CHAPTER 3 - CONCILIATION PROCESS

GLOSSARY OF ADR PROCESSES[1]

"Arbitration" means a process in which a neutral renders a binding or non-binding decision after hearing arguments and reviewing evidence.

"Arb/med" means a process in which an arbitrator/mediator conducts a standard arbitration and makes a written award, but keeps it confidential from the parties. Immediately thereafter, the parties may choose to mediate a settlement. If no settlement is reached, the award is issued and becomes binding and enforceable pursuant to G.L. c. 251.

"Case evaluation" means a process in which the parties present a summary of their cases to an experienced neutral who points out the strength and weakness of each side's case and renders a non-binding written opinion of the settlement value of the case or a non-binding prediction of the likely outcome if the case is adjudicated.

"Conciliation" means a process in which a neutral assists parties to settle a case by clarifying the issues and assessing the strengths and weaknesses of each side of the case, and, if the case is not settled, explores the steps which remain to prepare the case for trial.

"Early intervention" means a compulsory, judicially supervised event, early in the life of a case, with multiple objectives relating to both scheduling of litigation and selection of dispute resolution services.

"Early neutral evaluation" means case evaluation which occurs early in the life of a dispute.

"Mediation" means a process in which a neutral facilitates discussion and negotiation among the parties to a dispute in order to achieve a voluntary resolution of a dispute between two or more parties.

"Med/arb" means a process combining mediation and arbitration in which the parties agree in advance that, if the dispute is not resolved through mediation, they will proceed to arbitration with or without the same neutral serving as arbitrator.

"Mini-trial" means a two-step process to facilitate settlement in which (a) the parties; attorneys present a summary of the evidence and arguments they expect to offer at trial to a neutral in the presence of individuals with decision-making authority for each party, and (b) the individuals with decision-making authority meet with or without the neutral to discuss settlement of the case.

"Screening" means an orientation session in which parties to a case and/or their attorneys receive information about dispute resolution services. The case is reviewed to determine whether referral to a dispute resolution service is appropriate, and, if so, to which one. In a screening, there may also be discussion to narrow the issues in the case, to set discovery parameters, or to address other case management issues.

"Summary jury trial" means a non-binding determination administered by the court in which (a) the parties' attorneys present a summary of the evidence and arguments they expect to offer at trial to a six-person jury chosen from the court's jury pool, (b) the jury deliberates and returns a non-binding decision on the issues in dispute, (c) the attorneys may discuss with the jurors their reaction to the evidence and reasons for the verdict, and (d) the presiding neutral may be available to conduct a mediation with the parties.

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[1] Rule 2. Definitions, contained in Supreme Judicial Court Rule 1:18 Uniform Rules on Dispute Resolution, June 1999.

Conciliation Process Issues

- **Managing the Interactions of the Parties**

  How do you assist parties who are having difficulty talking to each other but would benefit from direct negotiations?

  Work with the parties in a joint session and act as the moderator and referee of the process, intervening as needed to discourage unproductive tactics.

  What if the parties are too hostile to talk directly even with your assistance?

  Adjourn the joint session and move into private caucuses, transmitting information between the parties to achieve productive communications.

- **Identifying Underlying Issues**

  How can you help the parties to surface issues besides legal disagreements that are keeping them apart?

  Probe for psychological obstacles (unconscious feelings, misunderstandings, miscommunication of negotiating messages) and missed opportunities for gains such as good past relationship between the parties. Ask explicitly whether such an issue exists. Approach these issues first in private caucus. Consider sounding out lawyers away from their clients. Solicit ideas for addressing problems and exploiting opportunities. Rely on the privacy of caucuses. Consider using "brainstorming" techniques.

  How can you help parties who are having difficulty letting go of an emotional issue or bad feeling toward the other party?

  Speak with the parties privately and offer them the opportunity to say something directly to each other that will help work through the emotional problem (e.g., by giving an acknowledgement or apology).

- **Altering Party Expectations**

  What if the parties have unrealistic views / overly optimistic perceptions about the merits of their cases, which are making it harder to reach settlement?

  What if the parties are bluffing about the weaknesses of their case in order to bolster their bargaining positions?

  Reality Test: question the litigants about key issues; draw out and dramatize the monetary and non-monetary costs of continuing to litigate; lead the disputants

The information in this handout is drawn from: Dwight Golann, Mediating Legal Disputes, Aspen Law & Business, Aspen Publishers, Inc., United States, 1996.

through a systematic analysis of the strengths and weaknesses of their case; offer a prediction of the likely outcome in adjudication.

There is a tension inherent in reality testing between being pointed enough to force the players to confront the problems with their legal options and not pushing them into stubbornness or hostility. Thus, conciliators should begin with open-ended questions, gradually focusing more specifically on weak points and making confrontational comments only if necessary; ask merits questions in private and withhold personal opinions about the merits until conciliator has established a good relationship with the participants and is convinced that evaluation will be necessary to break an impasse.

What if one or more of parties remains wedded to an unrealistic view of the merits or needs help in justifying settlement to a superior?

Refer to case evaluation or nonbonding arbitration.

- **Presenting an Evaluation of the Case on the Merits**

What if presenting your evaluation to the parties in a joint session is not going to be received well by one of the parties, who will find it hard to maintain an open mind or show receptivity toward unwelcome news in the presence of an adversary?

Deliver the evaluation to the party's separately in caucus. But be careful because it may be important to maintaining the conciliator's neutrality for that he/she deliver the same evaluation to everyone in the same way at the same time.

- **Facilitating Negotiations and Breaking Impasse**

How can you assist parties who have become locked into their positions and are having difficulty extricating themselves?

What to do when the parties' negotiations have deteriorated and the parties feel that they are being pressured to make more than their fair share of compromises?

Ask for movement to restart the process, then coach the negotiators about later steps. Explain opponents' perspectives; package concessions; reduce suspicion and frustration by verifying that the other side is making an effort and is felling pain too; encourage the players to think about new options; move parties from positional bargaining to principled or interest-based negotiation. Help parties base their positions on objective principles and facts, explaining the reasons for each offer or demand made. Do not limit inquiry to legal issues and remedies. Seek to identify and explore both sides' underlying needs and interests, identify and address emotional issues and personal problems that are impeding agreement; willing to discuss matters irrelevant to the dispute and to involve

clients actively in the negotiations; look for settlement packages that will advance their own interests with the least possible harm to the other side or will satisfy both sides' goals simultaneously; find resolution that is best possible fit between the parties' needs.

- **Getting Closure on Settlement**

  What can conciliators do to help parties close the final settlement gap?

  Is it appropriate for conciliators to propose a settlement package?

  First strongly push the parties to develop a final offer themselves. Offer a package designed to be acceptable to all parties, given the history of the bargaining and their current attitudes toward settlement; ask one side to agree on the condition that the other does so as well. Alternatively, label the package a "conciliator's proposal" and present it to both parties simultaneously. Offer the package on a "What If?" basis, with disclosure of each disputant's consent contingent on the other side's acceptance of the terms.

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Conciliation Process Overview

Below are elements of the conciliation process. These are not always separate stages and they may blend together. Whether the conciliation process incorporates case assessment, settlement discussions and/or trial preparation may vary among programs and depend on the goals established by the court for its particular program.

I. Introduction

Steps:

1. Introduce yourself and identify parties present
2. Explain the purpose of the conciliation session
2. Explain your role as conciliator
3. If applicable, explain that a conciliation report will be filed with the court and/or program
5. Explain how confidentiality of settlement explorations will be preserved
6. Determine whether the parties have settlement authority

Goals:

* To convey information/set expectations
* To establish control of the session and set ground rules
* To build trust and establish neutrality
* To set tone for putting the parties at ease

II. Party Presentations

Steps:

1. Ask each party to make a brief presentation about the facts and issues in the case
2. Ask questions to clarify and understand facts and reasons for positions taken
3. Identify areas of agreement and disagreement
4. Ask about the procedural status of the case
5. Ask the parties what outcome they would like to see from the case conference
6. Summarize and reframe what you have heard

Goals:

* To learn each party's view of the case
* To clarify issues in dispute
* To identify underlying issues that are driving the dispute
* To determine initial ideas for resolution

III. Case Assessment

Steps:

1. Assess the strengths and weaknesses of the parties' arguments and evidence
2. Offer your opinion of the facts and legal issues in dispute
3. Explore possible scenarios if the case were to be tried
4. Offer your prediction of trial outcome

Goals:

* To offer the parties to re-evaluate their own case and the other party's
* To help the parties realistically assess the risks of trial
* To help the parties understand the value of their best alternative to a negotiated agreement (BATNA)

IV. Exploration of Settlement

Steps:

1. Ask about the status of any settlement negotiations to date
2. Identify areas of agreement/mutual concern
3. Help the parties to understand what is in their best interests
4. Help the parties create and explore options for resolution
5. Discuss ADR options and suitability to their case (refer to ADR/give the parties information about ADR resources)

Goals:

* To offer the parties an opportunity to focus on settlement and develop settlement options that meet their mutual needs and interests
* To help the parties to evaluate any settlement proposals against their BATNA (best alternative to a negotiated agreement)
* To educate the parties as to available ADR options

IV. Preparation for Trial

Steps:

1. Narrow the issues for trial
2. Review status of discovery and make a plan for its completion
3. Address any outstanding motions and/or procedural matters
4. Identify witnesses and exhibits for trial
5. Develop stipulations for trial
6. Identify any evidentiary questions for the judge
7. Discuss next steps and timing for a trial date

Goals:

* To expedite preparation of the case for trial
* To save judicial time and resources
* To narrow the issues that need to be resolved by the judge

V. Conclusion

Steps:

1. If the case settles, explain that the parties can seek a 30-day nisi order from the Clerk's Office
2. Determine whether the parties want to file a stipulation of dismissal or an agreement for judgment with the court
3. If the parties agree and it would be helpful, schedule another conciliation session for a later date

4. If the case does not settle, direct the parties to schedule a trial date with Clerk's Office (even if they are not ready)
5. Encourage the parties to work together to try to settle
6. If applicable, fill out the conciliation report form with the parties
7. Have the parties complete the session evaluation form
8. Direct the parties to report back to the Clerk's Office to get trial date, report settlement or confirm new conciliation date

Goals:

* To close the conciliation with the case in a better posture to proceed to trial or resolution than before the session
* To focus the parties on next steps
* To obtain the parties input on the conciliation process
* To report back to the court on the status of the case

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

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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 pary'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.

Meditation 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

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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.

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CONCILIATION INTRODUCTION

OPENING REMARKS

Introduce your self, and introduce all present.

Explain the purpose of conciliation: assess strengths/weaknesses of case, explore settlement, if no resolution, prepare/assist parties in getting the case ready for trial.

Explain the Conciliation Report: report the results (settled/not settled), case referred to other ADR processes, conciliation rescheduled, etc... See sample conciliation report.

Explain the process: conciliation is a confidential, voluntary process which brings parties together in order to discuss the issues of the case and come to a mutually acceptable agreement.

EXPLAIN THE DIFFERENT CONCILIATION ROLES:

Process convener - forum for communication
Case conferencer - engage parties about status of case and legal issues involved
Evaluator - discuss strengths and weaknesses of the case in private sessions with each party
Facilitator/Negotiator - manage expectations, explore settlement
Screener - offer referral to other ADR options like mediation or case evaluation, if appropriate
Attorney - expedite trial preparation
Case manager - move case to disposition

EXPLAIN HOW CONCILIATION WORKS:

1st, we talk to everyone together
2nd, we meet with you one at a time
3rd, we come together to formulate an agreement or plan for trial

EXPLAIN ABOUT CONFIDENTIALITY:

Will not tell anyone what we hear in conciliation
Will not repeat any information told to us in a private session, unless you say it's okay
Conciliator will, however, file a conciliation report with the court, if the case does not settle

EXPLAIN THE GROUND RULES:

Please listen, do not interrupt, speak respectfully, and keep an open mind

EXPLAIN THE ADVANTAGES OF CONCILIATION:

The parties can focus on the resolution of their dispute
The parties control the outcome of conciliation
Conciliation is a voluntary, confidential process
Conciliation allows both parties to fully explain their case
Conciliation is a successful way of resolving disputes without on going litigation
Conciliation agreements last because they are based on the best interests of the parties
If the conciliation is unsuccessful, the parties may continue to litigate

ADR Spectrum

Arbitration: private adjudication

Litigation: public adjudication

Master: quasi-judicial extension of the court

"Non-Binding" Arbitration: private determination of rights that is (arguably) advisory (no Award)

Med/Arb: hybrid process attempting to resolve dispute via facilitated communication (mediation) but if unsuccessful, becomes private adjudication (arbitration)

Summary Jury Trial: mock trial where the jury issues a verdict and the parties resume settlement efforts after hearing how the jury would decide

Mini-Trial: panel of "executives" (made up of one neutral and one representing each party) issue an opinion on facts and law based on highly summarized presentations of the case

Case Evaluation: neutral non-binding evaluation of merits and values of case

CONCILIATION: neutral facilitated negotiation guiding parties towards resolution (this is an important distinction)

Ombuds: neutral investigation of facts and mediation

Collaborative Law: attorney-assisted negotiations (4-way meetings)

Mediation: neutral facilitated negotiation

Facilitation: helping groups identify common objectives and achieve goals

Negotiation: "A process to get what you want." "A means to an end." (Fisher and Ury)

TEN STEPS TO SETTLEMENT

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1. Chart of Marital Assets/Debts
2. Who wants what, when
3. Alimony (Amount, duration, waiver)
4. Child Support (Guidelines, extracurriculars and college)
5. Other Financial Issues and ability to pay
6. Discounts
7. Give Backs/Take Aways
8. Discovering the "Hidden Agenda"
9. Creative vs. Standard Agreements
10. Getting to "Yes"

Rule 6(f) Communication with Program or Neutral.

(i) The court shall give a program which is providing court-connected dispute resolution services sufficient information to process the case effectively.

(ii) The program shall give the court's administrative staff sufficient case-specific and aggregate information to permit monitoring and evaluation of the services.

(iii) Communication with the court during the dispute resolution process shall be conducted only by the parties or with their consent. The parties may agree, as part of the dispute resolution process, as to the scope of the information which they, the program, or the neutral will provide to the court. Absent an agreement of the parties and subject to the provisions of Rule 9 regarding confidentiality and subparagraph (iv) below, the program or neutral may provide only the following information to the court: a request by the parties for additional time to complete dispute resolution, the neutral's assessment that the case is inappropriate for dispute resolution, and the fact that the dispute resolution process has concluded without parties' having reached agreement.

(iv) At the conclusion of **CONCILIATION** or dispute intervention, the program or neutral may communicate to the court recommendations, a list of those issues which are and are not resolved, and the program's or neutral's assessment that the case will go to trial or settle, provided that the parties are informed at the initiation of the process that such communication may occur.