

CONCILIATION

Description

Conciliation is the process in which a third party brings the disputing parties together so that they can begin to discuss the issues. It involves the adjustment and settlement of a dispute in a friendly, unantagonistic manner.

Conciliation is used in the courts before trial with a view toward avoiding trial, in labor disputes before arbitration and in public agencies to resolve contested administrative matters.

Advantages of Conciliation

- It is relatively inexpensive (typically provided free of charge).
- The proceedings are confidential.
- Conciliation may reduce emotional barriers to communication.
- The parties control the process and decide the outcome.
- Reduces judicial caseload burden so that judicial resources can be reallocated elsewhere.

Disadvantages of Conciliation

- The results are not binding on the parties.
- The success of conciliation depends to a large extent on the skills of the conciliator.
- Success of conciliation requires that both parties have a good faith interest in reaching agreement.

Suitability Factors

Used for all case types.

Conciliation may be particularly appropriate when emotions are running high or when ongoing relationships are involved and a major barrier to resolution is the parties' inability or unwillingness to communicate.

Conciliation may be inappropriate when one party has a clear legal entitlement or where the parties are of unequal bargaining power or sophistication.

Distinguished From Mediation

The term "conciliation" is frequently used interchangeably with "mediation." However, conciliation generally refers to a process less structured than mediation.

A conciliation session takes place at the court and is typically scheduled for an hour. There are usually no additional conciliation sessions, although the parties may be offered that as an

option. Mediation sessions generally take place outside the court and are scheduled for 2-4 hours. It often takes several sessions for a case to settle through mediation.

In some forms of conciliation, a conciliator does not take active part in the process or settlement discussions, while a mediator may actively promote a mutually acceptable settlement. The conciliator's primary role is to reduce the parties' inflammatory rhetoric and tension, open channels of communication, and arrange for formal negotiations.

After the initial joint session, mediators typically meet privately with each party to explore the party's underlying interests and concerns, both legal and nonlegal, and to help them generate and weigh options, and to package settlement proposals. When conciliators assist with settlement discussions, they do not always meet privately with parties.

In another form of conciliation, unlike a mediator, a conciliator is called upon to make a nonbinding recommendation or finding that often concerns the factual or legal issues in dispute, as well as what the conciliator considers the appropriate resolution of the dispute to be. The finding or recommendation is made to the parties jointly by the conciliator. In contrast a mediator's role is to facilitate a resolution of the conflict by the parties, not to suggest solutions.

Mediators are typically trained in communication, negotiation, conflict management theory and techniques. Conciliators are typically experienced trial lawyers, trained in the law, knowledgeable about court processes, and experienced at negotiations.

Client participation/attendance of principals with settlement authority is standard for mediation. Often lawyers appear for conciliation sessions without their clients.

Mediation is suitable to all civil cases. It is especially useful for case in which the parties have an on-going relationship, and complex cases involving multiple parties and interests.

Distinguished From Case Evaluation (and Early Neutral Evaluation)

Conciliators' opinions are typically not presented in writing, whereas in case evaluation and early neutral evaluation (ENE), the parties are provided with a written assessment. The evaluation is of the relative strengths and weaknesses of their positions, the likelihood of liability (noting the central reasons) and the range of damages/judgment value of the case (noting the major elements and calculations).

While a goal of case evaluation or ENE is to help the parties eventually settle their case, evaluators do not typically assist in settlement negotiations during the evaluation process.

Conciliation typically takes place at the pretrial stage whereas early neutral evaluation is held early in the case, sometimes at the time of filing.

ENE focuses on in-depth case planning, such as scheduling motions and/or discovery to put the case in a position for rapid settlement or disposition. The case planning provided by conciliators focuses on preparation for trial.

Evaluators must have subject matter expertise. While it is preferable for conciliators as well, that is not always possible. Conciliators are typically assigned to handle a list of diverse cases

scheduled for a pretrial conference by the court on a particular day as opposed to specific cases within their areas of expertise.

In case evaluation and ENE, unless settled, the case returns to the assigned judge, with no information from the session relayed to the judge or included in the case file. In conciliation, a report on the status of the case for trial, including an estimate of trial time, and sometimes stipulations, lists of witnesses and exhibits is prepared by the conciliator for the judge.

CE and ENE are widely applicable to civil cases of varying types and complexity. ENE is particularly appropriate for cases where the parties differ substantially on legal or factual issues. It can also be appropriate in complex cases where subject matter expertise may be helpful in narrowing issues or simplifying them for trial.

Distinguished From Arbitration

Arbitration is an adjudicatory dispute resolution process in which one or more arbitrators issue a judgment on the merits after an expedited, adversarial hearing. Conciliation typically precedes arbitration as process option.

Typically arbitrators' awards are binding, although the process can also be used to provide a non-binding opinion. When binding, arbitrator decisions are only subject to appeal in very limited circumstances. A conciliator's opinion is non-binding.

Conciliation is typically a free service mandated and scheduled by the court. Arbitration is often written into commercial contracts as the chosen method of dispute resolution. It can therefore be prescribed by the parties or entered into voluntarily. It is usually a fee-for-service process and is scheduled by the arbitrator outside the court.

For legal disputes, arbitration addresses only the disputed legal issues and applies legal standards, whereas, a conciliation process can produce a mutually agreed upon resolution that goes beyond the legal dispute.

An arbitration often involves witness testimony and the presentation of other evidence, even though the rules of evidence are not strictly applied. Conciliation is informal and is typically based on presentations by counsel.