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Introduction

This booklet is intended to provide you with a general summary of the processes of legal dispute resolution generally known as “litigation”. It is not intended to be exhaustive. It is very important that you work closely with your attorneys regarding any litigation in which you may become, or are, involved. The summary information is provided to you in an easy to read Q& A format. This booklet is a companion to several other similar Q&A booklets produced by the Farrell Law Group to assist our clients in making their legal decisions.

1. What is litigation?

When a dispute develops, and direct negotiations are not successful in resolving that dispute, litigation is one of several different processes to resolve disputes between two or more people or entities.

2. What types of litigation processes are there?

The process of litigation can include non-binding mediation, binding or non-binding arbitration, court proceedings (e.g. a formal trial), and court appeals.

3. How is mediation used?

The use of mediation may be agreed to between the parties to a dispute, or ordered by a court if court proceedings have already been started. In mediation a "neutral" (usually, but not always, a lawyer) is either selected by the parties to the dispute, or appointed by the court handling the dispute. All of the parties to the dispute, usually including their lawyers, meet together with the mediator. It is the job of the mediator to guide the negotiation process in order to have all the parties to the dispute fully examine their positions and, hopefully, reach a negotiated settlement. It is <u>not</u> the role of the mediator to impose a settlement on the parties. A mediation takes at least several hours, can extend beyond a single day, depending upon how negotiations are proceeding. Well conducted mediation proceedings can generally result in a resolution of more than fifty percent (50%) of disputes.

4. How is arbitration different from mediation or court proceedings?

Arbitration occurs only if it is agreed to between the parties to the dispute. Arbitration is often agreed to in written contracts between parties as the way disputes will be resolved. Arbitration is generally a binding decision rendered by an arbitrator. Therefore, an arbitrator is not involved in trying to get the parties to negotiate with one another. Rather, the arbitrator acts much as a judge would act, hearing evidence from both sides, and rendering a decision. There are different agencies that provide a system of rules to conduct an arbitration. They include the American Arbitration Association, and the CPR Institute for Dispute Resolution. Arbitration allows more freedom for the parties to schedule the arbitration proceedings than does a court, where the court administrator, or the judge, will establish the schedule.

Arbitration proceedings are usually not as formal as court proceedings. Discovery (discussed below regarding court proceedings) is often more limited, and controlled by the arbitrator. The rules regarding evidence are generally more relaxed. However, the decision rendered by the arbitrator at the conclusion of the arbitration proceedings is binding, and generally final, i.e. there is little right to appeal an arbitrator's decision. Unlike court proceedings, the parties are required to pay the arbitrator a fee for the time served as an arbitrator. This fee can often be several thousands of dollars.

5. Since court proceedings can be very complex, can you describe them as simply as possible?

A court proceeding begins by the filing of Complaint by one party against one or more other parties. The party filing the Complaint is known as the "Plaintiff". The Complaint lays out the facts, and legal claims, which the Plaintiff claims it has against the other parties, who are known as the "Defendants". The Defendants then file an Answer responding to the claims described in the Complaint, and may also file a "counterclaim" setting forth legal claims they may have against the Plaintiff. Taken together, the Complaint, and the Answer/Counterclaims "frame" the disputes between the parties.

The parties then conduct what is known as "discovery" in order to ensure that both sides are familiar with the facts relating to their dispute. This discovery may include depositions (sworn testimony taken of a witness by an attorney, conducted outside of court), requests for production of documents from the other side that may be relevant to the dispute, and written questions ("interrogatories")that the other side is required to answer. Various proceedings may also take place at the same time known as "motions". The purpose of motions is to bring before the court various disputes that my come up in the case before trial. All of these proceedings taken together are known as "pretrial proceedings". When all pretrial proceedings are completed, if a settlement has not been reached, a trial is held either before a jury, or before a judge. At the trial all of the relevant evidence is presented by both sides in a structured format, applying the formal rules

of evidence. At the conclusion of the presentation of evidence, a verdict deciding the dispute is made by either the judge, or the jury.

6. What is an appeal?

An appeal is not another trial before a different court. Rather, the purpose of an appeal is to allow a higher court (i.e. a court of appeals), generally consisting of three or more judges, to review the "record" of what occurred in the previous trial, to determine whether or not there were any legal errors committed by the judge that would require the verdict to be overturned, and either approving of or rejecting the result in the trial held earlier. If important errors occurred at the earlier trial, it is possible that a new trial could be ordered to be held.

7. How long does it take to complete any of these litigation procedures?

Once the parties involved in a dispute agree to try to resolve it by mediation, a mediation can generally be held within thirty (30) to sixty (60) days. If an arbitration process is used, a relatively simple case should be resolved within 90-120 days. More complex cases can generally be resolved within 6-8 months. Court proceedings can take 2-3 years to resolve a matter. Therefore, from a simple time prospective, parties should use a mediation procedure even if it appears unlikely that a negotiated settlement can be reached. Binding arbitration is almost always faster than court proceedings. However, binding arbitration means that a jury trial cannot be held. There are also formalities in court proceedings that may be beneficial to one or the other parties so that an agreement

to arbitrate (unless already agreed to) is not possible. However, as noted previously the arbitration requirement generally arises out of a prior written agreement between the parties requiring arbitration to resolve any disputes.

8. What percentage of cases filed in court actually go to trial?

Only a small percentage of cases, generally around 10%, ever actually go to trial. In part this reflects the successful mediation of cases resulting in a negotiated settlement so that trial is not necessary.

9. What are the costs of litigation?

Because any litigation process is "dynamic", it is impossible to accurately predict what the costs of litigation will be through the conclusion of a dispute. It is therefore extremely important to make a business/economic decision before commencing any litigation. However, if you are the party being sued it will obviously be necessary to defend yourself against the claims of the Plaintiff. It is also important not to get caught up in the emotions of defending "principles", or your "sense of fair play". Defending these concepts can prove to be extremely expensive to you. You should work with your lawyer to come up with at least a loose estimate of what litigation costs, and timing, will be. It is critical that you understand that any of these estimates are exactly that: ***estimates only***. Whatever the initial estimate may be, you should multiply that x 2 in making your business/economic decision of whether to proceed, or in reaching a decision to try as hard as you can to settle the dispute as quickly as possible. You should have a plan, but understand that a significant

portion of any plan in litigation is reacting as necessary to the actions of the other party. Finally, keep the end in mind when you are involved in any litigation. This means that you are always keeping an eye out for a possible means of resolving any litigation disputes at the earliest possible time, and with the least expense.

10. What type of attorney fee arrangements are involved in litigation?

In litigation proceedings there are different types of fee agreements. They include fixed fee arrangements, hourly fee arrangements, contingent fee arrangements depending upon the outcome of the litigation, and mixed hourly and contingent fee agreements.

In a fixed fee arrangement you will pay your attorney a predetermined "fixed" fee for handling the litigation. In an hourly fee arrangement you will pay the attorney an agreed upon amount per hour to represent your interests in the litigation. In a contingent fee arrangement the attorney recovers a fee only if the litigation is successful. That fee is a percentage of the recovery agreed to ahead of time. Finally, there can be "mixed" fee arrangements. For example, a reduced hourly fee charged, with a reduced contingency percentage.

Be sure you have a written fee agreement with any attorney representing you in litigation, and be sure that the fee agreement is fully understood by you before you sign it.

11. Are court proceedings more costly than arbitration or mediation?

If a case can be settled early by mediation it will obviously be the cheapest means of resolving the dispute. Usually, but not always, arbitration proceedings, because they generally are quicker, will be cheaper than formal court proceedings. However, this is not always the case, especially because the parties must pay the arbitrator his or her fee for the services rendered, usually on an hourly basis. Generally, however, arbitration proceedings will be less costly than court proceedings.

12. How do appeals work?

As noted earlier, an appeal is not a retrial. Rather, the court hearing the appeal receives the entire "record" of what occurred at the trial. All of the parties in the trial present written briefs to the court of appeals setting forth their arguments about why there were errors committed during the trial requiring that the verdict be overturned or, on the other side of the coin, why the verdict shouldn't be overturned. Usually (though not always) oral arguments are presented to the court of appeals, and a panel of three or more judges, after reviewing everything submitted by the parties, and contained in the trial court "record", will determine whether or not the trial was conducted properly, and resulted in a proper verdict. The court of appeals can approve the verdict, reverse the verdict, or overturn the verdict and send the case back for another trial.

13. Do you have any final comments or recommendations about being involved in litigation?

If you are sued, try to settle. If you are unable to settle, you may have no choice but to defend yourself against the claims. If you are considering suing someone, make a full determination of the "economics" of suing, much as you would make any type of business decision. It is important that you consult with your lawyer during the entire decision-making process. However, it is also important to understand that there is nothing certain in litigation. What you will be given by any responsible attorney are recommendations, and estimates. Ultimately, the decision to proceed, and how to proceed, will be a decision you must make.

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We hope this information helps you. It is understand that you need the assistance of professionals who are knowledgeable in the field of litigation in order to make the decisions that are necessary to determine if you should proceed with litigation to resolve your dispute. If we can be of further assistance to you, please contact us by phone or e-mail at your convenience to schedule a conference.

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