WHAT IS MEDIATION?

By Donald B. Cripe, Senior Mediator

Mediation is a form of "alternative dispute resolution" (ADR). ADR is a general term for methods of resolving a dispute (whether family, civil or otherwise) without going through the formal court process but providing an opportunity for a complete resolution. ADR can save time and money and can increase overall satisfaction with the outcome of disputes. Briefly, Mediation is a “facilitated negotiation” wherein a mediator moderates and facilitates, from an informed perspective, the negotiation of the parties.

ADR can be used at any point in a case to resolve sub-issues. In Civil cases resolvable issues include, but are not limited to, contracts, business, personal injury, etc. In Family Law (Divorce) cases, resolution of issues such as including property division, child support, spousal support (alimony), paternity, child custody, parenting plans, and many other issues can be obtained quickly and relatively inexpensively.

Studies have shown that the vast majority of cases filed in court (95-98%) do not go to trial. Most cases are settled or decided in some other way. But in too many cases, settlement comes only after considerable resources have been expanded. This is why ADR is strongly recommended and, in some courts, is a court policy. Even though the parties are responsible for the fees for the mediator or arbitrator, usually what the parties save in the costs of litigation will more than compensate for the costs of the arbitrator or mediator. Instead of waiting six months, a year, or more for a trial, cases can be resolved through ADR--many times within weeks of making arrangements and at a fraction of the cost of taking a matter to trial.

Mediation is a strictly voluntary, confidential means by which parties to a dispute of any kind can resolve their case far more quickly, efficiently and less expensively than pursuing a judgment through the ordinary course of litigation.

The parties may resolve a single issue or their entire case. The agreements reached through mediation are not limited by the remedies available under the law so mediated solutions can more easily accommodate the circumstances of individual cases. When mediating a case, the parties retain control of their case. In trial, however, the judge and the law control. An agreement reached in mediation can be binding is an enforceable contract which can be summarily binding in litigated cases. The mediated agreement may become an order signed by the court and, if violated may be converted into a judgment without a trial.

The difference between having a matter decided at a hearing by a judge as opposed to mediation is as day and night. A trial focuses upon what has happened in the past while mediation looks to a resolution for the future. In a hearing the court will apply the law and the parties have little to say about how the decision is created. In mediation neither party can be forced to accept a decision. Also, participating in mediation does not impact the party’s right to a court hearing if it is desired. If an agreement is not reached through mediation the parties have a right continue through the court system. However, a skilled, experienced mediator can bring most issues to a final resolution.

WHAT IS A MEDIATOR?

A mediator can be almost anyone the parties agree upon to act as a neutral to assist the parties with resolution of their case. Preferably, your mediator is will be formally trained and, ideally, somewhat

familiar with the law involved in your matter. Most mediators have a background as a lawyer or judge, but many do not.

A mediator is not a judge while mediating. The mediator cannot make orders nor can mediator give what is commonly thought to be legal advice. The mediator is neutral and while the mediator may provide simple explanations of specific legal elements or regarding forms or format the mediator may not offer legal advice to either party.

A mediator should be engaged jointly by the parties. Mediators who are professionals in the field agree to practice according to very strict ethical guidelines similar to those to which lawyers and judges are held. Before the mediation begins the mediator rarely meets with the parties individually. The mediator may have an individual known as a "convening agent," "convener," some are referred to as a “case manager,” meet with the individual parties to arrange for the mediation and to have agreements to mediate, etc., signed by the parties. Most Mediators consider discussions on the elements or facts with an individual before the case is convened to be improper. Just as one must not discuss a case with a judge outside of the presence of the other party, at least before the mediation is convened, so is the case with a mediator. Therefore, parties seeking the services of a professional mediator should not expect to discuss the case directly with the mediator before it is convened.

A mediator is a professional whose business it is to mediate cases. Fees will be charged by a mediator. However, usually the fees charged by the mediator will be offset by the savings in court costs and other costs of litigation such as attorney's fees, all of which grow as a litigated case continues unresolved. The faster a case can be resolved the less it will cost. A professional mediator familiar with the courts and the law at issue in a case can assist the parties through the maze of procedures and documents required by the courts.

Most of the time mediation conducted by and experienced mediator will result in a judicially enforceable agreement or judgment.

MORE DETAILS ABOUT MEDIATION:

The process of mediation is held in high regard by the legal system in California. The mediation process is strictly confidential and is governed by specific and special rules of evidence and conduct. Before the mediation commences, the parties will probably be asked to sign a “confidentiality agreement” stating that they understand the process and that the facts and any "evidence" that may be revealed during the process of mediation, is inadmissible at trial or subsequent hearing if the case does not settle—Unless such information or evidence is *otherwise admissible*. The mediator's role is highly protected because the mediator cannot be called as a witness, asked or compelled neither to prepare a report regarding the mediation nor to report to anyone anything about the mediation except other than to state that mediation took place and whether the mediation resulted in an agreement.

Depending upon the case (particularly civil vs. family law), demeanor of the parties and the personal style of the mediator, during the mediation session(s) the mediator will most likely meet with the parties separately for some or all of the process. This is to allow the mediator to assist all parties in coming to a resolution. It also helps the parties to express themselves more freely to the mediator. Generally, whatever is shared with the mediator during these private sessions can be shared with the opposition *unless* the mediator is asked to keep it confidential. Most mediators do not communicate settlement terms suggested to them by a party unless given the authority to do so by the party making the suggestion. Sometimes the process of the mediator seems unusual to the parties but a mediator trained in the process and has experience with mediation conducts the mediation in a manner he or she has determined will work best with the individuals involved. There are several

mediation styles and philosophies. Most trained mediators will quickly determine which style and philosophy will work best in a given situation.

The mediator will probably encourage the parties to think "outside the box" to settle difficult issues. There are several ways to resolve difficult problems if the parties want to settle. One of the benefits of mediation is that most of the time the parties would not select mediation if they were not eager to settle. However, many times parties to a dispute do not discuss their case, so a mediator's involvement often enlightens the parties to settlement possibilities that may not have occurred to them.

Mediation is most effective when the parties can communicate and solve problems without fear or intimidation. When there is a history of domestic violence in a relationship, ADR/Mediation may not be appropriate.

ARBITRATION

The parties civil and family law matters may also wish to have their cases decided by a neutral arbitrator. Arbitration is private and less formal than a court trial. In arbitration, an arbitrator (most frequently an experienced attorney or retired judge) decides based upon the information presented by both sides. The arbitrator typically applies the rules of evidence under the *California Evidence Code* and has the discretion to control the evidence and rule on objections. Sometimes, particularly cases in which arbitration is contractual (required by a contract), the rules of evidence and law may only be guides for the Arbitrator which do not have to be followed in a way a sitting Judge would have to do.

There are generally three types of arbitration from which parties can choose. The first is Judicial Arbitration under statutes such as *Family Code* §2554. A court may order a case to nonbinding arbitration under this code section and similar sections in the *Civil Code* or *Code of Civil Procedure*. The arbitration award may be "appealed" or allowed to stand and become the judgment at which time it becomes binding. This selection applies most typically where the net amount in controversy (i.e., the dispute over property values has a net difference of $50,000 or less) is under $50,000. In some courts this form of arbitration may be provided at no cost by the court. Once this arbitration is completed, if a party is dissatisfied with the decision of the Arbitrator, that party may reject the award and ask that the case proceed to trial.

The Judicial Arbitration under the family law statute may not be covered by the court because of the severe budget issues in California. If the parties pursue their case through the court system and want to save time and money, the parties should ask the trial judge to be referred under this process.

The second arbitration is nonbinding arbitration by agreement of the parties (Such as in many real estate contracts). This is the same as the above, only the parties will agree in writing to have an arbitrator decide (a private mini-trial) irrespective of the amount in controversy. An award resulting from nonbinding arbitration may be rejected by either party or accepted by all. If accepted, it becomes a judgment or the basis of a judgment. This form of arbitration usually demands a fee by the arbitrator to be paid equally by the parties.

The third general arbitration is "binding" arbitration. This proceeding requires the written agreement of the parties and, under most circumstances, is not appealable nor is it correctable by a trial court. This proceeding is somewhere between a nonbinding arbitration and a trial as far as formality. In binding arbitration the arbitrator typically will try to conduct the case more formally and very similar to the procedures followed in trial. However, depending upon the terms of the contract and the organization for which the Arbitrator may work (i.e., the American Arbitration Association, etc.), the Arbitrator's

discretion may be far broader than that of a sitting Judge in a Court. The award issued from this arbitration is typically more detailed than either of the above. This form of arbitration also requires a fee paid equally by the parties or under the contract upon which the Arbitration is conducted.

THE BENEFIT OF ADR

California Courts are in a terrible financial situation. Our courts are desperately overcrowded with Riverside and San Bernardino counties having the highest caseloads per judge in the entire state. Though this does not seem to be something that a litigant should be concerned about, the litigant ultimately pays the price. Court fees are being increased rate that is unprecedented. Delays in getting civil and family cases to trial can sometimes be long. Even for parties who have little money, the litigation process in the courts can still be very expensive. Because of the crowded court calendars, matters are routinely postponed or continued which may require the parties to take more time off of work. ADR gives the parties the exclusive attention of the arbitrator or mediator who has scheduled a time specially to handle a case. The delays are fewer and almost no matter what the mediator or arbitrator may charge, the expense is typically far less than taking a case through trial. Parties can complete their cases in a fraction of the time and cost it will take to navigate the court system.

Donald B. Cripe is a retired trial attorney and co-founder of California Arbitration & Mediation Services. California Arbitration & Mediation Services is experienced in civil and family law possessing the tools and knowledge to help parties resolve their cases quickly and efficiently.