbitration?

Some of the advantages of arbitration include:

- arbitrators are knowledgeable and experienced attorneys or retired Superior Court judges;
- prompt scheduling, expeditious procedures, and established time frames for each step serve to limit the time required to resolve the case;
- many of the costs associated with the formal court process can be eliminated by arbitration;

- each party tells his or her side of the case to an arbitrator in an atmosphere that is less formal and more relaxed than a court proceeding;
- an arbitrator's decision and award may resolve a case or serve as the basis for further negotiations to a settlement; and
- arbitration awards, if accepted by all parties and confirmed by the court, are legally binding and enforceable.

What cases are amenable to resolution by arbitration?

Arbitration has been found to be particularly effective in resolving cases having the following characteristics:

- the parties require an independent decision to resolve the dispute;
- the parties have full information, but seek the opinion of a third party respecting the extent of damages, or the credibility of a witness;
- the parties are committed to "litigating" and are not open to negotiation;
- the parties have no relationship beyond a single incident and the disputed issues involve only the amount of money damages; or
- the amount at stake is relatively small and a quick third-party decision is of primary importance.

VOLUNTARY BINDING ARBITRATION

The Supreme Court has approved use of voluntary binding arbitration to handle lemon law cases.

How does the program work?

The parties file a written consent form, signed by all attorneys and the parties themselves, submitting the case to binding arbitration and voluntarily dismissing their case. Parties are encouraged to enter into high/low agreements of which the arbitrators are unaware. The purpose of the high/low agreement is to give the parties control over the outcome. The case is presented in abbreviated form to a panel of two arbitrators whom the parties have selected. A sitting Superior Court judge also selected by the parties is present but becomes involved in the process only if (and to the extent that) the arbitrators do not agree. The proceedings are held in the courtroom and the judge explains to the parties at the outset and on the record that the determination of the panel will be final and not appealable. All parties must then agree, on the record, that they understand the final and binding nature of the program. The hearing, however, proceeds off the record. The decision of the arbitration panel is memorialized as a judgment if the court does not receive a stipulation of settlement within 30 days.

What are the advantages of voluntary binding arbitration?

Some of the advantages of voluntary binding arbitration include:

- the use of a high/low agreement allows for some modicum of control and predictability;
- prompt scheduling and expeditious procedures serve to limit the time required to resolve the case;
- many of the costs associated with the formal court process can be eliminated by voluntary binding arbitration;
- each party tells his or her side of the case to arbitrators and a Superior Court Judge selected by the parties, in an atmosphere that is less formal and more relaxed than a court proceeding; and
- if the parties had entered into a high/low agreement the plaintiff could get no less than the “low” and the defendant would not be subject to exposure above the “high.”

What cases are amenable to resolution by voluntary binding arbitration?

Voluntary binding arbitration has been found to be particularly effective in resolving cases having the following characteristics:

- the parties require an independent decision to resolve the dispute;
- the parties have full information, but seek the opinion of third parties respecting the extent of damages, or the credibility of a witness;
- the parties are committed to “litigating” and are not open to negotiation;
- the parties have no relationship beyond a single incident and the disputed issues involve only the amount of money damages; or the amount at stake is relatively small and a quick third-party decision is of primary importance.

“The New Jersey Judiciary should provide citizens with a full set of options for resolutions of disputes including traditional litigation as well as various complementary forums, so as to continue to fulfill the commitment to provide the highest quality of justice possible.”

Final Report Supreme Court Task Force on Dispute Resolution, 1990

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