

# Class 10

Alternative Dispute Resolution

# Mediation Agreements

- A mediation agreement is an agreement signed by both sides to a dispute that they will enter mediation in the event that a dispute arises.
- Courts will enforce these types of agreements, even if the prospects for an actual settlement being reached are very slim.
- Many clauses add the duty to mediate in "good faith," which is the only sure way to make sure the mediation has any "teeth" at all. Even then, mediators never have the power to force a settlement.
- "Non-binding arbitration" is similar to, but not the exact same as, mediation.
- The "right to mediation" is not the same thing as a responsibility to mediate and is basically a meaningless provision.

# Some other Points about Mediation Proceedings

- Mediation can be done by the parties alone or with their attorneys present (without attorneys is also referred to as "classic" mediation).
- Courts can order the parties to go to mediation (usually when directed by statute).
- In cases of court ordered mediation, there is usually a strict rule of confidentiality regarding what occurs in the mediation proceeding (as courts will not force parties to reveal information that may hurt them later on).
- **Should the mediator later report to the court or arbitration if the mediation fails?**

# Confidentiality in Mediation

- There is no inherent confidentiality requirement for a mediation proceeding.
- Note that even though the mediator will likely be a lawyer, there is no attorney-client confidentiality rule that requires confidentiality in a mediation proceeding because the mediator does not represent either party.
- However, a confidentiality requirement can be imposed by:
  1. Agreement between the parties
  2. Contract between the parties
  3. Rules of evidence (in a subsequent legal proceeding)
  4. Court order (where the court orders the mediation)
- Mediation discussions and all materials developed for a mediation are *not admissible in any subsequent court or other contested proceeding*, except for a finalized and signed mediated agreement.



**QUIZ TIME!**

# Steps in a Mediation Proceeding

1. Agreement to mediate or court ordered mediation is commenced. Sometimes a regulation requires mediation during certain administrative challenges or proceedings.
  2. Each side may have a "private caucus" with the mediator to discuss issues such as:
    - what they're looking for in the proceeding
    - what the party's positions regarding the issues are
  3. Meetings where all three parties are present (the two parties and the mediator)
  4. Settlement
- OR
4. Discontinuance and proceeding with litigation or arbitration