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Resolution by Mediation & Settlement vs. Litigation & Adjudication

MEDIATION & SETTLEMENT LITIGATION & ADJUDICATION

Focus of Process	Accept the feelings, needs, experiences, and context of the parties as being unique in designing a solution for all parties & family	Fits people and their problems into a broad, consistent rational pre-determined matrix so that the outcomes to all issues are identical
Criteria Applied in Decision-Making	Achieve a fair outcome that all parties can voluntarily accept	Strictly apply established law to the facts found in each case
Credo	Outcome can and should be tailored to the unique needs and interests of the parties and their circumstances	Justice is BLIND – Equal Protection translates into a “One-Size-Fits-All” remedy; identify the issue then find the case law that gives the answer
Who Is in Control, Sets the Rules and Procedures?	The parties, their counsel and the Mediator whom <i>they</i> chose to assist them control the process & rules	Congress, State Legislature, Supreme Court, Local Courts, Judge assigned to the case
Privacy Considerations	Documents and statements relied upon are private and confidential, except for the few documents to be filed with the court to finalize the case	Other than certain financial records and Parenting Evaluation, all files are open public records, scanned to be published on the Internet, forever, for all to see
Time, Convenience	Preparation and meeting times are set at the convenience of the parties and their counsel	Timelines are imposed by a Case Scheduling Order, State Court Rules, and Local Court Rules
Location	Where ever it is convenient for the parties and counsel to meet	Arbitrary sites located in population centers; no exceptions are allowed
Formality	Whatever is deemed important by parties and their counsel is considered in resolving the matter	Formal court Rules of Evidence limit admissibility of facts, opinions and evidence considered
Contact with the Neutral Person or Decision Maker	Parties make the decisions, but all are free to speak directly with the Mediator, and may do so privately with their counsel present	<i>Ex parte</i> contact is forbidden; no direct communication, except as a witness – and then subject to objection and cross-examination
Parties’ Role in Selecting “the Neutral” Person in the Process	Parties and counsel have absolute control of the selection. Usually based on recommendation of counsel and on their knowledge and experience with the Mediator	No control whatsoever in the selection of court commissioners; no control for judges other than one Affidavit of Prejudice may be filed by each side against assigned judge
Finality of Outcome	Civil Rule 2a Stipulation is fully	All decisions are subject to

	binding and final -- agreed orders are not subject to appeal	reconsideration, review, revision, modification and appeal
Lawyer' Role	Legal counsel serves as fact finder, negotiator, spokesperson, advocate, legal drafter	Attorney is researcher of the law and facts, negotiator, memorandum writer, advocate, litigator
Role of Neutral Person (Mediator or Judge)	Educate, evaluate, and explore how various options available may apply to best meet the needs and interests of all parties & the family	Proclaim the general law of the state, then apply it to the specific parties and issues before the court as that person sees it
Qualifications of Neutral	Specific dispute resolution training and experience; knowledge of the subject matter; selected by parties based upon experience and proven success and track record	Assigned by the local Presiding Judge; must be a licensed lawyer, experienced at litigating, no specific knowledge of trial issues required; ultimately selected by public election
Stake in Outcome	Problems may come back for further services; individual reputation and future referrals depend upon achieving a full, fair and final satisfactory outcome	None – the judge must finish the matter at hand, then move on to next case waiting; problems that arise will be heard by another judge or the appellate court another day
Limitations to Decision	All can “Think Outside the Box” in arriving at solutions; authority is given to adopt outcomes not available to a trial court	Strictly bound by legal precedent established by previous cases; jurisdiction is limited by law
Gross Expense Incurred /Utility of Time	MINIMIZED: Parties may stipulate to limit or avoid excess discovery; the need for dueling experts is diminished; there is no delay in getting a courtroom; the session time is only when and as long as all parties agree. Final papers can be prepared at the mediation and presented to court on a “walk-in” basis	GREAT: May require excess time and expense of counsel and parties for discovery and self-protection. Trial requires preparation time, retention of experts, delay in getting courtroom, heavy structuring of hearing times, witnesses, presentment of final orders, post-trial hearings, and appeals
Overall Time from Beginning to Final Outcome of Case	As determined by the parties and their counsel	Determined by court rules, local court procedures and the computer-established Case Scheduling Order given to the case
Common Feelings During and at the Conclusion of Process	Relief, closure, ready to plan for the future; a fresh start and a new beginning	Loss of control, unhappy, impoverished, not listened to, not treated unfairly, uncertain, “put through the ringer,” “loser”