

Oklahoma Bar Association

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Methods for Resolving Conflicts and Disputes

RESOLVING CONFLICTS AND DISPUTES

What Are Your Options: We are all familiar with the most traditional dispute-resolution process of our civil justice system: litigation and trial with a judge or jury deciding who is right or wrong - where someone wins and someone loses. However, there are many other options available. Negotiation, mediation and arbitration - often called ADR or alternative dispute resolution- are the most well-known.

Whether you are involved in a family or neighborhood dispute or a lawsuit involving thousands of dollars, these processes should be considered. They are often the more appropriate methods of dispute resolution and can result in a fair, just, reasonable answer for both you and the other party. Settlement and compromise have long been favored in the legal system. In fact, most cases that are filed in a court do settle. Only five percent of all cases filed go to trial. ADR procedures are excellent options for you in dealing with controversy, allowing you to reach resolution earlier and with less expense than traditional litigation. In fact, many courts require parties to consider some form of ADR before going to trial.

The following processes describe ways to resolve disputes.

NEGOTIATION

Definition: Negotiation is the most basic means of settling differences. It is back-and-forth communication between the parties of the conflict with the goal of trying to find a solution.

The Process: You may negotiate directly with the other person. You may hire an attorney to negotiate directly with the other side on your behalf. There are no specific procedures to follow - you can determine your own - but it works best if all parties agree to remain calm and not talk at the same time. Depending on your situation, you can negotiate in the board room of a big company, in an office or even in your own living room.

Negotiation allows you to participate directly in decisions that affect you. In the most successful negotiations, the needs of both parties are considered. A negotiated agreement can become a contract and be enforceable.

When and How Negotiation Is Used: Most people negotiate every day. In some circumstances you may want the help of a lawyer to help you negotiate a fair deal. Negotiation is the first method of choice for problem-solving and trying to reach a mutually acceptable agreement. If no agreement is reached, you may pursue any of the other options suggested here. This process can be appropriately used at any stage of the conflict - before a lawsuit is filed, while a lawsuit is in progress, at the conclusion of a trial, even before or after an appeal is filed.

Characteristics of Negotiation:

- Voluntary
- Private and confidential
- Quick and inexpensive
- Informal and unstructured
- Parties control the process, make their own decisions and reach their own agreements (no third party decision maker)
- Negotiated agreements can be enforceable
- Can result in a win-win solution

MEDIATION

Definition: Mediation is a voluntary process in which an impartial person (the mediator) helps with communication and promotes reconciliation between the parties which will allow them to reach a mutually acceptable agreement. Mediation often is the next step if negotiation proves unsuccessful.

The Process: The mediator manages the process and helps facilitate negotiation between the parties. A mediator does not make a decision nor force an agreement. The parties directly participate and are responsible for negotiating their own settlement or agreement.

At the beginning of the mediation session, the mediator will describe the process and the ground rules. The parties or their attorneys have an opportunity to explain their view of the dispute. Mediation helps each side better understand the other's point of view. Sometimes the mediator will meet separately with each side. Separate "caucusing" can help address emotional and factual issues as well as allow time for receiving legal advice from your attorney. Mediations are generally held in the office of the mediator or other agreed location.

Agreements can be creative. You could reach a solution that might not be available from a court of law. For example, if you owe someone money but don't have the cash, rather than be sued and get a judgment against you, settlement options could include trading something you have for something the other wants. If an agreement is reached, it will generally be reduced to writing. Most people uphold a mediated agreement because they were a part of making it. It can become a contract and be enforceable. If there is no agreement, you have not lost any of your rights and you can pursue other options such as arbitration or going to trial.

When and How Mediation Is Used: When you and the other person are unable to negotiate a resolution to your dispute by yourselves, you may seek the assistance of a mediator who will help you and the other party explore ways of resolving your differences. You may choose to go to mediation with or without a lawyer depending upon the type of problem you have. You may always consult with an attorney prior to finalizing an agreement to be sure that you have made fully informed decisions and that all your rights are protected. Sometimes mediators will suggest that you do this. Mediation can be used in most conflicts ranging from disputes between consumers and merchants, landlords and tenants, employers and employees, family members in such areas as divorce, child custody and visitation rights, eldercare and probate as well as simple

or complex business disputes or personal injury matters. Mediation can also be used at any stage of the conflict such as facilitating settlements of a pending lawsuit.

Attorneys and other professionals provide private mediation for a fee. If you have an attorney, you can work together to select a mediator of your choice. You may want a mediator who is knowledgeable about the subject matter of your dispute. You may wish to use a for-fee mediator in the first instance or if Early Settlement mediation has not resulted in a resolution of your dispute. You may also find mediators or mediation services listed in the telephone directory or available on lists provided by some courts or private professional organizations. When selecting a mediator, you should always check their credentials and get references. Mediators qualified under the District Court Mediation Act or certified pursuant to the Dispute Resolution Act meet statutory standards of training and experience.

Who Provides This Service: Public mediation services are available through Early Settlement Regional Centers located statewide. A list of the regional centers can be found online at www.oscn.net/static/adr. This program provides the services of volunteer mediators, trained and certified to mediate in the Administrative Office of the Oklahoma Supreme Court. Mediators in this system are assigned to mediate your dispute by the various program administrators. They are available at minimal or no charge to help you resolve conflicts, often without the assistance of an attorney or the need to go to court. Call 405-556-9300 for the phone number and location of the center nearest you.

You may also find mediation in our state and federal court systems called court-sponsored mediation. Generally you and your attorney may select a private mediator or choose a public service. Fees may apply. Judges are frequently referring cases to settlement procedures such as mediation to help litigants resolve their disputes in less time and with less cost than litigation and trial.

Characteristics of Mediation:

- Promotes communication and cooperation
- Provides a basis for you to resolve disputes on your own
- Voluntary, informal and flexible
- Private and confidential, avoiding public disclosure of personal or business problems
- Can reduce hostility and preserve ongoing relationships
- Allows you to avoid the uncertainty, time, cost and stress of going to trial
- Allows you to make mutually acceptable agreements tailored to meet your needs
- Can result in a win-win solution

ARBITRATION

Definition: Arbitration is the submission of a disputed matter to an impartial person (the arbitrator) for decision.

The Process: Arbitration is typically an out-of-court method for resolving a dispute. The arbitrator controls the process, will listen to both sides and make a decision. Like a trial, only one side will prevail. Unlike a trial, appeal rights are limited.

In a more formal setting, the arbitrator will conduct a hearing where all of the parties present evidence through documents, exhibits and testimony. The parties may agree to, in some instances, establish their own procedure; or an administering organization may provide procedures. There can be either one arbitrator or a panel of three arbitrators. An arbitration hearing is usually held in offices or other meeting rooms.

The result can be binding if all parties have previously agreed to be bound by the decision. In that case, the right to appeal the arbitrator's decision is very limited. An arbitrator's award can be reduced to judgment in a court and thus be enforceable. In nonbinding arbitration, a decision may become final if all parties agree to accept it or it may serve to help you evaluate the case and be a starting point for settlement talks.

How and When Arbitration Is Used: A common use of arbitration is in the area of labor disputes - between fire fighters and the city in wage disputes, for example. You will usually be represented by an attorney in arbitration.

Many contracts have clauses which require that disputes arising out of that contract be arbitrated. You may have seen such a provision when you applied for a credit card or opened a retirement account or other account with a stock broker. You may want to explore using this process if you and the other side agree that the problem needs to have someone make a decision but you do not want the expense of going through the court process. If you agree to arbitrate or sign a contract with an arbitration clause, you should understand that the arbitrator may make the final decision and that you may be waiving your right to a trial in court.

Who Provides This Service: Many attorneys, other professionals or professional associations offer their services as arbitrators. Typically your attorney will select the arbitrator based upon the particular type of the dispute. In complex and highly technical cases, often an arbitrator who is knowledgeable in that field is chosen. Usually fees are charged.

Some courts offer court-sponsored, nonbinding arbitration and have specific procedural rules to follow.

Characteristics of Arbitration:

- Can be used voluntarily
- Private (unless the limited court appeal is made)
- Maybe less formal and structured than going to court, depending on applicable arbitration rules
- Usually quicker and less expensive than going to court, depending on applicable arbitration rules
- Each party will have the opportunity to present evidence and make arguments
- May have a right to choose an arbitrator with specialized expertise

- A decision will be made by the arbitrator which may resolve the dispute and be final
- Arbitrator's award can be enforced in a court
- If nonbinding, you still have the right to a trial

LITIGATION (Going To Court)

Definition: Litigation is the use of the courts and civil justice system to resolve legal controversies. Litigation can be used to compel opposing party to participate in the solution.

The Process: Litigation is begun by filing a lawsuit in a court. Specific rules of procedure, discovery and presentation of evidence must be followed. The attorney for the other side will want to take your deposition to learn more about the facts as you see them and your position in the case. There can be a number of court appearances by you and/or your lawyer. If the parties cannot agree how to settle the case, either the judge or a jury will decide the dispute for you through a trial.

A trial is a formal judicial proceeding allowing full examination and determination of all the issues between the parties with each side presenting its case to either a jury or a judge. The decision is made by applying the facts of the case to the applicable law. That verdict or decision can conclude the litigation process and be enforceable; however, if appropriate, the loser can appeal the decision to a higher court. In some cases, the losing party may have to pay the costs of the lawsuit and may have to pay the other party's attorney fees.

How and When Litigation Is Used: Our American civil justice system is one of the best in the world. Our Constitution gives us the right to a fair trial. If you want your day in court with a judge or jury of your peers deciding the outcome, then the pursuit of litigation and trial of the case is for you.

You may be in a municipal court, state district court or a federal court depending on the type of dispute you have and where your attorney files your case or where you get sued. State court trial judges are elected on a nonpartisan ballot, though vacancies are filled through an appointment process from highly qualified applicants. The district courts also appoint special judges, who handle certain kinds of cases, such as small claims and divorces. These judges are selected by the district judges from qualified applicants. Federal district judges are nominated by the president and confirmed by the U.S. Senate. Federal magistrates are selected by the federal district judges. In all courts, cases are randomly assigned to the various judges. You have no choice concerning which judge will hear your case. Juries are randomly selected from a jury wheel of licensed drivers within each state judicial district and, in the case of federal court juries, from a jury wheel of registered voters and drivers license holders.

If you cannot settle your differences through negotiation, mediation, arbitration or some other means, then you should pursue litigation through the courts with your lawyer.

Characteristics of Litigation:

- Involuntary - a defendant must participate (no choice)

- Formal and structured rules of evidence and procedure
- Each party has the opportunity to present its evidence and argument and cross-examine the other side - there are procedural safeguards
- Public - court proceedings and records are open
- The decision is based on the law
- The decision can be final and binding
- Right of appeal exists
- Losing party may pay costs

OTHER DISPUTE RESOLUTION PROCEDURES AND WHERE YOU MAY FIND THEM:

- If you have a problem with a new car, you may find automobile arbitration through the Better Business Bureau to be a solution for you. The manufacturer of your car may also have a process of resolving disputes.
- If you are involved in agriculture and have a farmer-creditor controversy, the Agricultural Mediation Program may be helpful to you. For more information, visit www.ok.gov/mediation or call 800-248-5465.
- Victim-offender mediation which can result in restitution to the victim is available through the Oklahoma Department of Corrections.
- Other state and federal agencies sometimes offer settlement options in addition to their regular administrative procedures. For example, mediation of workers' compensation claims is now available.
- If you do go to court, in addition to court-sponsored mediation or other ADR programs, you may find more procedures that encourage settlement or can resolve the dispute. Your attorney can tell you about the processes available in the court in which your case is pending.
- Appellate courts, such as our state Supreme Court and the federal Tenth Circuit Court of Appeals, have settlement conference opportunities.
- Don't forget Small Claims Court where a judge can decide your dispute - usually without a lawyer - if your claim is valued under \$7,500. Early Settlement mediation is often available here to offer settlement assistance first so you may not need to go before the judge.
- Managing meetings and reaching consensus within any kind of organization or group can often be achieved through the assistance of a trained facilitator. Facilitators are available through various nonprofit support centers and service leagues or other community organizations.
- School Peer Mediation - Peaceful Resolutions for Oklahoma Schools (PROS), a project of the Oklahoma Bar Association/Law-related Education Department and Early Settlement, is training students to mediate their own disputes.
- Communication and conflict resolution skills classes may be available in your community by contacting the Law-related Education Department at the Oklahoma Bar Association thanks to a partnership with Leadership Oklahoma.
- The OBA Alternative Dispute Resolution Section may be a resource to identify additional options.

SELECTING THE APPROPRIATE METHOD

The method you use to resolve your dispute will depend upon your personal needs and the nature of your particular dispute. You may want to consult with an attorney to help diagnose which process best serves your particular situation.

Considerations:

- Private and confidential or in a public court setting
- Informal setting and a more flexible process or one that is more formal and has specific rules to follow
- Personal control or decision made by a judge or arbitrator
- Time
- Costs
- Maintaining relationships
- Dispute decided on questions of law, resolved with business principles or a solution found through other fair, yet practical, means
- Binding and easily enforceable

There will always be times when a courtroom trial is the best option. Often, however, you are better served by one of the other alternative dispute resolution processes described in this brochure. With a better understanding of the considerations that can help you choose the most appropriate method, your conflicts can be more successfully managed and your disputes more satisfactorily resolved.

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