MICHIGAN SUPREME COURT | STATE COURT ADMINISTRATIVE OFFICE

Office of Dispute Resolution

Resolving Your Dispute . . .
. . . Without Going to Trial

Dispute Resolution: An Introduction

The business of courts is to help citizens resolve disputes, whether they involve family matters, commercial transactions, or personal injuries.

Most people are probably familiar with the traditional means of resolving disputes in court: the hearing or trial. The trial is what we typically read about in the newspaper or view on television. Leading up to and through trial, parties, represented by counsel or on their own, argue their positions to a magistrate or judge and receive a binding decision. Traditionally, communications and practices leading up to trial are adversarial in nature and result in one party winning and the other party losing.

For quite some time, however, the clear trend in courts has been away from parties resolving disputes by a trial. In fact, nationwide, about 97% of all civil cases are resolved through some type of settlement or judicial process before the trial date arrives.

This court now offers additional, alternative processes to help parties resolve disputes. This pamphlet outlines the processes and how you can take advantage of them.

Recognizing the value of these Alternative Dispute Resolution (ADR) processes and their demonstrated ability to help people resolve disputes to their satisfaction, the Michigan Supreme Court has authorized judges to order parties to at least try a dispute resolution process as an alternative to the adversarial court process. Reaching a resolution is completely voluntary, however, and no one will ask that you reach an agreement with which you are not satisfied.

The following ADR processes are available in the circuit, probate, and district courts, although not all courts currently offer all of the processes. If you have an attorney, your attorney should know which processes are available in each court. You should also feel free to ask the court staff about the availability of the ADR processes at the court.

What is mediation?

By far the most commonly used ADR process is called "mediation." Mediation is a process in which the various parties in the dispute meet with a trained neutral person—the mediator—and work out an acceptable resolution. Unlike resolution by a magistrate or judge in which one party generally wins while the other loses, in mediation, the parties themselves find options for resolving their matter. Parties voluntarily enter into settlement agreements. This means that no mediator will decide who is right or wrong, identify how a matter should be resolved, or otherwise take sides. The mediator's job is to help parties communicate, clarify the issues involved in the dispute, and find mutually beneficial solutions for the matter in dispute.

Throughout the mediation process, the mediator makes sure that everyone has a chance to be heard and to contribute ideas for resolution. The mediator also helps "balance the power" by ensuring that one party does not "take over" the mediation. The mediator will also

prevent any terms with which a party expresses discomfort from being incorporated into an agreement.

A judge may determine that resolving your dispute might best be accomplished through mediation. In that case, you and the other parties to the dispute might be ordered to try mediation. Most matters can be completed in one mediation session, however, it is common for some particularly complex matters, like domestic relations cases, to take several sessions. Experience suggests that nearly everyone finds that mediation is helpful, even if a dispute is not completely resolved.

This court encourages all persons in civil actions to consider whether mediation would be a more appropriate process for the resolution of their dispute. To help you make this assessment, you should consult with your attorney if you have one, or refer to some of the resources appearing at the end of this pamphlet.

You do not forfeit your right to any aspect of the legal process by attending mediation, and you can always choose to preserve your right to a trial.

What happens in mediation?

Once the parties have selected a mediator, or if a mediator has been assigned by the court, the mediator will schedule your mediation session. The mediator may make several preliminary telephone calls to arrange the first session and to receive some background information about your dispute. Occasionally, mediators request that certain written documents be provided in advance of meeting.

A typical mediation session begins with the mediator and parties establishing some ground rules. The mediator and parties also determine how the mediation process is to move forward. Once the ground rules are established, one party will "tell her/his story" in an uninterrupted manner while the other party(ies) listen. One by one, the parties will tell their stories so that all the information relevant to the dispute is heard by everyone.

The mediator then works with the parties to determine exactly what issues are in dispute, and parties will be encouraged to identify options for resolving the various issues.

Generating settlement options is often the most exciting part of mediation, because very frequently the parties are able to find creative options for resolving the dispute which result in "win-win" solutions. This is in contrast to obtaining a decision by a judge, who often can only rule for one side or the other. It is also very common that the solution the parties reach is something not previously contemplated by any one party.

Keep in mind that a mediator is not like a judge; the mediator will not impose any solutions, nor identify which is the best solution for you. Deciding how you would like to resolve your dispute remains entirely up to you and, if you are represented, your lawyer.

If you have a lawyer and he or she attends mediation with you, the mediator will almost always encourage direct conversation between you and the other party(ies). Lawyers can certainly participate, but discussions between you

and your lawyer are most commonly held in separate meetings where your conversations with the mediator are confidential and are not heard by the other party(ies) or their attorneys.

Even in the best of mediation sessions, there are times when parties are not able to find satisfactory settlement options. When that happens, the mediation is stopped and parties return to court just as if mediation had not taken place. Inability to reach agreement in mediation will not negatively impact movement toward trial. Because mediation is confidential (with very few exceptions), the judge and court staff will have no knowledge of what was said or done in mediation.

Why mediate?

The Michigan Supreme Court encourages parties to try mediation because of its demonstrated success in helping parties resolve disputes to their satisfaction. It's as simple as this: in the traditional court process, when a judge enters a judgment in a case, usually one party wins, and the other loses. In mediation, all parties have a chance to reach an acceptable solution, and it can be a solution quite different from that imposed by the judge. Put differently, parties have maximum control over how to resolve their dispute in mediation. In the court process, parties give all authority to resolve their case to the judge.

Mediation can be scheduled quickly and can be less expensive and produce more satisfactory results than litigating a matter through trial.

Moreover, experience shows that parties who reach agreements in mediation are more likely to keep them than they are to abide by court judgments.

For persons who have on-going relationships, like family members, business associates, neighbors, landlords and tenants, or employers and employees, mediation is an effective way to not only resolve the problems at hand, but also to improve their relationship and decide how future disputes might be resolved.

Because court proceedings are public and documents appearing in court files are generally public, parties frequently choose mediation to keep various aspects of their dispute private. Many parties like to enter mediation because it is a confidential process; anything that the parties produce or say in the mediation process is confidential and, with very few exceptions, cannot be revealed. Exceptions to writings and statements being confidential include:

- information forwarded to the court to advise that mediation occurred and whether an agreement was reached (no information about what parties said or did in mediation is included in this report);
- information necessary for the court to administer the program; and
- information required if there is a dispute over the fees in mediation.

How do I select a mediator?

If you decide to try mediation on your own, or if you are ordered to try mediation, you and the other persons involved in the dispute

have the right to select your own mediator. Some factors you should consider in selecting your own mediator include:

- the extent of the person's mediation training and continuing education;
- how much experience the person has had as a mediator;
- how quickly the mediator would be able to work with you;
- the mediator's fees and the services included;
- the type of mediation process used by the mediator.

If you are ordered to try mediation and you and the other party(ies) do not select a mediator on your own, the court will select one. Mediators on the court roster have completed a training program and have mediation experience.

When interviewing mediators in family matters, if you have any concern about domestic violence, you should immediately alert the mediator. The mediator will help you determine whether you should proceed with mediation and, if so, how to proceed to ensure your maximum safety.

Other types of dispute resolution

This court encourages you to discuss other types of dispute resolution processes with your attorney, if you have one. Increasingly popular forms of dispute resolution include:

Binding and non-binding arbitration: The parties select an independent fact finder to make a decision resolving the dispute. In binding arbitration, the written decision (award) of the arbitrator may be entered as a judgment by the court and enforced. If the parties have requested non-binding arbitration, the arbitrator's decision is advisory only and the parties use the information to assist future settlement discussions.

Summary jury trial: In complex cases, a mock jury listens to abbreviated testimony and instructions on the law, and provides an advisory verdict of the case. The parties use this verdict in future settlement negotiations.

Case evaluation: There are several types of case evaluation, and your attorney can discuss these in greater detail. "Early" case evaluation involves parties agreeing on a neutral third party to provide a monetary value on the case soon after a case has been filed in court. Michigan court rules provide for another form of case evaluation, typically occurring late in litigation, whereby a panel of three lawyers evaluate the value of a case and provide a monetary figure they believe reflects the value of the case.

These three processes are all somewhat like litigation in that the parties, in an adversarial setting, present arguments, and a third party renders an opinion as to the value of a case. The key distinction between these processes and mediation is that in mediation, the parties work together to create their own solutions that satisfactorily end the dispute.

Objections to mediation

If you have been ordered to try mediation and you feel that you should not have been ordered, perhaps because you have already tried

mediation, you must file a motion to set aside the court's order to mediate within 14 days of the court's order. The court will schedule a hearing to determine whether your case should be referred to mediation. A copy of the motion you need to fill out, serve, and file is available in the ADR (Alternative Dispute Resolution) Clerk's office.

How to find a mediator

The court maintains a roster of mediators you can consult to help you select a mediator. The mediators on this roster have completed mediation training and meet State Court Administrative Office guidelines for serving as mediators. The roster is available by contacting the court's ADR (Alternative Dispute Resolution) Clerk.
Mediators are also available through local community dispute resolution centers, which are provided some funding through the State Court Administrative Office. The Community Dispute Resolution Program center nearest you can be contacted by calling 1–800–8RESOLVE [1–800–873–7658].

You may also refer to local attorney bar associations for the names of attorneys who serve as mediators and, in some areas, telephone listings now carry a "mediation" category.

How much does mediation cost?

Mediators, like other professionals, charge for their services, and the parties to the dispute are responsible for paying the mediator. Usually, parties split the costs of mediation equally, but other arrangements may be reached working either through the mediator or the court.

What if I can't afford a mediator?

If you feel that you are unable to afford the services of a mediator, you may petition the court for appointment of a mediator at no expense to you. If the court determines that you are unable to pay for a mediator, the court must either provide you with low cost or free mediation services. If you meet the court's indigency standard and free or low cost services are not available in your area, the court will not order you to try mediation. One service available to Michigan residents which offers free or low cost mediation services is the Community Dispute Resolution Program. More information on these services appears in the section titled "How Can I Learn More About Mediation?"

Family Court mediation

If you are in court because of a dispute in a family matter, much of the information presented earlier in this pamphlet applies, but there are several additional things you should consider.

First, in a divorce case, if children are involved, mediation can help create a collaborative way of looking at the future. Since parents will need to talk in the years ahead about such things as parenting time, and working together for the best interests of the child (children), mediation has distinct advantages over returning to the adversarial court

environment each time parties have a disagreement.

Second, it has been clearly shown that parties who reach agreements in divorce have far fewer post-judgment contacts with the court. This means that parties usually keep their agreements because they have crafted them and they do not need to return to court for resolving matters. The obvious benefits are that parties save both time and money in not having to return to court for resolution of problems likely to arise in the years following the judgment of divorce.

Mediation has been shown to be helpful in a wide variety of family matters. Parties involved in contested trust and estate matters, and even contested child and adult guardianships and conservatorships, have benefited from the problem-solving aspect of mediation.

When wouldn't someone mediate a divorce matter?

If, within a divorce matter, you have a personal protection order or are involved in a child abuse and neglect matter, you should not be ordered to mediation without a hearing before the judge. If you have been ordered to try mediation and are in either of these situations, you should immediately let your attorney or the court know.

Domestic violence in your relationship may be grounds for not participating in mediation; you may feel that your safety or health would be jeopardized if you attended a mediation session with the other party. You should discuss any reasons you have for not participating in mediation with your attorney. If you have been abused by the other party, mediation is almost never appropriate unless your attorney will be present with you at all mediation sessions attended by the other party and other safety precautions are taken.

Mediation is not appropriate for your matter if the other party uses fear, force, threats, violence or intimidation with you to get what they want. It's also not appropriate if parties have been threatening or violent to each other or where parties do not feel able to safely express their opinions about the dispute.

If you have been ordered to try mediation and you feel that you should not have been ordered, perhaps because you have already tried mediation, you must file a motion to set aside the court's order to mediate within 14 days of the court's order. The court will schedule a hearing to determine whether your case should be referred to mediation. A copy of the motion you need to fill out, serve, and file is available in the ADR (Alternative Dispute Resolution) Clerk's office.

There are over 45 programs in Michigan offering confidential counseling, shelter, support groups, and safety planning to survivors of domestic violence. You can get the number of your local domestic violence program, and confidential crisis counseling and support, by calling the National Domestic Violence Hotline at: 1–800–799–SAFE (1–800–799–7233).

What if we can't resolve all the matters in our divorce?

In mediation, if the mediator is willing, the mediator may provide an "evaluation" of any unresolved issues.

This means that if you and the other party are able to resolve eight out of ten issues (for example), but are stuck on resolving the final two issues, the mediator may provide recommendations for resolving the final two issues. You are free to accept or decline those recommendations. Because the evaluation is confidential, the judge will not know what the recommendations were and who may have accepted or rejected them.

Another advantage of mediation is that if you have agreed on all but two issues in your case, those are the only two issues you will need to take back into court. Your agreement on the other issues can be preserved if you choose.

Mediation after the judgment of a divorce

Many parents in divorce will continue to communicate with each other regarding parenting time and other issues which arise. Where disagreements occur, instead of taking the disagreements back to court for "post-judgment" decisions by the judge, many people find that mediation quickly and effectively resolves the problems. As mentioned earlier in this pamphlet, mediation takes place in a collaborative "problem-solving" environment rather than in adversarial proceedings in the courtroom. This helps parents focus on resolving the immediate problem at hand, as well as creating a process for resolving problems that are likely to arise in the future.

Legal counsel

Mediators do not provide legal advice about any aspect of a case. If you have a lawyer, you should carefully consider mediation and other dispute resolution processes with counsel and assess what process might be best for you.

Depending on the type of dispute, lawyers may elect to attend or not attend mediation with you. You and your lawyer make that decision.

Mediation in small claims cases

Mediation in small claims cases is very effective. In these cases, approximately 85% of the persons using mediation reach agreements resolving their disputes in less than two hours. And in nine out of ten cases, parties abide by the terms of the agreement.

Many courts offer mediation in the small claims division, either through the court's own program or through the local Community Dispute Resolution Program (CDRP) center. Because of the speed with which small claims matters are handled, you may not have the opportunity to select your own mediator. All mediators assigned by a CDRP center have completed training approved by the State Court Administrative Office and a supervised internship.

Common dispute types mediated in the small claims division include: landlord/tenant, consumer/merchant, fee disputes between professionals and their clients, and neighborhood problems.

How Can I Learn More About Mediation

The following resources are available to help you learn about resolving your dispute in ways other than through

litigation and final determination by a judge.

Michigan's Community Dispute Resolution Program: This program, begun in 1990, provides low cost mediation services for many types of disputes. The program is administered by the Michigan Supreme Court State Court Administrative Office. Grant funding provided by the Michigan Supreme Court ensures that mediators are available across the state to help resolve a wide variety of disputes. Services are available statewide through a network of non-profit organizations and are generally provided free or at low cost.

For additional information about this program, please call 1–800–8RESOLVE [1–800–873–7658] to reach the Community Dispute Resolution Program center nearest you. Staff at your local dispute resolution center can explain the options available locally for resolving your dispute through mediation. The Michigan Supreme Court, State Court Administrative Office, maintains information about the Community Dispute Resolution Program on its website: http://courts.mi.gov/SCAO/dispute.

The Internet provides a wealth of information about mediation. A popular and easy-to-use clearinghouse for mediation information can be found at: www.mediate.com.

For information about arbitration, the American Arbitration Association maintains a website at www.adr.org.