CHAPTER 20

ALTERNATIVE DISPUTE RESOLUTION – MANDATED AND VOLUNTARY

Lisa Almasy Miller
Miller Arbitration

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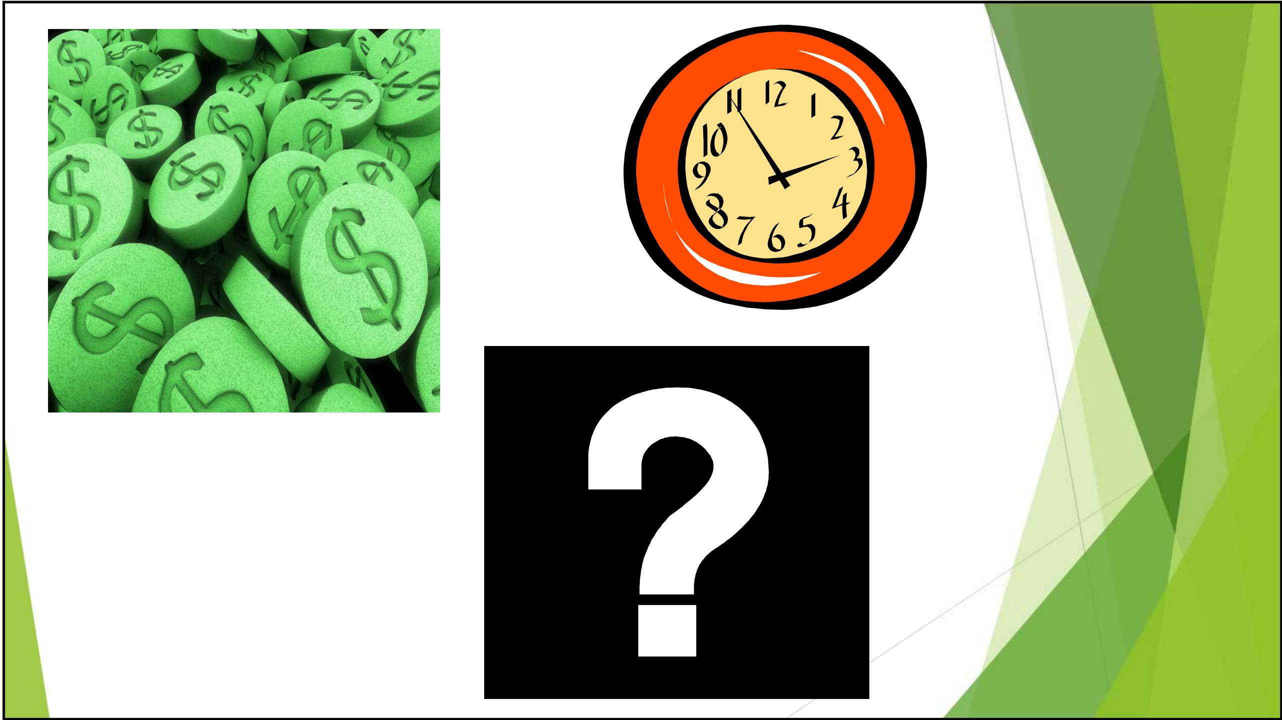
Additional Resources

ADR in Oregon (OSB Legal Publications, Fall 2019) To be available at BarBooks
https://www.osbar.org/legalpubs/barbooks.html

ALTERNATIVE DISPUTE RESOLUTION IN OREGON

MANDATED AND VOLUNTARY

"Sometimes I wear this in court.
It's my frivolous law suit."



TYPES OF ADR

- COURT-ANNEXED ARBITRATION
- CONTRACTUAL ARBITRATION
- PRIVATE ARBITRATION
- MEDIATION (CIVIL AND DOMESTIC RELATIONS)
- JUDICIAL SETTLEMENT CONFERENCE
- REFERENCE JUDGE

COURT-ANNEXED ARBITRATION STATUTES AND RULES

- 1. ORS 36.400 – 36.425
- 2. UTCR Chapter 13
- 3. Supplemental Local Rules (SLRs)

Where to find them? www.courts.Oregon.gov/courts/ name of county, e.g. Multnomah, Clackamas, Washington

Top of the page – Oregon Judicial Branch links - Forms/Rules/ Fees

Left hand side of the page – "Civil" for arbitration forms

Referral to Arbitration

"Subject to Mandatory Arbitration"

- All civil cases with damages of $50,000 or less
- All domestic relations cases involving only distribution of property and debts (no kids or support issues)

Case can be removed from or referred to arbitration after motion practice

UTCR 13.070 (exemption)

Selection of Arbitrator

- Parties select arbitrator by stipulation (can be a non-lawyer)
- Court furnishes list of names (from panel) and each side follows process of identifying preference or rejection; Court selects

PREHEARING PROCEDURES and REQUIREMENTS

- Arbitrator handles all motions (except whether case subject to arbitration, and in Multnomah County, where motion to amend adds a party)
- Hearing must be scheduled within certain time from assignment to arbitration
- Arbitrator must be paid (if no waiver/deferral) – amount varies
- Prehearing Statement of Proof due 14 days prior to hearing

PREHEARING STATEMENT OF PROOF UTCR 13.170

Due 14 days in advance of hearing

Must identify witnesses and exhibits

Upon request, must make exhibits available to other side

Estimate length of hearing

Failure to comply might result in exclusion of evidence

CONDUCT OF HEARING

- Informal and Expeditious
- Admissibility of documents (hearsay schmearsay)
- Public invited
- Hearing may be recorded

ADMISSIBLE DOCUMENTS UTCR 13.190

- Medical records, chart notes, bills
- Repair estimate
- Police, weather, traffic signal reports
- Life expectancy table
- Photographs, x-rays, maps, blueprints
- Written statements of witnesses, including experts, if made by affidavit or declaration under penalty of perjury
- Other documents having "equivalent circumstantial guarantees of trustworthiness"

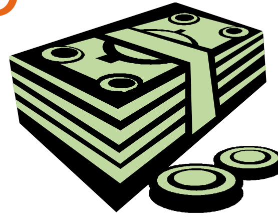
ABSENCE OF PARTY AT HEARING UTCR 13.200

Hearing can proceed without all parties present (Note: Clackamas County SLR 13.161)

If Defendant fails to appear, Plaintiff must put on a prima facie case

In case with multiple Defendants, if one Defendant fails to appear, Arbitrator can assess damages against absent party

ARBITRATION AWARD



- Prepared on court's form
- Written opinion not required
- Deadline for filing
- Error in award
- Procedure for award of costs and attorney fees ($325 prevailing party fee)

POST-AWARD PROCEDURES

- Exceptions to costs and/or fees
- Request for trial de novo
  - In writing
  - Proof of service on all parties
  - Payment of $150 fee
  - Filed with clerk within 20 days

CONTRACTUAL OR PRIVATE ARBITRATION

Know the terms of the contract or the rules under which you are arbitrating

Read the insurance policy if the case is a UM, UIM or PIP case

Binding vs. non-binding

High-low arbitration

MEDIATION

- ORS 36.100 – 36.190
- Policy of the State of Oregon - ORS 36.100
- Voluntary (usually), neutral, confidential
- The mediator facilitates a resolution of the conflict (unlike arbitrator who decides outcome)
- Private or court mediation program
- Civil and domestic relations cases

JUDICIAL SETTLEMENT CONFERENCE

- Mandatory conference required in some judicial districts
- Voluntary conference (generally with judge who will not preside over trial)
- Selection of settlement judge (may even be conducted by judge in another county)
- Time more limited than private mediation

REFERENCE JUDGE

- Check with presiding judge for approved names
- Reasons to use reference judge
- Cost
- Rights of Appeal
- Judge for hire (See ORS 3.300)

LISA ALMASY MILLER

Mediator, Arbitrator & Reference Judge
12042 SE SUNNYSIDE ROAD, #552
CLACKAMAS, OR 97015
503-805-6988
lisa@millerarbitration.com
www.MillerMediationArbitration.com

TOP TEN TIPS FOR PREPARING CLIENTS FOR ARBITRATION
by Lisa Almasy Miller

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.

WHAT DO MEDIATORS WANT?
TAKING STEPS TO GET THE BEST SETTLEMENT POSSIBLE
FOR YOUR CLIENT
by Lisa Almasy Miller

Effective Advocacy: Remember, just because you are pursuing settlement through mediation, does not mean you are no longer an "advocate" for your client. In fact, the mediator *wants* you to be an effective advocate. It is, after all, not the mediator's job to represent the interests of your client. The mediator needs *you* to be an effective advocate to help her be the most effective mediator she can be.

Dictionary Definition of "Advocacy": Verbal support for a cause; the act of pleading, supporting or recommending.

Advocacy in mediation can be broken down into three phases: (1) selection of the mediator; (2) pre-mediation preparation; and (3) conduct during mediation.

Selection of the Mediator: The first step in advocating for your client is in the selection of the mediator. Actively analyze who would be the most effective mediator for *that* case, with *that* client. Ask yourself these questions:

1. **FIRST STEP – RECOGNIZE THAT DIFFERENT MEDIATORS HAVE DIFFERENT STYLES.** What style of mediation would likely garner the best result for my client?

2. Do I want a *directive* mediator? (Meaning, one whose style is to "arm-twist" the parties into settling on the terms the mediator thinks are appropriate.)

3. Will my client (and opposing counsel/party) respond more to a mediator with a *facilitative* approach? (Meaning, the mediator will promote communication and determine whether the parties share common interests that can result in a "win-win" settlement.)

4. Does the experience of the mediator lend itself to an *evaluative* approach? (Meaning, the mediator will not only encourage communication between the parties, but will explore the parties' positions, raise questions to draw out information to help expose the relative strengths and weaknesses of each side's case, and provide feedback on their views of each party's position.)

5. **SECOND STEP: RECOGNIZE THAT THE SEX OF THE MEDIATOR MAY PLAY A ROLE.** Would a male or female mediator be more effective in dealing with the facts of the case, or with the client? (EXAMPLE: Plaintiff is a female victim of sexual abuse by a man and you perceive she has serious issues with men in general.)

6. **THIRD STEP: RECOGNIZE THE PERSONALITY OF THE MEDIATOR MAY PLAY A ROLE.** What type of personality should the mediator have considering what you know about your client and opposing counsel? Do you want someone who is sensitive, empathetic and compassionate? Do you want someone who is business-like and no-nonsense? Do you want someone who is capable of both?

7. **FOURTH STEP: WOULD HAVING MORE THAN ONE MEDIATOR BE EFFECTIVE?** Would a favorable outcome be more likely if more than one mediator

was involved? (For example, in a family law case, it can be effective to have co-mediators when custody or parenting time issues are involved.)

Before selecting a mediator, you need to know your case and your client well enough to know which type of mediator is likely to be the most effective in that particular case, with that particular client. If you have a client, for example, who you suspect does not respond well to authority, you probably do not want to agree to a mediator who has a directive approach; to do so might sabotage the process before it even begins. The point is that as an advocate, when it comes to selecting a mediator, you do not simply want to agree to whomever your opponent suggests, nor do you want to automatically select the same mediator in every case. Just as you would analyze the merits of the case, and the credibility of your client, the selection of your mediator must also be analyzed and an informed decision made based on the answers you reach from the questions raised above.

Pre-mediation Preparation: To maximize the likelihood of a good outcome in mediation, one must be prepared just as though the case was going to trial. Having all of one's i's dotted and t's crossed not only gives you, the advocate, added confidence in the mediation setting, but also sends a message to your opponent that you are ready to try the case if mediation is not successful. On the flip side, an unprepared lawyer sends a message to opposing counsel that (1) they aren't interested in investing a lot of time in the case; (2) they have no intentions of going to trial regardless of the offer; and (3) they and their client are willing to settle "cheap."

(1) Providing one's opponent with *all* relevant discovery well in advance of the mediation so all concerned parties have adequate time to evaluate the documentary evidence;
(2) Having *all* economic damages itemized and supported;
(3) Establishing the amounts of all potential liens (e.g. PIP, **Medicare**, hospital, DHS);
(4) Making sure that all lienholders have been contacted about mediation, and are available to participate in person, or by phone (or you have established ahead of time what it will take to satisfy a given lien);
(5) Properly preparing your client for mediation (see more about this below); and
(6) Fully evaluating the strengths and weaknesses of your case.

In *all* types of mediation, pre-mediation preparation also means educating the mediator, and educating the client.

EDUCATING THE MEDIATOR: Provide her with more than a one-page summary of the bare-bones facts of the case. **[Recall definition of "Advocacy."]** There is nothing persuasive about that. Rather, you want to provide the mediator with information and documents that not only inform the mediator about the facts of the case, but also arm the mediator with the "nuggets" that support your client's position and undermine the opposition's. The latter may include excerpts from medical records, an IME report, photographs, e-mails exchanged between the parties, etc.
It is also important to provide the mediator with some perspective on past settlement negotiations, if any. The mediator needs to understand the history of any offers/rejections/counter-offers that have been made so she can explore the reasons for why a settlement wasn't reached on those terms.
Lastly, a lawyer may have "client control" problems. Perhaps the client has unrealistic expectations of what they are entitled to. Perhaps the client is exceptionally emotional and not ready to let go of the conflict. Perhaps the client is from another state and doesn't have a good understanding of Oregon law or precedent. While the lawyer is not going to want to put these kinds of disclosures in writing to the mediator (with a copy going to the client), it is vitally

important that the mediator be aware of these kinds of issues. The way to handle it? Call the mediator ahead of time. Ex parte communications are not taboo in mediation.

EDUCATING THE CLIENT:

1. Explain how mediation works. Make sure they understand the reasons for going to mediation and the statutes that make the process confidential. Find out from the mediator (in a phone conversation or e-mail) whether the parties will be in the same room for some or all of the mediation, and pass that information onto your client.

2. Go over the mediator's written agreement with your client ahead of time and make sure they understand it.

3. Discuss case values. In $ damages cases, have that frank discussion with client about jury verdicts and unpredictability of juries.

4. Don't limit yourself to a cookie-cutter resolution. Be open to creative problem solving.

5. Don't forget the value of an apology.

The client who is well prepared for mediation will be calmer and better able to work more effectively with their advocate and the mediator to reach the best possible settlement of their case.

Conduct during Mediation: Some lawyers do not want the parties to be in the same room, even at the beginning of the mediation, and insist on private caucuses only. In more cases than not, this is a mistake. A joint meeting is important for several reasons: (1) it allows people who haven't met before, to put a face with a name; (2) it allows the lawyers and the parties to identify the issues in the case (a good opportunity for the mediator to identify those things on which everyone agrees); (3) it allows the lawyers to present an "opening statement" to the other side, which can be designed to not only summarize the strengths of one's case, but also show one's opponent how prepared you are; and (4) in family law cases, or other cases where there is an-going relationship between the parties, it gives the parties the chance to get some grievances off their chest.

During joint sessions, the advocate needs to be courteous to the other side and demonstrate a willingness to listen. The dynamics of the negotiations may change significantly, and to your client's benefit, if the opposing party feels he has been heard.