

Settlement Conferences and Mediation in Arizona

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ALTERNATIVE DISPUTE RESOLUTION IS A FORMAL PART OF THE LEGAL LANDSCAPE

Most trial courts of general jurisdiction require either a settlement conference or participation in mediation before a trial date will be given to parties.

GOALS FOR TODAY

1. Explain how settlement conferences and mediations are the same
2. Explain how settlement conferences and mediations differ
3. Explain the process – how they work
4. Talk about when one or the other makes sense to initiate
5. Talk about how to maximize your chances for success at ADR, allowing you to avoid trial

MANDATORY SETTLEMENT CONFERENCES AND MEDIATION ARE VERY SIMILAR

But are not the same!

THINGS THEY HAVE IN COMMON

1. Goal is to settle a dispute
2. Typically less expensive than litigation
3. Both employ neutrals to assist in resolution
4. Process is generally the same

Otherwise, the differences are significant

SETTLEMENT CONFERENCES

Settlement conferences are court-ordered. This means, you have to be involved in litigation before you can have a settlement conference.

Absent a lawsuit, a settlement conference is not an option.

SETTLEMENT CONFERENCES

In one of the smaller counties, a judge may conduct the settlement conference.

In the larger counties, the court's ADR department will assign your case to a Judge *Pro Tempore*, or *Pro Tem*.

- Judges *pro tem* are lawyers who volunteer their time
- Have to have at least 5 years of experience
- May not be experienced in specific area of law
- May be limited on time and availability
- May be less prepared
- Typically offer services free of charge

SETTLEMENT CONFERENCES

Because settlement conferences are ordered by the court, the court remains at least tangentially involved.

Judges *pro tem* have all the powers of a judge. Cannot order settlement but can sanction

Judges *pro tem* also report to the court. Again, sanctions are possible.

PRIVATE MEDIATION

- Not tied to litigation – may take place at any time, including before suit has been filed
- May be required by contract with or without a required provider
 - AAA
 - AHLA
- May be court-ordered as alternative to settlement conference
- Judicial involvement is typically minimal

PRIVATE MEDIATION

Benefits of hiring a private mediator

- You get to pick
- Can choose mediator with specific applicable experience
- Typically more flexible once retained
- Possibly better prepared

PRIVATE MEDIATION

Drawbacks of a private mediator

- Initial scheduling may be difficult
- Cost
- Is there a retainer
- How does the mediator bill and to whom

WHEN IS IT TIME FOR MEDIATION OR A SETTLEMENT CONFERENCE?

1. May be required by contract
2. May be court-ordered
3. Whenever the parties think they can and want to settle

THE PROCESS: MEDIATION OR SETTLEMENT STATEMENTS

Both types of ADR typically involve providing the neutral with a position statement

- Rule 16.1, Arizona Rules of Civil Procedure provide a good guide

THE PROCESS: MEDIATION OR SETTLEMENT STATEMENTS

Statements to the neutral may be exchanged or confidential

- Highly advise exchange of at least some information
- Most neutrals will accept or even encourage parties to provide confidential supplements to the statements that are exchanged

THE PROCESS: CONFIDENTIALITY – THREE LEVELS

- Rule 408, Arizona Rules of Evidence
- A.R.S. § 12-2238
- Caucusing with the neutral

Process is designed to foster disclosure to help the neutral get the dispute settled

THE PROCESS: CAUCUSING WITH THE NEUTRAL – SHUTTLE DIPLOMACY

- Neutral will decide who to talk to first
 - Often with whichever party received the last settlement offer
- May (or may not) focus initial meetings on getting additional information, hearing arguments, and asking questions
- Neutral will play the devil's advocate
- Subsequent meetings focus more on remedy

THE PROCESS: TIPS TO MAXIMIZE THE CHANCE FOR SUCCESS

1. Learn about your mediator
2. Review your statement of the case
3. Review the other party's statement of the case
4. Make sure you have given the neutral what she needs to discuss the case
5. Bring documents/exhibits that may become relevant
6. Have a game plan – do not make the neutral do your job too
7. Be prepared to jettison your game plan

QUESTIONS?



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