

Using Mediation to Resolve Discrimination Complaints

Training Presentation for
the Los Angeles County Commission on HIV

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Conflict in Employment Settings

- Differences in beliefs and values and ideation.
- Competition over resources.
- Competition over opportunities to train and promote.
- Concern about roles and responsibilities (turf).
- Personalities that clash.
- Sexual harassment and general harassment
- Title VII and FEHA protected classifications – pregnancy, mental disability, physical disability, sexual orientation...
- And more...

Conflict in Housing

- Beliefs, values, and ideation.
- Personalities.
- Culture.
- Socio-economic status.
- [Mis]communications.
- Companion animals.
- Title VII and FEHA protected classifications – mental disability, familial status, physical disability, religion, sexual orientation, etc.
- Other...

Constructive View of Conflict

- Not “domination,” which is easy, fast, and not lasting.
- Not “compromise,” which is unsatisfying and not lasting.
- Integration –creativity and consideration that invites both parties to revalue the interest(s) of the other. The work is to learn new information, move toward clarity of core issues, eliminate the useless chatter. The process requires inventiveness, ability to assess risk, and consider ways to avoid the mentality of being ***the sole winner***.

Dispute Resolution Tools

- **Mediation** is where a third party neutral assists with defining the issues of mutual concern, developing options, and finding an acceptable resolution. Private/voluntary.
- **Arbitration** is where parties agree to submit in writing to allow a third party neutral to find a binding resolution. Private/voluntary.
- **Litigation** is a process of dispute resolution in which parties go before a judge or jury. Public/involuntary.

DFEH Dispute Resolution Division

- The Dispute Resolution Division offers a free, confidential administrative mediation process that is available in employment and housing discrimination cases as well as Disabled Persons Act and Unruh and Ralph Civil Rights Acts cases. It is a process that can:
 - Prevent litigation.
 - Educate the public about the DFEH and CA law.
 - Provide means to empower disputants.
 - Invite creativity in problem-solving.

Pathways to DFEH Mediation –

- Employment complaints received at DFEH may be selected to be referred to the Dispute Resolution Division (DRD) so that the parties have the opportunity to mediate before investigation commences after a Respondent gets notice of the filing of a complaint (“pre-investigation” voluntary mediation).
- Dispute Resolution Division staff contact the parties to explain the mediation process and determine whether the parties agree to mediate.
- Enforcement prescreens housing discrimination complaints before referring to the DRD, after service upon Respondent is complete, and parties have agreed to mediate, but before investigation commences.

Pathways to DFEH Mediation – cont'd

- One or both parties to a complaint filed for investigation may request voluntary mediation at any time.
- The Department requires parties to participate in mandatory dispute resolution when the DFEH has decided to file a civil complaint. (Government Code sections 12965 & 12981.)

Mediation Confidentiality and Firewall

- Everything that transpires during DFEH mediation is confidential. (Evidence Code section 1119.)
- All participants, including the mediator, sign a confidentiality agreement.
- DFEH Mediators have no access to DFEH investigative files or other information management systems. There is a “firewall.”
- Information DFEH Mediators learn about a case comes from the mediation participants themselves.

DFEH Voluntary Mediation

- Primarily pre-investigation, but also available during and sometimes after investigation.
- If pre-investigation, not attended by a representative of the Department's Enforcement or Legal Divisions.
- Parties may have counsel if they like, but representation is not required.
- Family member or friend may accompany and participate as a support person for the complainant.
- Any agreement reached is an agreement between the parties and is treated as an enforceable contract.

If Parties Decide to Mediate, Response to Complaint is Temporarily Suspended

- While a pre-investigation complaint is with the Dispute Resolution Division, all work on the matter by Enforcement must cease, and the requirement to submit a response to the complaint is temporarily put on hold.
- If mediation is declined or is unsuccessful, a response must be provided to the Department no later than twenty-one (21) days after the date the Enforcement Division notifies the respondent in writing that a response is due.

DFEH Mandatory Dispute Resolution

- DRD must mediate all complaints Legal intends to prosecute.
- Conducted before a civil complaint is filed in superior or federal court.
- Attended by a DFEH Staff Counsel who represents the Department's Legal Division.
- Settlement may include DFEH attorney fees.
- If a settlement is not reached, the same DFEH Staff Counsel may be assigned to prosecute the case on behalf of the Department.

Post Civil Complaint Mediation

- Attended by the member of the Department's Legal Division who filed the civil complaint or who was subsequently assigned the case.
- Settlement may include DFEH attorney fees and costs.
- Legal Division representative will sign the settlement agreement, if any, which becomes a public record.
- Agreement is not confidential and the DFEH may publicize.
- If settlement is not reached, same Staff Counsel who filed the civil complaint and participated in the mediation may prosecute the case.

Red Flags for Liability

- Subject of Investigation is a Manager/Supervisor [strict liability exposure].
- Failure to acknowledge a reported issue.
- Adverse action taken against individual who makes complaint [or witness in support of].
- Failure to investigate;
- Failure to remedy if investigation supports action;
- Ignorance of the law.

Top Reasons Why Mediation Works

- Both parties share ownership of the resolution.
- Mediation promotes cooperation.
- Mediation builds capacity to resolve future disputes.
- Mediation is a faster and less expensive option than litigation.
- Mediation allows all issues to be raised and is not limited by rules of evidence or procedure.
- Mediation can effectively be used to learn how to improve processes and practices that are outdated.
- Mediation has been shown to produce higher levels of compliance and satisfaction than litigation.

2016 Data based on DRD Services through July 2016

Total Mediations conducted	453
Total cases settled	251
Total percentage of cases settled	55%
Total settlement amount (vol)	\$3,575,082.54
Housing settlement total	\$415,215.63
Employment settlement total	\$3,123,366.91

Questions?

- Answers to FAQ's about DFEH's mediation services coming soon at www.dfeh.ca.gov
- Policy change: “general releases” (claims that may be available under statutes other than those that the DFEH enforces) are not presumed to be available; parties must negotiate for this term of settlement.
- Also, confidentiality of settlement agreements is not a required term, but is negotiable in voluntary mediations.
- Questions in specific cases should be directed to Annmarie Billotti, Division Chief

Contact Information for DFEH Dispute Resolution Division

- For more information:

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