

Checklist for Making an Appropriate Dispute Resolution Process Choice

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Alternate Dispute Resolution offers choice of dispute resolution processes to attorneys and their clients. The benefits of each type must be balanced with their challenges and costs. These processes can be used in relationships other than divorcing couples, including never-married couples, elder law disputes or members of the GLBT community. The chart below could apply to ADR processes in general but is intended primarily for use in family law related cases such as divorce, split ups, moving away, custody, support, and property division.

An earlier version of this chart has been previously printed in the Family Law Journal. However, the authors wished to incorporate comments gleaned from the invaluable input of other members of the Sections. It is hoped that the following revised ADR Chart will be of even greater value to family law practitioners seeking to evaluate and determine the best dispute resolution options for their clients.

Type of ADR Processes	Benefits	Challenges	Costs
<p>Parties only negotiation</p>	<ul style="list-style-type: none"> • Opportunity for negotiation based upon parties' needs as opposed to a position without explanation. • Serves parties who can compromise, communicate and cooperate, likely with nominal marital estates. • Parties are in charge of the process. • Direct communication between parties, reduces opportunity for misunderstanding or assumptions about the other party's agenda. • Possibility of early resolution. 	<ul style="list-style-type: none"> • Risk of incomplete division; incomplete discovery or ignoring important details needed to implement intention of parties. • Party assumptions may not be mutual and may be unexpressed. • Court procedures and drafting pleadings are an obstacle for unrepresented. • Unequal bargaining power, domestic violence dynamics or unequal bargaining skills may lead to inequitable results or impasse. • Poor communication skills or unwillingness to compromise can sabotage effort. • Uninformed about legal rights or court processes. 	<ul style="list-style-type: none"> • Generally least expensive unless problems develop in the future because agreement is incomplete or inaccurate.

<p>Collaborative divorce practice</p> <p>Use of a team model where each party is represented by a collaboratively trained attorney. Experts are selected to join the team. Occurs prior to filing a divorce action, to negotiate a private, family specific agreement on all issues of concern.</p>	<ul style="list-style-type: none"> • Private negotiations with goal to reach agreement before case is filed. • Each family negotiation process is unique to that family. • Financial professional helps gather financial information in one place with neutrality. Cuts down discovery costs. • Respectful process to participants who work together as a team and not as adversaries. • Time and process needs of the client are given priority. • Use of child specialists, divorce coaches and/or financial experts focus on problem solving and information gathering to help reach balanced decisions and to maintain and build future communications between the parties after the divorce. • Focuses on problem solving rather than satisfying procedural obligations. • Less stressful; more emotionally supportive. • Interest based negotiation as opposed to positional approach to problem solving. • Access to collaboratively trained attorneys who can 	<ul style="list-style-type: none"> • Team building skills required to develop trust for a truly open, transparent problem solving team. This is hard communication work. • Assumes honest sharing of information without deception—risk of giving up the traditional tools of subpoena and interrogatories because case not filed and no means to enforce. • Agree no one will go to Court until all issues are resolved. If process ends before agreement, client-collaborative attorney relationship ended and collaborative attorney cannot appear in traditional divorce action that follows. Client must retain new counsel. • No leverage to move a team member forward if there is unwillingness to move forward. • Requires both attorneys to be collaboratively trained. • Not every situation is appropriate for collaborative divorce—the process requires each party to communicate, collaborate and be honest/ transparent. • Alcoholism, mental health issues, domestic violence, or personalities can be insurmountable problems, or cause great expense. • If the case is not screened by a collaboratively trained mental health professional to evaluate fitness for collaborative process, may experience insurmountable obstacles after investment of 	<ul style="list-style-type: none"> • Cost varies depending upon parties and issues. • Financial professional costs shared. • Child Specialist costs shared. • Divorce coach expense varies based on the needs of each party. • Collaborative divorce attorney costs vary based on the needs of each party. • Absence of court deadlines means open ended process continues as long as issues remain unresolved. • Parties more likely to comply with an agreement reached through a respectful process where they are heard and their concerns are a priority. • Actual cost likely less than litigation and trial or arbitration. • Since parties
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<p>Collaborative divorce practice contd.</p>	<p>advise each party about the law to ensure informed decision making while focusing on client needs.</p> <ul style="list-style-type: none"> • Personal satisfaction greater than mediation or other ADR processes. 	<p>time and resources.</p> <ul style="list-style-type: none"> • May be a longer process than traditional litigation if court does not reduce statutory waiting period. 	<p>work to create their own agreement, they work to implement it resulting in fewer post-judgment disputes.</p>
<p>Early stage facilitative mediation</p> <p>Use of a 3rd party neutral who will facilitate communication and encourage the parties to hear each party's ideas; mediation may take place prior to filing or shortly after, but before process becomes adversarial.</p>	<ul style="list-style-type: none"> • Can be used by parties with or without legal counsel. • More likely to be interest based at this stage <i>before parties take a firm negotiation position.</i> • Opportunity to identify and discuss issues and collect needed information as a joint project. • Direct communication between the parties, when attitudes not hardened and creative solutions can be identified and discussed. • Reduced potential for misunderstandings. • May lead to faster resolution. • With aid of skilled Facilitative Mediator, opportunity to express anger and anxiety so parties can move forward to issue resolution. • More creative options may be possible. • Settlement tailored for the family. 	<ul style="list-style-type: none"> • Parties may begin with misconceptions about the other party, the law, the facts and their needs. • All information may not yet be available to the parties at this stage. • Circumstances can change during the process, creating a moving target to reach agreement. • One party can create delay until court deadlines are imposed. • Unequal bargaining power, domestic violence dynamics, or unequal communication skills can be exploited without legal representation. • Expectations of a party may not be realistic at this stage. • Facilitative mediator cannot provide legal advice to parties. Information about law and courts must be obtained by parties independently. • Unrepresented parties must retain counsel or draft own final documents (judgment, support orders, deeds, QDROs, etc.) 	<ul style="list-style-type: none"> • Costs can vary depending upon party cooperation, attorney involvement, complexity of issues; however, settling before trial preparation generally leads to cost savings through early resolution.

<p>Litigation to settlement</p>	<ul style="list-style-type: none"> • Informed about law; issue spotting and options • Clients have assistance with document preparation. • Experienced family law attorney can provide guidance on what court might order. • Lawyers decide tactical/procedural approach; parties make substantive decisions. • Motions can resolve small issues while case pending. • Pressure by court creates motivation to settle. • Court moves case along when one party is unwilling. • Opportunity to request and enforce discovery. 	<ul style="list-style-type: none"> • Communication through attorneys, rarely through parties, increases party misunderstanding, communication breakdown and escalates tension and lack of trust and inability to appreciate the perspective of the other side. • Good will between parties damaged. • Unreasonable attorney on one side can escalate costs and delay settlement, with few options to address it. • Priority given to hard deadlines rather than needs of parties. • Risk of attorneys without family law experience can undermine settlement prior to trial. • Process can take longer depending upon when settlement reached. • No guarantee all information can be obtained through discovery if one party is motivated to deceive. • Negotiation more likely to be based upon final goals without explanation compared to being based on each party's needs. 	<ul style="list-style-type: none"> • Expensive, because of need to plan for trial while trying to settle. Costs increase as case gets closer to trial. • Cost of traditional discovery without cooperation of parties is expensive.
<p>Late stage facilitative mediation</p> <p>Use of a 3rd party neutral who will facilitate communication and encourage</p>	<ul style="list-style-type: none"> • The difference from early stage is that discovery is usually complete. • Both parties may be emotionally ready. • Likely there have been 	<ul style="list-style-type: none"> • Generally, the parties' attitudes have time to harden, with potential for positional bargaining contrasted to bargaining based on goals, interests and a mutually satisfying settlement. 	<ul style="list-style-type: none"> • Generally more expensive than early stage facilitative mediation, although not necessarily. • Creative

<p>the parties to hear each party's ideas; the mediation takes place closer to a trial date.</p>	<p>one or more court appearances to give a feeling for the risks and costs of court.</p> <ul style="list-style-type: none"> Parties informed of legal rights and attorney has better sense of likely outcome in the event of trial to advise client. Direct communication between parties with input from attorneys rather than communication through attorneys. 	<ul style="list-style-type: none"> Additional pressure mounts as trial approaches. Settlement options seem reduced and more likely to follow customary court solutions than tailored to a specific family. Some family problems may become part of the public record and the court file. Longer process. Facilitative mediator cannot provide legal advice to parties. Information about law and courts must be obtained by parties independently. 	<p>solutions may be developed late stage which outweigh the cost incurred leading to late stage mediation.</p>
<p>Late stage evaluative mediation</p> <p>Use of a 3rd party neutral who will suggest settlement terms as well as hear each party's ideas.</p>	<ul style="list-style-type: none"> The parties will likely be guided to a traditional court settlement plan. Discovery likely complete. Advice and guidance of an attorney about rights and legal process. Court procedures and documents handled by attorneys. Opportunity to avoid trial if a judge is viewed as problematic by both counsel and parties. Opportunity to resolve case prior to trial at time selected by both parties. 	<ul style="list-style-type: none"> Same "cons" as late stage facilitative mediation, with less control over outcome. Parties less able to obtain creative and tailored solution to fit their family because the evaluative mediator recommends the outcome. Unlikely that mediator hears all of the facts a party wants to present. Mediator's recommended settlement may not result in agreement. 	<ul style="list-style-type: none"> Cost less than arbitration or facilitative mediation. <p>[An evaluative mediator is less likely to spend as much time with the parties hearing all options before a settlement is reached.]</p>

<p>Parenting Coordinator</p> <p>Child specialist, attorney or mental health professional, works with the parties to resolve disputes related to raising children.</p>	<ul style="list-style-type: none"> • Purpose is to resolve disputes between parents concerning child related issues, including reaching an agreement concerning custody or parenting time issues. • Usually solves the problem or dispute in a timely manner rather than going to Court. • Promptly holds parties accountable without delay and expense of court. • Good way to resolve matters in a private manner, without involving court. Helpful in high conflict divorce. • PC can model for parties an interest based approach to problem solving as well as identify and apply interest based solutions. • Parties may choose a mental health professional to assist them as parenting coordinator. 	<ul style="list-style-type: none"> • If parenting coordinator is appointed by the Court or chosen by the parties, attorneys may not be involved in the process. • Court can't delegate its independent authority to determine best interests of children to parenting coordinator. • Role and limits of parenting coordinator decision making must be clearly defined. • Party with better communication skills may have advantage. • Uncertain period of time for process to end. • Parenting decisions made by third party when parties unable to agree, loss of party control. • Parenting Coordinator's role is not to advise parties on the law or court process but may involve the court to enforce decision making authority. • Friend of the Court resolves child support and health cost issues. 	<ul style="list-style-type: none"> • The parties must pay the parenting coordinator in addition to any other professionals. • The expenses significantly increase if the parenting coordinator must become a witness in a court proceeding. • The expense is directly related to how many services are needed by the parties and within the control of the parties. • Parties split the cost of a parenting coordinator, • Cheaper than involving 2 lawyers and court costs and used frequently for issues the court unwilling or unhappy to hear.
<p>Litigation to trial</p> <p>All actions are aimed for trial; decisions are made by Judge or Friend of the Court.</p>	<ul style="list-style-type: none"> • Client's decisions informed and protected by advice and experience of family law attorney. • Law applied to facts and protects a party from unequal bargaining, domestic violence dynamics, or 	<ul style="list-style-type: none"> • Proofs may be scheduled on non-consecutive days or interrupted by other matters, creating advantage to one side. • Court's opinion may be issued long after proofs presented. • Adversarial process 	<ul style="list-style-type: none"> • Generally most expensive.

<p>Litigation to trial contd.</p>	<p>unreasonable opponent.</p> <ul style="list-style-type: none"> • Fault factored in property division. • Each party has a chance to present his or her story and law is applied. • A third party makes the decision. • Appellate rights preserved. • Witnesses and documents can be presented as evidence. 	<p>destructive to relationships.</p> <ul style="list-style-type: none"> • Great emotional damage is done to the family. • Only 2 or 3 % of the cases are tried. • Details often not addressed and needs of the family often over looked in favor of judicial economy and practicality. • Insufficient time to tell the whole story; certain facts and issues are emphasized. • Often only one party wins or both parties lose. • Many cases don't have assets that justify the costs. May win the battle but lose the war because of cost to go to trial. • A lot of work to prepare for trial. • Trial is public, formal, and stressful. • Appeals require copies of the court transcript and are expensive. 	
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