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Alternatives Paths to Dispute Resolution – Getting Started

General Classification of Dispute Resolution Alternatives

There are five generic methods of conflict resolution for legal issues: ***negotiation***, ***conciliation***, ***mediation***, ***arbitration***, and ***litigation***. ***Mediation*** is the crown jewel of these alternative procedures, as being the central choice in the resolution continuum, it embraces the best attributes of all of them.

In ***negotiation,*** the opposing or adverse parties communicate directly or through legal counsel in an attempt to find a mutually acceptable solution. This process can be efficient and effective for resolving relatively simple, minor and discrete issues. However, it exists in the binary, legal paradigm world of 'either/or,' 'black/white,' 'win/lose' rather than the real world, which is full of grays. Sometimes the most expedient result for a party is to give up by making a compromise in order to avoid a worse outcome or avoiding the cost of a trial. While lawyers may participate in this process, they do so as partisan advocates for their clients, trying to exact the greatest advantage for them. The process lacks a skilled, neutral leader to guide the parties to a fair or mutually beneficial end-result. There is no neutral person to insist upon full disclosure, good faith, equality of bargaining power and a complete, open resolution of all aspects of the matter.

In ***conciliation,*** there is a skilled neutral person guiding the process, with the criteria applied being directed toward the goal of a merger of the interests of the parties to the conflict. In the commercial area, this might take the form of a merger of businesses, or reorganization within a business. In the Family Law area it would be directed toward a reunification of the parties and their interests or of an estranged parent with a child. The goal of reconciliation may be achieved in the criminal forum by applying the principles of restorative justice. However, the goal of reconciliation is not often sought in the Family Law area, because the "no-fault" divorce law of the state compels a separation and division of parties and property, if either one of the parties seeks such.

In ***mediation,*** the parties utilize the skills and experience of a neutral person to guide and lead the parties toward a resolution that is independent for each of the parties, which is based upon an identification of the distinct interests and needs of each. The parties retain the greatest participation in the outcome, as they both serve as factual informants and decision-makers. No settlement is attained except by consent of all parties. Decisions are reached in a confidential proceeding, with no outside publicity; and the outcome is final by law.

In ***arbitration,*** many of the same principles as mediation are applied, but the decision resolving the matter is made by a third person, rather than by a party participant – one would best know the facts, history, and circumstances relevant to the outcome. While the arbitrator has no stake in the outcome (similar to a judge), the arbitrator (unlike a judge) may be selected by the parties and their attorneys,

based upon the candidate's experience, skill, knowledge, temperament, and demonstrated track record. There is a limited right of appeal from the decision, but the process, as in mediation, is private.

In ***litigation,*** the full umbrella of due process rights and procedures designed to protect those accused of crime is applied to a matter that, whether civil, family or probate in nature, may require far fewer formalities as when one's civil liberties are at risk. This "one-size-fits-all" panoply of rights and rules comes at a great cost: full preparation is expected of counsel, even on tangential points; the court exercises full and complete control of the timing, sequence and presentation of the evidence; and the fact-finder is insulated from much of the information that the parties may deem germane. This insulation from the facts is exacerbated by the exclusionary Rules of Evidence and is further increased by the prohibition of direct communication between the parties (the stakeholders in the proceeding) and the decision-maker. Cross-examination can be discrediting, embarrassing and humiliating.

Of greatest concern about the process, however, are the criteria applied in the decision-making. Rather than an inquiry into the interests and needs of the parties before it, the court's concern is with an exploration into the law pertaining to the *legal* issues of the dispute. Rather than hearing from the parties on *their* concerns, the judge listens to the lawyer's dissertations on the relevant law. The judge's decision will not be reversed on appeal, if it follows established *legal precedent* – with a greater emphasis on due process and equal protection of the law – rather than a customized outcome based upon the interests and needs of the parties. Further, judges are protected from any adverse consequences of their decisions and they are unlikely to ever see the parties again. For a more complete comparison of mediation and litigation attributes, see the chart: *Mediation vs. Litigation*.

Benefits of Utilizing the Mediation Process

Mediation, as a dispute resolution process, offers:

- Convenience as to time, location, comfort, and the preparation schedules of each party and their attorney.
- Confidentiality in the negotiation process and privacy of the documents used to attain the result. This contrasts with litigation, in which all records not specifically protected by court rule or order are scanned to be placed in the public record and the Internet every day.
- Fairness and safety are the concerns and responsibilities of the mediator, who keeps a level playing field for the participants in the process. All parties and their views are respected.
- Keeping costs down, as there is no need for full or competing discovery that would primarily benefit counsel in the event of an adverse claim (defensive legal practice); pre-trial memoranda to help the judge; pre-trial case conferences which absorb the time of the parties and their counsel; hiring of expert witnesses to testify to what they could have offered in their written reports; time lost due to trial date uncertainty and delays; key evidence being filtered through and restricted by the cumbersome Rules of Evidence; and the necessity of post-trial motions and presentation hearings.
- Finality of result, as there is no need or ability for reconsideration, review, revision, or appeal from an order reached by agreement, particularly since the parties are adults and are represented by legal counsel. After settlement, the parties may then move on with their lives.
- Outcomes are based upon parties' interests, after a full identification of the distinct needs of each party, rather than an exhaustive exploration of state and national statutory and case law.

Mediation Formats

1. ***Facilitative Mediation.*** In ***Facilitative Mediation***, the Mediator guides the participants in defining and reframing the issues; identifying their interests; articulating their values as pertains to the issues; assisting them in brain-storming the various alternatives available; and by guiding the parties in determining the most appropriate outcome for each of the issues.
2. ***Evaluative Mediation.*** In ***Evaluative Mediation***, the mediator performs all the tasks of ***Facilitative Mediation***, and in addition adds a component of values clarification to assist the parties in weighing the various alternatives available, according to their stated values.
3. ***Directive Mediation.*** In ***Directive Mediation***, the mediator builds upon the notion of ***Evaluative Mediation*** by expressing and applying the mediator's own independent opinion as to the best value-weighted resolution to the pending issues. This format most commonly occurs in a ***Settlement Conference***, and especially in a ***Judicial Settlement Conference***. Some dispute resolution professionals question whether this is truly a form of mediation at all, but it is categorized as such because of the attributes of the process and because the ultimate decisions made are those of the parties, rather than (even a strongly influential) third person.
4. ***Transformative Mediation. Transformative Mediation*** is a process whereby with information and guidance the parties are empowered and aspire to achieve outcomes that are best for all persons impacted by the decisions – the parties, the family & the children – reaching a fair balance that maximizes the most desirable outcomes for themselves in so doing. This form of mediation is the ultimate, preferred means of resolution to be attained when the parties may have a continuing relationship (example: as parents) or in the process of Collaborative Law.
5. ***Co-Mediation. Co-Mediation*** is the practice of utilizing two or more mediators, usually simultaneously. In a Family Law proceeding, a pair of mediators may be utilized, one with a legal professional background (retired judge or attorney) and one with a mental health background (social worker or family therapist). Often the pair is also comprised of one man and one woman. One mediator may, but need not, focus on parenting issues (though not exclusively) while the other focuses on financial and legal issues (though not exclusively).
6. ***Settlement Conference***. ***Settlement Conferences*** are time-limited forms of intervention as a dispute resolution process and are usually conducted by an acting or retired judge or a volunteer attorney. They are heavily evaluative and directive in nature, and often relegate the participation and interests of the parties to levels secondary to those of their counsel. In some conferences, only the attorneys are invited into the room with the Settlement Conference Master, leaving the attorneys thereafter to "sell" the recommendations to the parties outside. As a mini-legal proceeding, the values applied are primarily those derived from the law or courts, rather than focusing on the unique interests of the parties. See ***Directive Mediation***.
7. ***Mediation-Arbitration (Med-Arb). Mediation-Arbitration*** is a variation on the mediation format wherein the mediator exercises best efforts to resolve all issues by mediation, but if unable to do so, the mediator then moves on to follow an arbitration model. While some mediators are challenged in shifting roles, others are specifically trained on how to do so. Thus the participants are enabled to proceed to a final decision based upon the values *they* have shared, the alternatives *they* have developed in mediation, and *their* ability to speak directly and frankly to the decision-maker. When in the arbitration phase, their communications can be clear and pure, without their comments being stricken (as not permitted by the Rules of Evidence) or having their own credibility attacked by the hostile cross-examination often common to the court's trial system.

The parties retain all the benefits of mediation in combination with the benefits of arbitration (short of litigation) if they cannot agree, such that a decision by a third person is appropriate.

How We Mediate—Steps in Our Mediation or Arbitration Processes

1. ***Getting a Date.*** One of the attorneys for the parties contacts our office by phone (206-465-3500) or email (stephengaddis@comcast.net) to find available dates for the meeting. Once both attorneys (sides) agree upon a specific date, time and location, they notify our office by telephone or email. Our office will then reserve the date by sending a confirming email and copy of the Engagement Letter (Alternative Dispute Resolution (ADR) Agreement).
2. ***Retaining Our Services.*** Attorneys then usually mail the Engagement Agreement to their clients, who sign and return the agreement to their attorney's office, along with the deposit check required for agreed-upon, reserved date. Each attorney may also then sign a copy of the Engagement Agreement and forward it along with the deposit check to our office. Or, they may simply forward the deposit check to the office and bring their signed copy of the ADR Agreement to the meeting. Because it is the attorney who is retaining our services, they may forward a law firm trust check in the deposit amount on behalf of their client.
3. ***The Reserved Date.*** The office only schedules one matter per day, to ensure that each matter can proceed to full completion on the date scheduled. An added benefit of having more time available on the reserved date is that in addition to coming away from the session with a signed, legally enforceable Civil Rule 2A Stipulation, often counsel are able to draft and have their clients sign the final documents necessary to complete the entire matter with the court.
4. ***Special Arrangements.*** Occasionally issues of location, confidentiality of materials, starting time, and personal contact issues need to be addressed in advance. These are easily resolved by email, as one of the prime benefits of using an alternative dispute resolution process is its flexibility and informality.
5. ***Settlement Packets.*** One week (or such lesser time as is mutually agreed upon) before the scheduled session date, each side will exchange a Settlement Packet that includes a settlement letter and copies of the supporting documents appropriate or necessary to achieve a full and final outcome of the case. These may include pleadings, declarations, reports, appraisals, financial statements, receipts, property spreadsheets and proposed final court documents.
6. ***Response and Reply Materials.*** Responsive materials, commonly offered or required in litigated cases, are neither required nor expected in a mediation proceeding, but are sometimes offered for arbitration. Not requiring such materials saves the attorneys' time and the parties' money. It is sufficient that responses to the Mediation Packet are made orally at the mediation session while presenting one's case; and by testimony given during the presentation in an arbitration proceeding. We keep the paperwork, time and expense to a minimum.
7. ***Cancellation of a Reserved Date.*** If a reserved date needs to be cancelled or postponed, there is a modest cancellation fee imposed to cover the mediator or arbitrator's time, as it is difficult to reschedule a cancelled date on short notice. Even if the date were re-filled, administrative costs would still have been incurred in negotiating the date, setting up the file, opening an accounting ledger with deposits and transfers, and responding or initiating email correspondence with the participants.

Conduct of the Mediation Session

1. ***Time Available/Attendance.*** Only one matter is scheduled per day. Mediation sessions usually begin at 9:30am, unless another time is requested. All parties and their attorneys attend. Additional persons may attend only by advance notice or consent of the mediator. Parties should keep the entire day clear, making no other appointments and having a backup plan arranged for daycare of children or other matters that may arise during the day.
2. ***Dress Code.*** There is no dress code -- the parties are welcome to dress comfortably.
3. ***Brief Initial Joint Session/Separate Caucus Rooms.*** The most efficient, effective and economical means of mediation, especially in Parenting Plan cases, is what is denominated as the 'hybrid method.' In this method, the parties meet together initially to review the rules of mediation (Step 1) and to share the relevant and operative facts to negotiate from (Step 2). Thereafter, each party and their attoneys may move to separate conference rooms or offices, in order that the parties and attorneys may speak freely and confidentially with the mediator (Step 3); and then negotiate and write up offers (Step 4). The mediator will take turns going to each of the caucus rooms to talk with the parties, solicit offers and offer suggestions on the framework of a settlement that will be fair and lasting, while the host attorney drafts final papers that will memorialize the settlement with the court (Step 5). While working with the other side, the mediator will often leave a "homework assignment," so that all parties and attorneys are working simultaneously and no time is lost.
4. ***No Record of Proceeding.*** There is no oral or written record made of the session, as to do so would limit the negotiations and seriously jeopardize the privacy of the parties.
5. ***Memorializing the Agreement.*** As a minimum, the agreements reached by the parties will be set forth in a "Civil Rule 2A Stipulation" – referring to the name of the document sanctioned by the Washington State Supreme Court as a full, final, and binding settlement of parties. More often than not, however, counsel and the parties are able to retain the momentum achieved during the session to complete the drafting and signing of all final documents required to complete the legal proceeding with the court.
6. ***Time Outs.*** The parties are expected to fully participate and are welcome to speak out and ask questions at any time. If anyone needs a break for a walk, a cup of coffee or lunch, arrangements are easily made. Persons present can use their cell phones or the Internet as necessary to verify figures, ask questions or handle personal matters.
7. ***Role of the Mediator.*** The mediator will work with each side in narrowing the issues and brainstorming acceptable alternatives for resolving each of them. There are a number of professional techniques and combinations that the mediator may use to assist the participants in bringing solutions forward which are acceptable to all. However, the mediator role does not include the practice of law, so that the mediator will direct you to your own attorney for legal advice and for the drafting of the documents required to complete the action with the court.
8. ***Contact of the Parties.*** While the parties may use separate caucus rooms to meet with their lawyer and the mediator, oftentimes it is efficient and most productive for all persons to meet together briefly at the beginning of the session; or at the conclusion of the meeting to gather for the signing of final documents. However, contact between the parties is optional, with the benefits and concerns discussed in advance separately with each of the parties.

