

Your ADR Options

Mediation,
arbitration
and
collaborative law

BY JOAN H. MCWILLIAMS

Historically, couples had little choice in how their marriage was dissolved. They either settled the matter or presented their case to a judge or (believe it or not) a jury. The direct and indirect costs of going to court were staggering, and the emotional scars of a hard-fought court battle made it difficult, if not impossible, for couples to move on with their lives or to cooperatively raise their children. In addition, many couples did not realize what it meant to give a court complete decision-making authority over their future lives.

Although litigation is still an option today, many divorcing couples are choosing to make their own decisions with the help of a trained mediator or present their case to an arbitrator. Mediation and arbitration are types of alternative dispute resolution (ADR) or methods of resolving a dispute that are less intrusive and less expensive than litigation. They allow participants to preserve their dignity, resolve their problems, and, if necessary, design their future

relationship. Mediation and arbitration offer a cooperative and cost-effective way to navigate through the legal system and reach a conclusion designed to meet each participant's needs.

Following are answers to commonly asked questions about mediation and arbitration. For more details, contact your lawyer or a local mediator or arbitrator.

Mediation

1. What is mediation? Mediation is a process in which a trained neutral and impartial third party (the mediator) facilitates negotiations between the participants and helps them reach a settlement that is fair, meets as many of their individual needs as possible, and is in the best interests of their children. A mediator, unlike a judge or arbitrator, has no decision-making authority, but helps the parties identify issues to be resolved, develop options to satisfy each of their interests, and choose the options that work best for both of them. Mediation occurs within the framework of the

law, but it allows the parties to create solutions that go beyond legal remedies. The issues that can be discussed are limitless and typically include decision-making for the children, parenting time or visitation, division of marital assets and debts, maintenance, and child support.

2. How is mediation initiated? In most states, the court may order mediation. Court-ordered mediation is helpful when couples are unaware that mediation is an option or when one person is reluctant to participate. Court-ordered mediation may not work if either person refuses to negotiate in good faith. Mediation can be terminated in such cases, and the invested time and expense will be minimal. Although court-ordered mediation is mandatory, it does not preclude a hearing before a judge if all matters cannot be resolved.

Couples also may agree to mediate a dispute or be compelled to mediate by a provision in their separation agreement or prenuptial or postnuptial agreement. Mediation may be used in



collaborative divorces in which the lawyers agree to work cooperatively but need the help of a neutral third party to facilitate negotiations. (For more information on collaborative divorce, see Pollak, page 28.)

3. How is the mediator selected? Generally, the couple and/or their lawyers select a mediator or the judge appoints one. The mediator may be a lawyer or a mental-health professional trained in ADR techniques. Many couples use pastoral mediation services at their house of worship. Participants meet informally with a priest, minister, rabbi, or other religious leader or use the more formally structured services of the Christian Conciliation Services, for example, or, in the Jewish faith, the Bet Din. State judicial departments also offer mediation services.

In some cases, participants choose a team of mediators that brings different skills to the process. For example, a lawyer and a mental-health professional working together can address therapeutic and legal problems. A Christian conciliator, a minister, or a rabbi working with a lawyer can focus on religious and legal problems. A male-female team might help address gender differences.

Regardless of background, the mediator must be a person whom the participants trust and who knows the law and can facilitate communication, can create a safe environment, and can translate the parties' discussions into an agreement that is understandable and legally sufficient.

4. How are mediation sessions structured? Mediation sessions are structured to meet the participants' needs. For example, some people work more productively in several shorter sessions, whereas others may prefer one full-day session. Lawyers may be present, depending on the issues of the case, the parties' negotiating skills or needs, and the participants' preferences. The mediator might meet with the parties in one room or separate the parties and shuttle back and forth with offers and counteroffers. Financial or other experts may be present at the participants' request.

The timing of mediation sessions is flexible. Some sessions begin immediately to meet court deadlines. Others are delayed to accommodate discovery, property appraisals, or business valuations. To have a successful conclusion, the participants must control the structure and timing of mediation.

5. How do we know what to discuss? With the help of the mediator, participants will set the mediation agenda. At the first meeting, the mediator often makes a brief opening statement and explains the process. The participants may establish ground rules, and the mediator will help identify issues to be discussed, finalize the agenda, facilitate discussions, and expedite a settlement.

6. Do mediators use different styles of mediation? A good mediator will be skilled in using different forms or styles of mediation to help the parties reach a settlement. For example, when the parties identify an issue that

will require them to work together in the future, the mediator may use an *interest-based style* of mediation in which the parties identify their interests as opposed to their positions. A "position" is a desired result, and an "interest" is the underlying reason a party wants the result. Using this form of mediation, the parties often reach creative solutions that would be unavailable in court.

When the case presents issues in which one party's gain results in the other party's loss, the mediator may use a *settlement-conference style*. Using reality-testing techniques, the mediator helps the parties review the facts, analyze the issues, and project the likely outcome if the case were presented to a judge. With this style, the parties are often in separate rooms, and the mediator shuttles between them.

In *evaluative mediation*, the parties ask the mediator to analyze and assess the strengths and weaknesses of their legal positions. Usually, the lawyers are present during mediations and they ask the mediator for a written evaluation.

The *therapeutic model* of mediation combines counseling or therapy with traditional mediation. A mental-health professional works with the parties on therapeutic issues, while the mediator works with them on substantive issues.

7. Is mediation confidential? In most jurisdictions, mediation is confidential. A mediator is not allowed to disclose communications without the consent of the parties. However, communications that are otherwise discoverable or that the law requires to be reported are generally not confidential. Although confidentiality in mediation is not comparable to privileged communications between a client and a lawyer, therapist, or doctor, it does provide a protected environment in which participants may share factual information and emotional roadblocks as well as explore creative options for settlement.

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1600 S. Main Street • Racine, WI 53403
262-619-1334 • Fax: 262-619-1335
Eiseld@aol.com

DESIGN/PRODUCTION

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8. Can the mediator give legal advice? No. Even if the mediator is a lawyer, he or she does not represent either party and will not give legal advice. Although the mediator may provide legal information, mediation is not a substitute for independent legal advice regarding rights and responsibilities. Each person is encouraged to obtain legal advice throughout the process and have an attorney review the final agreement (memorandum of understanding) before signing it.

9. What is the attorney's role in mediation? Although participants are not required to have attorneys during mediation, many find consulting with a lawyer helpful. The attorney will help the client review the facts of the case, explain applicable law, and help create options for settlement. Clients may have their attorneys present during mediation. The attorneys will advise clients about settlement options and review the final memorandum of understanding before the client signs it.

10. What if some issues are not settled? Sometimes, couples are not able to settle all issues. For example, they might determine how to make major decisions regarding the children (legal custody or decision-making) and how to share visitation or parenting time, but they cannot divide marital assets and debts or agree on maintenance. In such cases, they may submit the agreed-upon issues to the court for approval as partial permanent orders and ask the judge or an arbitrator to make a final, binding decision for any remaining issues. Each party must decide how to handle unresolved issues, but agreeing to separate these will reduce the amount of time in court or arbitration.

11. How are tentative agreements recorded? Generally, at the end of each mediation session, the mediator will draft a memorandum of understanding, which reflects the partici-

pants' tentative agreements. This document will be sent to each party and the attorneys for review, correction, and additions. Until the memorandum is signed, neither participant is bound by it. At the end of mediation, both parties will receive the completed memorandum reflecting their agreement. They will execute it and submit it to the court to become a court order.

12. Can mediation be used in a collaborative divorce? Yes. In a collaborative divorce, the participants hire attorneys who are committed to resolving issues through informal methods, such as the voluntary exchange of documents, negotiation, and four-way conferences. The goal of a collaborative divorce is to settle the case without going to court. If negotiations fail, a mediator may facilitate further discussions among the parties and their attorneys.

13. What are the advantages and disadvantages of mediation? Mediation has many advantages. It is private, confidential, and less expensive and less time-consuming than litigation. Although it is not therapy, it allows participants to separate emotional from substantive issues and, ideally, to resolve both. This can be empowering. By focusing on the future rather than the past, participants can design their postdivorce relationship and reach a positive result that is appreciably better than a court could order because the participants make all decisions themselves.

There are, however, risks. For example, mediation is based on full and fair disclosure. This works in many cases but will not work if one participant withholds information or undervalues assets. A competent attorney can remedy such a situation by conducting thorough discovery and performing necessary due diligence.

Mediation may not be appropriate for the mentally or emotionally incapacitated or anyone unable to nego-

tiate due to substance abuse, a power imbalance, or domestic violence. Again, a good lawyer can represent such a client and attend mediation sessions to protect the client's rights.

Finally, mediation will not always result in settlement. When this happens, the parties may terminate mediation and select another form of dispute resolution.

14. Is mediation really worth trying? Yes. Mediation allows the parties to retain decision-making. If the process does not work, the participants may proceed to litigation or arbitration. When it is successful, mediation provides an eloquent way for participants to solve problems, focus on the best interests of their children, and design their future interaction. Ideally, each party will be heard, and together they will arrive at a settlement that meets their individual needs and the needs of their particular situation. Mediation allows the parties to step away from a difficult situation with grace and dignity.

Arbitration

1. What is arbitration? Arbitration is a process in which one or more neutral third parties, the arbitrator(s), are selected by the participants to hear testimony, take evidence, and issue a decision or award, which may or may not be binding, depending on the authority granted to the arbitrator in the arbitration agreement. The arbitrator may be asked to divide marital assets and debts and determine maintenance. In some jurisdictions, arbitrators decide child-related issues, including decision-making about children or legal custody, parenting time or visitation, and child support. The arbitrators may decide other issues at the participants' direction.

2. How is arbitration initiated? Although arbitration may be court-ordered, in most cases the parties agree to arbitrate a dispute or the option has been included in a separa-

tion agreement or a pre- or postnuptial agreement. In most jurisdictions, an agreement to arbitrate will be enforced unless grounds exist for revocation of the contract.

As a general rule, the parties, with the help of their attorneys, will identify the issues to be arbitrated. These might include all issues in dispute or only those left unresolved after mediation. The arbitration agreement should identify issues to be decided, grant decision-making authority to the arbitrator, and state whether the award will be binding. If issues are not carefully spelled out in the agreement, one party may later argue that the arbitrator exceeded his or her authority.

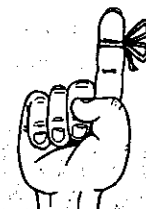
3. Who selects the arbitrator? The participants and/or their attorneys select the arbitrator. The choice will depend on the issues to be decided. For example, the conflict may require an expert in a particular area of the law or a mental-health professional adept at dealing with child-related issues. Some participants may prefer to use religious panels, such as the Bet Din or Christian Conciliation Services.

4. How is arbitration structured? The arbitration hearing is much like a court hearing, although less formal. Generally, each party or lawyer presents an opening statement. The petitioner (person initiating the arbitration) presents his or her case, and the respondent (the other party) conducts cross-examination. The respondent then presents his or her case, which also is subject to cross-examination. Then the participants or their lawyers make closing arguments.

5. Is arbitration confidential? No. Unlike mediation, arbitration is not confidential. However, the parties may provide for confidentiality in their agreement and may limit the form and content of the arbitrator's decision. Although the arbitration

hearing may be closed to third parties, the proceeding often is recorded, and a transcript of the hearing may be submitted to the court. The arbitrator's decision will be submitted to the court and, if approved, will become a court order.

6. What is the attorney's role? The attorney assists in selecting the arbitrator and helps formulate issues to be presented in arbitration. He or she drafts the agreement to arbitrate. The attorney works with the client to gather facts, review applicable law, complete discovery, and submit documents to the arbitrator. During



REMEMBER

Mediation Can-Do's

- Emphasize self-determination.
- Produce voluntary agreements by the parties.
- Contain rather than inflame the conflict.
- Focus on the needs of children.
- Generally cost less than litigation.
- Foster a cooperative relationship between parents.
- Resolve disputes more quickly than litigation.
- Produce more "personalized" agreements.
- Generally result in parents having more contact with their children.
- Result in higher rates of parenting-plan and child-support compliance.

arbitration, the attorneys question and cross-examine the participants and present opening and closing arguments. The attorney also will prepare postarbitration motions to vacate or change the award or the arbitrator's decision.

7. How does the arbitrator communicate the decision? The arbitrator issues a written decision or award. Unless the participants have agreed otherwise, the award will be binding and will be submitted to become a court order. Either party may request or the court may order that the award be vacated, modified, or corrected if it fails to meet certain statutory criteria.

8. What are the advantages and disadvantages of arbitration? Arbitration has many advantages. It is private, easily scheduled, and not likely to be continued. The parties may select an arbitrator(s) who is well suited by training and experience to their particular case, and the process is efficient and more relaxed than a court hearing. Unless the parties agree that the award will be nonbinding, arbitration results in a final decision with limited rights of review.

On the downside, arbitration should be approached cautiously because your right to have a court review the decision is limited. In some cases, finality is less important than a right to appeal the decision. Likewise, unless prearbitration procedures are limited by the parties, preparing for arbitration can be as time consuming and expensive as preparing for trial. The right of discovery also may be limited, strict rules of evidence may not apply, and the weight of evidence may be different from that of a court hearing. Finally, the parties will have to pay the arbitrator, whereas they would not pay a judge in litigation.

9. Is arbitration worth trying? Arbitration offers great advantages if appropriately used. The parties must

decide if the advantages of arbitration outweigh the disadvantages.

Conclusion

Although parties may not choose to be divorced, they may choose the method by which they obtain their divorce. Alternative methods of dispute resolution can save money and time, reduce stress, and create lasting solutions that

benefit both parties and their children. ADR makes good sense. ■

Joan H. McWilliams is a lawyer-mediator in Denver, Colorado, and the author of *Creating Parenting Plans That Work* (Bradford 1998). Portions of this article were adapted from the chapters she wrote in the *Colorado Family Law and Practice* and are printed with the permission of West Group.

Glossary of ADR Terms

Arbitration: is a form of alternative dispute resolution in which the parties hire a neutral third party (or parties) to hear testimony, take evidence, and issue a decision or award.

Collaborative law: a form of alternative dispute resolution in which each party hires separate legal counsel who reject litigation as an option and are trained and committed to negotiating a settlement agreement.

Consulting counsel: is a lawyer hired by a party about to begin mediation. The lawyer's role is to answer questions, address concerns, and provide the party with a solid understanding of the legal foundations.

Mediation: is a form of alternative dispute resolution in which the parties hire a trained, neutral, and impartial mediator to help them negotiate a mediation agreement.

Mediation agreement: is an agreement reached by the parties that forms the basis of a settlement agreement and, when accepted by the court, becomes a court order.

Legal advice: may only be provided by a lawyer. It is the translation of information and the law into a recommended course of action.

Legal information: may be provided by anyone who can read the law and report what it says.

Prenuptial agreement: (also called antenuptial agreement)—is a written agreement signed by both parties before a marriage to provide for advance decision-making for future contingencies and events. These agreements are generally entered into to protect the property or inheritance rights of one party or to protect one party from the liability of the other party's debts.

Review counsel: is a lawyer hired by a mediation participant to advise the client about settlement options and review the final memorandum of understanding before the client signs it.

Settlement agreement: is an agreement that is reached by the parties to resolve financial and custody issues in dispute. ■