CHAPTER 22

ALTERNATIVE DISPUTE RESOLUTION – MANDATED AND VOLUNTARY

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ALTERNATIVE DISPUTE RESOLUTION
MANDATORY AND VOLUNTARY

1. **Alternative Dispute Resolution (ADR)**
    a. What is ADR?
    b. Types of ADR
        i. Arbitration
        ii. Mediation
        iii. Others
            1. Judicial Settlement Conferences
            2. Reference Judge

2. **Arbitration**
    a. What is arbitration?
    b. Mandatory- Court Annexed
        i. Sources
            1. ORS 36.400 to 36.425
            2. UTCR Chapter 13
            3. SLR Chapter 13
        ii. Applies to:
            1. Civil cases where only monetary relief is sought and amount is less than $50k exclusive of attorney fees, costs and disbursements;
            2. Domestic relation cases where the only contested issue is division or disposition of property.
        iii. Notable deadlines:
            1. Motion for exemption from mandatory arbitration must be filed within 14 days from assignment to arbitration.
            2. Arbitration hearing must take place:
                a. Between 14 to 49 days from assignment unless otherwise provided in the SLR;
                b. Within 91 days from assignment in Multnomah County; **Check SLR for different counties**
            3. Prehearing statement of proof due at least 14 days before arbitration.
    c. Mandatory – by Contract
        i. Common in insurance, real estate, construction, and employment contracts.
    d. Voluntary
        i. When to choose arbitration over litigation

3. **Mediation**
    a. What is mediation?
    b. Court-annexed mediation programs
    c. Voluntary mediation
        i. Civil cases
        ii. Domestic relations cases
        iii. Employment
        iv. Probate

4. **Other ADR options**
    a. Judicial Settlement conference
    b. Reference Judge

5. **Tips on avoiding malpractice in arbitration and mediation**

6. **Resources**
    a. Guide to Oregon Court Arbitration Laws and Rules-updated July 2014
    b. Arbitration and Mediation (Oregon CLE 1996 & Supp 2008)

TOP TEN TIPS FOR PREPARING CLIENTS FOR ARBITRATION

1. Take the time to explain to your client what to expect in arbitration. Remember that this is probably the first time the client has ever been through something like this. In the client's mind, arbitration is akin to going to court. What is routine for the lawyer, is nerve-wracking for the client. Nervous, edgy clients tend to make mistakes while testifying. This may adversely impact their credibility. You want your client to be able to make their very best "appearance" as a witness.

2. Take the time to go over the complaint (or answer) allegations with your client. All too often, clients have no idea what their lawyers alleged on their behalf. They get very confused when they are asked on cross-examination: "Isn't it a fact you are alleging…?" Your client should know what "their" position is before the hearing. (By going over the allegations ahead of time, you might even discover that your position varies from your client's.)

3. Be sure your client has a copy of his/her deposition prior to the hearing and has reviewed it. Explain how the deposition is likely to be used by the other side's lawyer. Prepare them for any inconsistencies in their testimony that you expect to be elicited by opposing counsel.

4. If you represent a client in a personal injury action, go over their medical records with them ahead of time. Be sure to point out the "problem" issues in the records that you expect to be elicited by opposing counsel.

5. Arrive at the hearing at least ten minutes ahead of time. Give your client the opportunity to settle in and get used to the surroundings before the hearing starts. If you arrive late or right when the hearing is scheduled to begin, you have not only inconvenienced the arbitrator but you have also flustered your client right from the start. Remember, you want your client to be able to make their very best "appearance" as a witness.

6. Give some thought to how you position your client at the hearing. Your client's back should not be turned to the arbitrator.

7. Instruct your client to direct their testimony to the arbitrator as much as possible. Eye contact is important for establishing credibility.

8. Be sure your client understands that engaging in a verbal battle with opposing counsel during cross-examination will not inure to their benefit.

9. Advise your client to stop testifying if opposing counsel raises an objection. Explain that the arbitrator will make a ruling and the client will be advised as to whether s/he can complete their response.

10. Inform your client that the arbitrator may ask him/her questions. Explain that an evasive response given to a question propounded by the arbitrator is a major faux pas.

TIPS FOR SELECTING AN ARBITRATOR

by Lisa Almasy Miller

There are a lot of advertisements these days in the Bar publications about full-time neutrals. Many of these folks are lawyers disenchanted with litigation, billable hour requirements, client disloyalty, large firm politics, etc. Many are former judges who have presided over trials and settlement conferences and assume their knowledge and skills are directly transferable to presiding over arbitrations. The options are numerous. So, how does one decide on a particular arbitrator?

- Experience: The experience of your arbitrator does count! By this I mean not only that your arbitrator has experience as an arbitrator and knows the procedural and evidentiary rules that apply to arbitrations, but also that that person has experience and knowledge in the type of case being presented. Years ago, I was handling a personal injury case that went to arbitration. The arbitrator had been picked off a list of arbitrators issued by the Court. Supposedly that person knew tort law. However, when the arbitrator asked for an explanation of what was meant by "comparative negligence" I knew I was in trouble. Remember that the arbitration may be a substitute for your client's "day in court." The client needs to feel confident that the arbitrator understands the law pertaining to their case.

- Demeanor: Over the years I have represented many people who have told me in no uncertain terms that they will not go to Court; others have undoubtedly felt that way but have not admitted it openly; still others will go to Court if all other options fail. Regardless of your client's feelings about litigation, two things are certain – they want to be treated with respect and feel that the process was fair. It is therefore important to pick an arbitrator whom you believe will address those needs appropriately. Be sure to pick an arbitrator who will (1) listen carefully; (2) be respectful; (3) remain objective; and (4) have the presence and confidence to assure your client the justice system is working for them.

- Results: The purpose of "alternative dispute resolution" is to get a case resolved to avoid the cost (financial and emotional) of going to Court. Chances are your client is not particularly eager to go to Court and would like to get their case resolved. Your client probably has no interest in incurring the cost of *both* arbitration and trial. You therefore want to select an arbitrator who can get the job done. Check with your colleagues about an arbitrator's reputation; don't, however, base your decision to use (or not use) a particular arbitrator because of one person's reaction to one result with that arbitrator. Keep in mind that the result may have been the *right* result based on the facts of the case, including the credibility of the parties involved.