

Mediation; Alternative Dispute Resolution (ADR); and the Alaska Court System

(December 1999)

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser — in fees, expenses, and waste of time.

— Abraham Lincoln

alaska judicial council

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Acknowledgments

Much of the information in this booklet is taken from publications of the CPR Institute for Dispute Resolution, in particular the JUDGES' DESKBOOK ON COURT ADR. Our thanks to CPR for their excellent material. Our thanks also to the work of Elizabeth Kent at the Hawaii State Judiciary's Center for Alternative Dispute Resolution.

This publication was released by the Alaska Judicial Council at a cost of \$.___ per copy and was printed in Anchorage, Alaska.

Purpose of this Booklet

Attorneys and litigants in Alaska increasingly are using alternative dispute resolution (ADR) to resolve court cases instead of a decision by a judge or jury. Alaska Rule of Court 26(f) requires attorneys to discuss alternative dispute resolution with opposing counsel and to create an ADR plan for most civil cases filed in state court. The ADR plan must address the timing of the ADR process and the method of selecting an ADR provider, or an explanation of why ADR is not appropriate. At pretrial conferences under Civil Rule 16, the assigned judge may wish to discuss the use of alternative dispute resolution procedures with counsel. Finally, Alaska Rule of Professional Responsibility 2.1 encourages attorneys to discuss ADR with their clients. (See side bar: *ADR Issues for Lawyers and Clients to Discuss*).

Attorneys, litigants and judges who are considering alternative dispute resolution may want more information about the various processes, how they work and how to choose among them. This booklet responds to this need by explaining ADR, defining some of the commonly used ADR processes and discussing how to choose an ADR process for a particular case. Part II discusses ADR generally and compares ADR to the traditional litigation process. Part III discusses some of the benefits of ADR. Part IV defines four ADR processes: arbitration, mediation, early neutral evaluation and settlement conferences. It also explains how each process works and what types of cases are most suitable for it. This section emphasizes mediation because of its great flexibility and ease of use. Part IV lists factors to consider when deciding whether to use ADR or the traditional litigation

ADR Issues for Lawyers and Clients to Discuss

- ! What can be gained and lost by choosing ADR;
- ! What type of ADR is best for the case;
- ! Will ADR save time or minimize litigation costs;
- ! Can the ADR process fit the case schedule;
- ! Is a neutral available who has experience in this kind of case;
- ! What will ADR cost;
- ! What does it mean to say that everything discussed at ADR is confidential;
- ! Would the other side agree to ADR.

process. Appendix A lists other sources of information about alternative dispute resolution. Appendix B describes ADR programs currently being offered by the Alaska Court System and explains what types of cases could qualify for those free services.

What is Alternative Dispute Resolution?

Alternative dispute resolution practices and techniques can resolve litigation short of a decision by a judge or jury. There are many kinds of ADR procedures. The Alaska Rules of Court explicitly recognize the ADR processes of arbitration, mediation, early neutral evaluation and settlement conferences. Some ADR processes are *adjudicative*, involving a third-party decision-maker who renders a decision based on adversarial presentations. Some are *consensual*, in which the parties make the decisions. Arbitration is the classic adjudicatory ADR process; mediation and settlement conferences are the primary consensual processes.

Another way to understand different dispute resolution processes is to distinguish between those that are *rights based* and those that are *interest based*. Rights-based processes like litigation and arbitration narrow issues, streamline legal arguments and predict outcomes based on fact and law. Interest-based processes like mediation expand the legal discussion to examine underlying interests, deal with emotions, and seek creative solutions. An ADR process can contain both rights-based and interest-based elements; for example, in settlement conferences judges often predict legal outcome but also may explore underlying interests.

How Litigation Compares to Arbitration and Mediation

Litigation	Arbitration	Mediation
Judge/Jury makes decision	Arbiter makes decision	Parties make decision
Formal process	Less formal process	Less formal
Formal rules of evidence	Rules of evidence relaxed	Rules of evidence do not apply
Formal discovery	Limited discovery	Informal fact-finding
Can be expensive and time consuming	Often quicker & cheaper than litigation	Often quicker and cheaper than litigation

Public record	Hearings are private	Private and confidential
Verdicts final, subject to appeal	Decisions can be binding with limited appeal rights	Parties decide whether to settle

The above information was developed by E. Kent at the Hawaii State Judiciary's Center for Alternative Dispute Resolution

Why Use ADR?

People choose ADR instead of litigation for many reasons. While ADR is not right for every case, for many it can reduce time and litigation cost through earlier settlement. Studies have shown that mediation settled cases 60-80% of the time with relatively high levels of user satisfaction and durable agreements. Studies of arbitration show that participants found the process fair and had the satisfaction of a “day in court” at a lower cost than a decision from a judge or jury.

Even when ADR does not immediately settle the case, it often prompts a settlement later in the dispute. It can make the litigation be more efficient by helping parties narrow issues and identify and prioritize their goals. An ADR process thus can help focus subsequent litigation.

In short, ADR offers choices to litigants and lawyers. ADR is available whenever the traditional litigation process seems inadequate or unsuited for the case, the parties or the circumstances.

Some Commonly Used ADR Processes

Scores of ADR processes exist, although some are more commonly used than others. This section describes four ADR processes that attorneys and litigants in the Alaska Court System are most likely to encounter.

A. Arbitration

Arbitration is a private, adversarial process in which the disputing parties choose a neutral person or panel of neutral persons to hear evidence and legal arguments and to render a decision. The decision can be binding (subject only to limited judicial review) or nonbinding (advisory), depending on the parties’ agreement and the method of case referral. Litigants who choose nonbinding arbitration preserve their right to return to the regular court docket for decision by a judge or jury.

Arbitration is less formal than litigation, often including streamlined procedures and rules of evidence. Arbitration can be attractive in cases involving modest amounts of money when litigants want a decision on the merits and the satisfaction of a “day in court” at a lower cost than a decision from a judge or jury.

In Alaska, parties choose and pay for their own arbitrator. Typically, private attorneys serve as arbitrators, although arbitrators do not have to be lawyers.

B. Mediation

Mediation is a flexible, nonbinding process in which a neutral third party (the mediator) helps people in conflict negotiate a mutually acceptable agreement. Mediators do not make decisions for the parties. Mediators help parties realize and explain their needs, clarify misunderstandings, identify issues, explore creative solutions and negotiate agreement.

Mediation discussions need not be limited to the legal issues in the case. They often include the parties’ underlying needs and interests, thus broadening options for resolution and increasing the likelihood that the resolution of the legal action also will address the parties’ true needs.

Most conflicts can be mediated if the parties are open to the idea of settling. Mediation is thought to be particularly useful when there are many plaintiffs or defendants, many issues in a case or when parties have a continuing business or personal relationship. Mediation has worked well in the following types of cases:

- ! Domestic Relations: divorce, custody, property division, child visitation, and child support (Note: mediation may not be appropriate in certain cases involving domestic violence);
- ! Civil: contracts, landlord/tenant, employer/employee, money demands, personal injury, malpractice, property damage and real estate;
- ! Juvenile: delinquency (victim/offender mediation) and child in need of aid matters;
- ! Probate: guardianships, conservatorships and estate distribution;
- ! Criminal: victim/offender mediation.

Mediation will not work if the other party refuses to mediate or acts in bad faith.

1. How to Get a Case to Mediation

Cases can come to mediation in two ways: parties can agree (stipulate) among themselves to mediate their dispute, or a party can ask the judge to order mediation under Civil Rule 100. The judge can order mediation if the judge believes that mediation might help the parties resolve their case. In

Alaska courts, the parties usually are responsible for picking their own mediator and paying that person, although the Alaska Court System will provide a mediator free of charge in some types of cases (see Appendix B for more information).

2. How to Find and Choose a Mediator:

Normally, the parties should select their own mediator; but if they cannot agree a judge can choose one for them (parties participating in one of the court system's mediation programs may have a mediator assigned to them). Parties who are looking for names of mediators could ask lawyers or friends to recommend someone, or they could look in the phone book under "mediation." The Alaska Court System's web site (www.alaska.net/~akctlib/mediat.htm) contains a directory of people in Alaska who offer mediation services.

Parties should be aware that in Alaska, anyone can act as a mediator. There are no State standards or licensing requirements. The Alaska Court System has not checked to see whether the mediators listed at its web site are competent mediators. It is up to the parties to decide what kind of training and experience they need in a mediator and to ensure that the mediator they select has the necessary skills. To help parties choose a qualified mediator, the Alaska Judicial Council publishes a free guide to selecting a qualified mediator (the guide is posted on the Judicial Council's web site: www.ajc.state.ak.us under "Council Publications and Reports").

3. What Happens in Mediation

How the mediation works depends on the mediator and the parties. Generally, the process has four or five stages. Parties who have voluntarily agreed to try mediation may stop the process at any time and return to the regular court process. Parties who have been ordered by a judge to try mediation can stop anytime after the initial session.

Preparation: Parties should meet with their attorneys to clarify goals. Attorneys may submit a brief written statement of the case to the mediator. Remember that mediation is not like a court hearing. A party should be prepared to think about possible solutions, not convince the mediator that his or her position is "right." In preparing for mediation, each party should carefully consider the issues he wants to discuss, the reasons underlying his position on each issue, what he needs from the other parties to settle the dispute, alternative ways of solving the problem that are acceptable to him and

the other parties, information he wishes to bring to the mediation, other people he may wish to consult before signing an agreement.

Initial Joint Session: The mediator usually begins by describing the process. Each party then has the chance to tell his or her side of the story. The mediator asks questions about the issues and promotes communication.

Separate Sessions: The mediator may meet separately with each party. A separate meeting (*caucus*) allows each party to discuss with the mediator specific concerns or goals that they might not want the other parties to hear.

More Separate and Joint Sessions: The mediator helps the parties identify all possible options for agreement and evaluate alternatives. If the case is complex or parties have many issues, the mediation may require several sessions.

Completing the Process: The mediator will outline the agreement and may help the parties put it in writing. Attorneys usually write the agreement in final form. The agreement may, but need not be, submitted to the court. If no agreement is reached the case continues through the normal litigation process.

Mediations can vary in length from one hour to many hours. Sessions may be scheduled in one day or over a series of days or weeks.

4. Role of the Lawyer in Mediation

Mediation often works better when parties have lawyers to give them legal advice, although lawyers are not required. The lawyer can explain legal rights and responsibilities and help evaluate settlement options. Lawyers need not attend the mediation, as long as the client keeps them informed. If a lawyer does plan to attend the mediation, the other parties and lawyers and the mediator should be notified in advance.

5. Role of the Mediator

The mediator's role can take various forms. Some mediators favor a "facilitative" style, encouraging parties to generate their own settlement options and seldom suggesting settlement terms. At the other end of the spectrum are "evaluative" mediators, who will propose settlement options, assess the merits of claims or defenses, predict the likely outcome in court and try to persuade parties to make concessions. Some mediators can use both facilitative and evaluative techniques, depending on what the parties want and what the situation requires. Before hiring a mediator, parties should ask the mediator about his or her preferred style.

6. Confidentiality of Mediation

Alaska Rule of Court 100 provides that mediation discussions are confidential. Parties might not be candid if they fear that their statements may be used later against them. Parties to mediation and the mediator should not reveal what was said in mediation, and statements made or things that happen during the mediation are not admissible in court. A lawyer should be able to answer any questions about confidentiality.

In addition to the confidentiality promised under the court rule, most mediators also have a written confidentiality agreement for the parties to sign before beginning. The mediator should be able to explain the confidentiality agreement to the parties.

7. Cost

Under Civil Rule 100, the parties share the cost of the mediation, unless the judge orders otherwise. Parties negotiate fees with the mediator they select. While volunteer mediators at community mediation centers often offer their services for free, most mediators charge fees ranging anywhere from \$50-\$200 (or more) per hour. The hourly fee may reflect the mediator's training and experience or the complexity of the case.

C. Settlement Conference

The most common form of ADR used in the Alaska Court System is the settlement conference presided over by a judge. The classic role of the settlement judge is to talk about the merits of the case and to help the parties discuss settlement offers. Some settlement judges also may use mediation techniques in the settlement conference to improve communication among the parties, probe barriers to settlement and help the parties generate resolutions. In the Alaska Court System, either the assigned judge or a different judge can host a settlement conference. Parties may request a settlement conference at any time but must work with the judge's calendar to schedule one.

One advantage of judicial settlement conferences is that the parties do not have to pay the judge to host the conference, although they do have to pay their lawyers. A disadvantage is that judges' schedules are very full and parties often have to wait for the judge to become available.

D. Early Neutral Evaluation

In ENE, a neutral evaluator (typically a private attorney with subject-matter expertise) meets in private with the parties and their lawyers early in the litigation to hear both sides of the case. The evaluator then identifies strengths and weaknesses in each party's case, flags areas of agreement and disputes, and issues a non-binding assessment of the merits of the case. The evaluator also may help the lawyers plan the case and, if requested by the parties, offer settlement assistance. A majority of attorneys interviewed in one federal court ENE program said that ENE helped them develop a more realistic assessment of their case and this change improved the likelihood of earlier settlement.

ENE offers parties an early opportunity to talk to each other directly about the case, to present their positions to their adversaries and to hear the other side's case. It encourages parties and counsel to analyze their situations early in the litigation. This early attention may help resolve the case earlier and with reduced attorney time. A concern about using ENE is that the skill of the evaluator is the most important predictor of whether the case will settle, and it may be difficult to find experienced evaluators.

Although ENE is not commonly used in Alaska, it has generated some interest among Alaska lawyers. Like mediation, ENE is applicable to many types of civil cases, including complex commercial disputes, personal injury and employment cases. Some ENE programs in federal courts specifically target cases involving inexperienced or poorly prepared lawyers, high levels of bad feelings between the parties or complex legal issues. ENE also may be helpful when parties hold widely different views on legal or factual issues in the case.

How to Decide on an ADR Process

The idea behind ADR is that no single method of dispute resolution can provide justice in all of the different disputes that come before the court. Litigants must ask themselves which case resolution method (including traditional court procedures) is best for the case at hand. The following very general discussion might help litigants and attorneys figure out which path is best for a particular case. (For more information, refer to F. Sander and S. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure* (1993)).

A. Consider Goals

First, what are the parties' goals in the litigation and how best can they be achieved? Parties often have a variety of legal and nonlegal reasons for litigation, even when the case involves a demand for money. Mediation often can identify and help satisfy a money demand that is motivated by non-monetary interests. On the other hand, a court decision might be best for a case in which the litigant's goal is to establish legal rules for future conduct or where assigning blame for past conduct, public vindication or delay are a litigant's primary goal. ADR procedures may be better for cases in which litigants want to minimize costs, speed up the resolution, define future conduct, avoid publicity or preserve valuable relationships. Remember that some cases might benefit from a combination of court and ADR processes.

When considering how best to achieve their goals, lawyers and litigants should consider each party's ability to participate effectively in the ADR process. A party who has difficulty expressing his or her needs and interests may not find mediation helpful or may need to have counsel attend the sessions. A party involved in an emotionally draining dispute may not want to wait for a court decision if mediation could be faster. In any type of case, domestic abuse and violence between the parties could affect the safety and fairness of mediation. A domestic violence counselor or women's advocate can help a victim of domestic violence decide whether or not to use mediation.

B. Analyze Barriers to Settlement

Second, if settlement is the goal, what is keeping it from happening? Many things make settlement difficult once litigation is started, including poor communication between parties or their lawyers, parties needing to express strong views or emotions to the other side, disputes about the facts or the law, principles, pressures from litigants' constituencies, linkage to other disputes, multiple parties and what has been called the "jackpot" syndrome. In a case where communication or strong emotions are the problem, mediation often can help. When parties differ on the facts or law, arbitration, ENE or evaluative mediation are indicated. When issues of principle prevent resolution, the traditional court process probably is best, although a mediator may be able to help parties find a creative way around the seemingly conflicting values. When members of a party's group have different interests that prevent resolution of the dispute, a mediator can bring the necessary people into the negotiations. In cases involving multiple parties or links to other disputes, mediation can help the parties arrive at a global resolution. In cases where the plaintiff anticipates a judgment far exceeding its damages and the defendant believes

this is highly unlikely, the parties might benefit from one of the evaluative processes (ENE or arbitration).

C. Consider Cost and Timing

Finally, the parties must consider cost and availability of an ADR provider. While the Alaska Court System offers mediation in some cases free of charge (see Appendix B), parties normally split the cost of the mediator. The court system provides settlement conferences free of charge as well, although parties may have to wait to get on the judge's calendar.

Conclusion

ADR will continue to be popular as litigants become more familiar with it and demand more choices in how to resolve litigation. This booklet attempts to familiarize litigants and lawyers with at least some of the many ADR processes to help them make those choices. But because ADR by its very nature is flexible and adaptable, the field is changing rapidly. The resources section in Appendix A lists sources of more information about ADR.

Appendix A: ADR Resources

Local Organizations:

Alaska Dispute Settlement Association (ADSA): A non-profit professional association of Alaskans working for resolution of conflict in non-judicial settings by providing mediation, arbitration and facilitation services. Membership costs \$40 per year and is open to everyone with an interest in alternative dispute resolution. The ADSA web page is located at www.alaska.net/~adsa. Members are eligible to participate in dialogue on ADSA's free listserv.

The Resolution Center: A non-profit community mediation center offering juvenile victim offender mediation, parent adolescent mediation. Trains community volunteers to be mediators. Call (907) 274-1542 for more information, or visit the website at cdrc@alaska.net.

Alaska Bar Association Alternative Dispute Resolution Section: Membership in this section of the Alaska Bar Association is open to lawyers and non-lawyers with an interest in alternative dispute resolution. Among its many activities, the section holds monthly meetings and presents continuing education programs on dispute resolution topics. Call (907) 272-7469 for more information.

National Organizations:

American Arbitration Association (AAA): Maintains panels of arbitrators and some mediators with wide range of subject matter expertise and supplies complete administrative services. A not-for-profit organization in operation since 1926, AAA has a network of regional offices throughout the United States. Cases processed in Alaska are administered from the AAA office in Seattle. Call 1-800-559-3222 or write to: 1020 One Union Square, 600 University Street, Seattle, WA 98101. Web: www.adr.org/offices/seattle/seattle.html.

American Bar Association Section of Dispute Resolution: Offers books, pamphlets and videos about alternative dispute resolution and mediation; publishes quarterly magazine. Call (202) 662-1680 or write to: 740 15th St. NW, Washington, D.C. 20005. Web: www.abanet.org/dispute/home.html.

Academy of Family Mediators: A mediator membership organization. Practitioner membership entitles the mediator to listing in the Academy's National Referral Roster. To qualify for practitioner member status, the applicant must complete 30 hours of the Academy's integrated family mediation training or 40 hours of integrated divorce mediation training, have at least 250 hours of face-to-face mediation experience in at least 25 family mediation cases; and submit sample memoranda, case reports or other documentation from the required mediation cases. **Call (781) 674-2663 or write to: 5 Militia Drive, Lexington, MA 02421. Web: www.mediators.org.**

Association of Family and Conciliation Courts: An interdisciplinary association of judges, lawyers, mediators and mental health professionals dedicated to the development and improvement of the practices and procedures of court-connected services as a complement to the judicial process. Members must subscribe to the purposes of the Association. **Call (608) 251-4001 or write to: 329 W. Wilson St, Madison, WI 53703. Web: www.afccnet.org.**

CPR Institute for Dispute Resolution: A membership-based nonprofit corporation with a variety of educational and information functions. Offers neutrals for public policy disputes. Also offers many publications. **Call (212) 949-6490 or write to: 366 Madison, New York, NY 10017. Web: www.cpradr.org.**

National Association for Community Mediation: An organization of community mediation programs and volunteer mediators which supports and promotes community-based mediation programs. **Call (202) 667-9700 or write to: 1527 New Hampshire Ave. NW, 3rd Floor, Washington, D.C. 20036. Web: www.nafcm.org/naefcm/.**

San Diego Mediation Center: A non-profit, public service organization which provides mediation and other dispute resolution services and training. It was established in 1982 by the San Diego Law Center, a program of the University of San Diego Law School and the San Diego County Bar Association. The Center, in conjunction with the representatives of the ADR community of San Diego, has developed a performance-based mediator credentialing program. The instrument used to assess performance is designed as a generic evaluation of specific behaviors, measuring both the ability to facilitate a process, and specific skills and techniques. **Call (619) 238-2400 or write to: 625 Broadway, Suite 1221, San Diego, CA 92101.**

The Society of Professionals in Dispute Resolution (SPIDR): A non-profit, professional membership organization promoting the use of alternative dispute resolution throughout the United States and other countries. SPIDR has issued two reports on mediator qualifications. Both draw on the observations of practitioners and consumers, the policy and personal goals of the SPIDR membership, and research attempting to quantify the combination of skills, training, education, experience and other attributes in a good mediator. **Call (202) 667-9700 or write to 1527 New Hampshire Ave. NW, 3rd Floor, Washington, D.C. 20036. Web: www.spidr.org.**

Appendix B: Alaska Court System ADR Programs

The Alaska Court System offers two court-based mediation programs. These programs provide free mediation services using court-selected mediators for certain types of cases.

I. Access and Custody Mediation

The court system offers this program in Anchorage and is developing a similar program for Fairbanks and possibly other locations. It is funded with a renewable federal grant. Parents involved in child custody and visitation disputes can be referred by a judge to a court-selected mediator. Some income restrictions may apply; contact the Anchorage Custody Evaluator at 264-0428 for details.

II. Child in Need of Aid Mediation

The court system will offer this program in Anchorage and will develop similar programs in Fairbanks and possibly other locations. It is funded with a renewable federal grant. Parents and others involved in child in need of aid proceedings can be referred by a judge to mediator selected and trained by the court system. No income restrictions apply.

In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.

Alaska Rule of Professional Conduct 2.1 Official Comment

... the parties shall... [before the Rule 16 scheduling conference] meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution in the case, including whether an alternative dispute resolution procedure is appropriate... and to develop... a proposed alternative dispute resolution plan. The plan shall indicate the parties' views and the proposals concerning... alternative dispute resolution, including its timing, the method of selecting a mediator, early neutral evaluator, or arbitrator, or an explanation of why alternative dispute resolution is inappropriate....

Alaska Civil Rule 26(f)

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