MEDIATION: AN EFFECTIVE MEANS OF SETTLING LAWSUITS

The Mediation Process:

Mediation is a form of settlement negotiation conducted and assisted by an impartial attorney trained in the art of settling lawsuits. Unlike arbitration and other kinds of alternative dispute resolution, mediation is non-adjudicatory. The mediator makes no findings of fact or law, whether binding or nonbinding.

The mediation process, a private meeting, comprises three stages. First, all parties and their counsel meet with the mediator hi general session. During this session, die mediator explains the process and sets forth the ground rules. Afterward, each attorney outlines his or her client's theory of the case and the legal and factual issues. The clients are encouraged to speak, but are not required to do so. The mediator asks clarifying questions, determines areas of agreement, and inquires as to the status of prior settlement negotiations.

After the general session, the parties separate to different conference rooms for private meetings called caucuses, the second stage of mediation. These caucuses are confidential. Anything said to the mediator during a caucus cannot be repeated outside the caucus except by express permission of the party. This confidential meeting allows counsel to express matters that lie or site would be unwilling to state in the presence of opposing counsel. Here the mediator, the party, and counsel undertake a candid discussion of risks, the party's interests sought to be protected, settlement flexibility, and strengths and weaknesses of the case. At some point during the caucus stage, the mediator will begin serving as a shuttle diplomat between the parties, conveying settlement offers back and forth.

When it appears that a consensus has been reached, the mediator brings the parties back together for the third stage: closure. The mediator assists the parties in memorializing the essential terms of the agreement, signed by each party.

The entire proceeding is privileged and confidential. Indeed, the law prohibits the mediator or any party front telling the court anything said during the mediation. At most, the mediator may report that the case did or did not settle. See Tex. Civ. Prac. & Rent. Code § 154: Tex. R. Evid. 604.1

Effectiveness of Mediation:

Mediation works. For years, federal and state judges in Dallas have been utilizing attorney-mediators trained by die Dallas Bar Association. Thus far, at least 75% of cases referred to those mediators have settled as a result of die mediation, and some mediators have enjoyed a success rate of over 90%. Several reasons account for this success are:

1. The mediator neutralizes hostility and emotion inherent i n many lawsuits. During the caucus sessions, the parties do not see or communicate directly with each other. All communications are filtered through the mediator, who serves as a lightning rod for

vehemence and frustration.

2. The mediation process causes parties and counsel to undertake a realistic risk/benefit analysis of continued litigation. Often, unrealistic expectations of a client or his counsel impede settlement of a lawsuit. The mediator serves as a catalyst for attention to reality.

3. Because the mediator serves as a communications bridge between the parties, the mediator has knowledge of each party's interests and goals extending beyond the knowledge of any one party. The mediator is in a unique position to suggest solutions and explore settlement possibilities.

4. The mediator serves as a neutral advocate of settlement, encouraging and prodding the parties toward an agreement.

Cost of Mediation:
Most mediations require only one day and, typically, cost no more than a single deposition. Some mediators charge an hourly fee, and others charge a flat daily rate which varies according to the amount in controversy and the number of parties. In Federal court, privilege and confidentiality are achieved by order and/or agreement.