

GUIDE TO MEDIATION AND SETTLEMENT CONFERENCES

ABOUT

- Alternative Dispute Resolution (ADR) encompasses several ways to resolve disputes outside of traditional trials. These methods are usually much less costly and less frustrating than trial, and you usually arrive at a resolution much faster than if you had proceeding to a trial.
- While there are some types of ADR that come to a binding resolution (such as Arbitration and Binding Settlement Conferences), this document focuses on the non-binding methods, which are focused upon coming to a resolution that each spouse/parent agrees to.
- In these non-binding options, you can't be forced into an arrangement that don't agree to, which means you keep some control over the outcome, rather than having a judge who doesn't know you make decisions for you.
- In **mediation**, we meet with an independent person, whose role is essentially to facilitate productive discussions. The mediator can help to generate alternative solutions, keep conversations on track, ask questions to help us think about the details or make us consider it from each other's point of view, can sometimes provide basic information, and will often put pressure on people who have unreasonable positions. Their role usually isn't to tell us what the outcome should be or tell us who's correct, although some mediators are more "directive", in that they share their preliminary opinions. Mediation is very much about finding a solution which addresses each spouse/parent's values and concerns, and aims for solutions that everyone is willing to live with.
- There are many different types of mediators. Some are psychologists (for example, post-separation counselling is akin to mediation, or Parenting Coordination can have a mediation component). Most family law mediators are lawyers or retired judges, although there are also mediators without legal or psychological training.
- A **Settlement Conference** is essentially mediation with a judge, who is present to help promote an agreed-upon resolution rather than making a decision. Because this is a government-provided service, time is limited and the judge may have limited knowledge of your circumstances, but may still be able to help us to arrive at a resolution.

- In addition to the advantageous speed and cost of ADR, ADR can also lead to more creative results which better address everyone's interests, as courts can be quite limited in what they can order.
- Both spouses might not be entirely happy about every term agreed to, but ideally we've found an agreement that you can both live with, which is more advantageous than the inflexible options, cost, delay, and frustration of trial.
- Even if ADR isn't completely successful or there are additional steps to complete before the matter can be resolved, ADR can still be useful to narrow the number of issues or agree upon a process to resolve the matter.
- ADR typically doesn't follow a formal procedure, it can differ depending on who the neutral facilitator is, as they usually plan out the path we need to follow. This can also make the process a lot more flexible, as we can focus on what's important.
- Sometimes there will be **caucusing**, which is where each spouse/parent and their lawyer meets separately with the judge. While this can slow down the process, this is often done so that we can have more frank discussions with the mediator or judge, it may help to minimize conflict, or they may deliver bad news to either team to help them save face.
- The focus is usually to explore the values and concerns of you and your former partner, rather than skipping directly to positions, offers, and demands. By determining each of your values and concerns, we may be in a better position to brainstorm solutions that both you and your former partner can live with.

ROLES OF CLIENTS AND LAWYERS

- Although I can do all of the speaking if necessary, I generally encourage you to speak throughout, and the mediator or judge will usually encourage you to do so as well. Your description of events and expression of your concerns can be a lot more powerful when it comes from you.
- The role of each lawyer is typically to keep communication on track, provide their client with legal information, ensure that their client's concerns are discussed, and brainstorm potential solutions.
- ADR is often still successful even when there has been high conflict and a lack of communication.
- If either spouse makes an unreasonable statement not based on the law, their lawyer is generally expected to let their own client know that their position wouldn't be upheld in the court. If I do this, it's not because I'm against you, but because I'm expecting mutual reciprocity from the other lawyer, and clients are more likely to listen to their own

lawyer. It also makes me look more objective, so that your former spouse is more likely to actually listen to what I have to say, and take it into consideration.

- I typically take a thorough, structured approach. This means planning an agenda of issues to discuss, planning the mechanics of any resolution, taking note of your concerns and your former partner's possible concerns, brainstorming some alternatives to discuss at the meeting, and providing you some advance guidance in effective communication through this document.

YOUR PREPARATION

- Other than reviewing this document now and the day before the mediation/conference, I recommend that you spend some time thinking about three things:
 1. Setting aside any negative feelings towards your former partner and your history.
 - We're not meeting to attack your former partner or to convince them that they were the villain in the relationship, we're meeting to attempt to find a resolution that addresses what the future will look like. If they are attacked and feeling defensive, they are much less likely to be willing to consider our offers.
 - It's not helpful to go into ADR aiming for some kind of punishment for your former spouse, or to block any potential resolution unless it only benefits you and not your former spouse. That kind of mindset won't bring us to a resolution.
 - While we can work on addressing concerns and minimizing risks, your former partner is unlikely to change, and you don't get to choose how they parent or what kind of person they are.
 - Our starting point is addressing what's in your control, and communicating your viewpoint.
 2. Thinking about what some of your former partner's interests are. Interests are their concerns, hopes, expectations, assumptions, priorities, beliefs, fears, and values (as opposed to positions, which are essentially demands for a particular outcome). Can you think of any ways to address their concerns? Addressing their underlying concerns might make them more likely to agree with our proposal.
 3. Have you thought about your future, such as your future living arrangements, budget, and retirement plans?
- Are there any sensitive topics that need to be addressed? Such as new partners or drug/alcohol concerns? Have there been any recent incidents since we last spoke? Have

your circumstances or your former partner's circumstances changed since we last spoke? Please speak to me in advance if any of this applies.

- Are there any additional concerns that you would like to discuss at the meeting? Please let me know in advance.

COMMUNICATING WITH YOUR FORMER PARTNER

- Don't express positions, express your concerns.
 - Our goal is to present your concerns in a way that your former partner will hear and understand them, rather than dismissing your concerns. That way we can focus on finding solutions.
 - For example, a person is much more likely to obtain cooperation by explaining their limited income, unusual expenses, financial insecurity, and how that's affected any children, rather than simply demanding that support be a certain amount.
- Don't say "I want _____", instead say "I'm worried that _____ will happen" or that resolving an issue is important to you.
- Begin sentences with "I", rather than making accusations that start with "you".
- You can ask the other side genuine questions. Genuine curiosity is usually okay and sometimes very beneficial if the answer facilitates resolution. However, be careful not to launch accusations. Ask your questions with the purpose of resolution in mind.
- We're meeting to attack the problem, not each other. We're not going to continue arguing when each side has explained their position and arguing is unlikely to change any entrenched positions. Not all disputes about what happened in the past need to be resolved to be able to move forward. That said, sometimes sharing additional information can help, especially because the lawyers and independent person in the room may not know all of the background.
- You can vent if necessary, but try to stay on topic, and return to thinking about potential solutions. If your venting is too intense, the mediator or judge may think that you are the roadblock to resolution.
- Offers made during ADR are confidential, making it a safe place to discuss alternate arrangements and talk about how we feel about potential offers. In a Settlement Conference, the same judge can't also make decisions in a hearing or trial.
- Don't jump to making offers too quickly, it's important to gather relevant information first and determine each spouse's concerns. It's okay to say how you feel about minor points of issue (for example, that you'd like to stay in the house, or that your former spouse can have the couch), but for any more important offers we can step out into a

separate room, or an online breakout room, so that you can I can discuss the offer before we make it. It's important that you know your rights and alternative options, sometimes we need to build leverage before making an offer, and because there's often a bit of haggling expected, sometimes it's not the right time to make a fair offer yet.

- Don't be too desperate for a resolution. If you go into the mediation/conference thinking that you have to come to a resolution that day, you will likely end up accepting an unfair resolution. There's a saying that the person who wants the deal the worst, gets the worst deal. That said, there will be risk in our position, trial outcomes can sometimes be erratic or arbitrary, so we do need to take risk into account and offer reasonable concessions. There is also value in achieving a peaceful resolution and limiting ongoing legal fees.

IF A SETTLEMENT IS REACHED

- Keep in mind that the dispute isn't completely resolved until we get an agreement signed or court order granted. It may take several more weeks to agree to the wording of what we've agreed to, and possibly even longer as we wait for any external financing.
- After ADR, it's not unusual for each spouse to wonder if they should have asked for more, or to forget why they made certain concessions, or forget or undervalue the concessions their former spouse made (a phenomenon known as "reactive devaluation"). However, settlements reached at ADR may still be enforceable in court. It is essential that you only commit to a settlement if you know you will follow through with it. If you refuse to follow through with a settlement that you agreed to, then your lawyer becomes a witness and can't ethically attack the resolution that they negotiated, so I would have to withdraw from representing you. You may still be bound by the agreement reached. It's possible to ask for time to think about a settlement until committing, although keep in mind that doing so risks that your former spouse might also change their mind during that time.
- It will be very important to avoid any new disputes until the agreement is signed, as new disputes might derail the settlement.