



DISPUTE RESOLUTION SECTION

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“Disputes arise across a broad spectrum of relationships and substantive areas of the law. Alternatives to litigation may best serve client needs for resolving many of these disputes. The NYSBA Dispute Resolution Section has prepared a series of White Papers to set forth some of the special advantages of mediation and arbitration in the various contexts in which disputes commonly arise.”

Edna Sussman, Chair, NYSBA Dispute Resolution Section

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AN INTRODUCTION TO ALTERNATIVE DISPUTE RESOLUTION FOR THE LGBT COMMUNITY

By Nancy Kramer, Esq.*

“Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, and expenses, and waste of time.” Abraham Lincoln

Litigation in this country is a lengthy and expensive proposition; a stressful process that destroys relationships. Lawyers seeking to best serve their clients who have legal disputes should consider other forms of resolution which are faster, less expensive and less disruptive. Mediation and arbitration, which are responsive to party needs in ways not possible in court proceedings, are the two most frequently utilized forms of dispute resolution. They have particular applicability in disputes involving the LGBT (Lesbian, Gay, Bisexual and Transgender) community, where confidentiality and discretion may be of particular interest to the parties and where courts may be insensitive or even hostile to parties. In LGBT family issues there is a dearth of applicable law and traditional family law can be inapplicable.

Mediation and arbitration have become common in the resolution of a wide variety of disputes--commercial and non-commercial disputes whether between and among business entities or individuals. Contracts routinely incorporate redress to mediation and arbitration for resolving any future disputes. Employment contracts for large corporations and government entities frequently offer mediation and arbitration and preclude litigation. Mediation or

arbitration are also utilized as a matter of choice after problems arise and the parties are seeking an appropriate means to resolve their disputes.

OVERVIEW OF MAJOR DISPUTE RESOLUTION TECHNIQUES AND WHAT THEY OFFER

I. Mediation

In mediation the parties engage a neutral third person to work with them to facilitate the resolution of a dispute—it is a negotiation session led by a trained professional with no stake in the outcome. The growth of mediation over the past 15 years has been exponential, a tribute to the success of the process. User satisfaction is high as parties retain control and tailor their own solution in a less confrontational setting that preserves relationships. While not every case can be settled, an effort to mediate is appropriate in almost every dispute. The advantages of mediation include:

1. *Success Rate*

Statistics have shown that mediation works very often. For example, the mediation office of the U.S. District Court for the Southern District of New York reports that over 90% of its cases settle in mediation. Most cases in mediation settle long before reaching the traditional “courthouse steps”, at a significant saving of cost and time for the parties. Since most cases eventually settle anyway, the “when” of the resolution through mediation is the key as it accelerates the process, saving more time and money than if the settlement were reached under pressure at the courthouse steps.

2. *Control by the Parties.*

Each dispute is unique, and mediation allows parties significant control over the process. They can usually select a mediator of their choice (not true for, e.g., government mediations) and can plan when, where and how often to meet. They can frequently have input into what approaches make sense during the mediation itself. A good mediator will be highly responsive to what the parties need and want throughout the process.

3. *Role of the Mediator as Reality Tester.*

The mediator’s goal is to help the parties settle their differences in a manner that meets their needs—as quickly and as well as possible. In many situations the experienced mediator serves as a sounding board and helps the parties identify and frame their relevant interests and issues. S/he assists the parties in testing their case and quantifying the risk/reward of pursuing the matter. With party consent, many mediators provide an objective analysis of the merits to each of the parties separately and may also suggest solutions that have not occurred to the parties and assist in overcoming impediments to settlement. Even if this does not occur, the mediator’s objective view of the case will often work to move counsel and parties. Attorney advocates may suffer

from “advocacy bias” -- they come to believe in and overvalue the strength of their client’s case. And the parties can benefit from the reality testing provided by the mediator. Furthermore, the mediator can provide the persistence needed to help parties reach a resolution.

4. Opportunity to Listen and Be Heard.

At a mediation the parties, as well as their attorneys, have the opportunity to air their views directly to their adversaries. The process provides a catharsis for the parties which sometimes engenders a willingness to compromise. It occasionally moves one party to “see” the other’s side. Moreover, the chance to speak to and be heard by a neutral authority figure can give the parties the sense that they have had “their day in court.”

5. Benefits in Complicated Cases.

In a case with particularly complicated facts and/or legal issues it can be difficult to sort them out in direct negotiations, or at trial. Mediation provides an opportunity to break the facts and issues into smaller components, enabling the parties to separate the matters that they agree upon from those that remain in conflict. The mediator can be indispensable to this process by separating, organizing, simplifying and addressing relevant issues. If the case does not resolve at the mediation, the process may eliminate or narrow issues, shortening the ultimate resolution of the case in litigation or arbitration.

6. Preserving Existing Relationships.

Litigation exacerbates differences rather than resolving them and can be very stressful for parties who previously had a viable relationship--business or personal. The process of litigating a dispute can make it impossible for the participants to continue or resume their relationship. In contrast, mediations -- such as those between an employer and employee or partners in a business -- can be resolved in manner that saves a relationship that is of value to the parties. The fact that there is no “winner” or “loser” in a mediation helps everyone save face.

7. Expedience.

A mediation can take place at any time. It can be utilized to settle a dispute instead of litigation or at any point in the litigation process. If scheduled early enough, the parties avoid the potentially enormous distraction and disruption that commonly results from protracted litigation.

8. Reduced Cost.

By resolving disputes earlier the parties can save tremendous sums in attorney’s fees, court costs and related expenses.

9. Lessened Emotional Burden.

Since mediation can be conducted sooner, more quickly, less expensively and in a less adversarial manner, there is typically much less of an emotional burden on the people involved

than is engendered by litigation. Furthermore, proceeding through litigation may involve publicly reliving a particularly unpleasant experience or exposing an unfavorable business action which gave rise to the dispute.

10. Confidentiality of Process and Result.

Mediation is conducted privately -- only the mediator, the parties and their representatives are present. The mediator and parties are generally bound by a confidentiality agreement not to divulge any information disclosed in the mediation or anything about the dispute resolution itself.

11. Certainty of Outcome.

Resolution during mediation avoids the inherently uncertain outcome of litigation and enables the parties to control the outcome. Recent studies have confirmed the wisdom of mediated solutions as the predictive abilities of parties and their counsel are unclear at best.¹

12. Parties Retain Their Options.

Resolution during mediation is completely voluntary, and the parties generally retain the option to proceed thereafter to trial or arbitration if mediation is not successful in resolving all matters. (This may not be true under an employer-designed system where the employee has given up the right to litigate.)

13. Benefits for Pro Se Litigants.

Mediation can be very helpful for parties who are representing themselves. Litigation is daunting for most *pro se* litigants who are unable to effectively navigate the complexities of the court process and trial. With the downturn in the economy, studies show that fewer parties are represented by counsel and that lack of representation negatively impacts the *pro se* litigant's case.² Dealing with a *pro se* litigant in court can also create difficult challenges for the party that is represented by counsel. In mediation, the parties can more easily participate in the process.

14. More creative and long-lasting solutions.

Parties develop and create their own solutions to issues addressed in mediation and may enter into innovative, creative solutions tailored to their own particular lifestyles and business interests rather than being limited by the remedies available in court or arbitration. Because the parties are involved in crafting their own solutions, the solutions reached are more likely to be long-lasting ones, adhered to by the parties.³

II. Arbitration

Arbitration is the process in which disputing parties engage a neutral arbitrator or panel of three arbitrators to conduct an evidentiary hearing and render an award to resolve the dispute. As arbitration is a matter of agreement between the parties, entered into either pre-dispute in a contract as is generally the case, or post-dispute when a difference arises. In either case, the process can be tailored to meet the needs of the parties. Arbitration offers many advantages including:

1. Speed and Efficiency.

Arbitration can be far more expeditious than court litigation. Most arbitrations can be commenced and concluded within months, often in less than a year. Leading dispute resolution providers report that the median time from the filing of the demand to the award was eight months in domestic cases, compared to a median length for civil jury trials in the U.S. District Court for the Southern District of New York of 28.4 months—many continuing for months longer through appeals in the Second Circuit.⁴

2. Lower Costs.

The arbitration process can result in substantial savings of attorney's fees, court costs and related expenses, even though the arbitrator(s) are paid by the parties. This is because arbitration generally does not include the time-consuming and expensive discovery that is common in courts in the United States. Extensive and expensive motion practice is also much less common.

3. More Control and Flexibility.

In cases where arbitration is required by contract, the parties can prescribe various preferences to suit their needs, such as the number of arbitrators hearing the case, the location of the arbitration and scope of discovery. A party seeking a more streamlined and less expensive process is better able to achieve that goal than in court. The parties will also have significant input in scheduling the hearing(s).

4. Ability To Choose Decision Makers.

The parties can generally select their arbitrator(s) using whatever criteria they wish. This enables, for example, the selection of arbitrators with in-depth subject matter expertise and experience. Arbitrators with such experience can often zero in on issues and play a more active role in questioning witnesses, making the process more expeditious than a trial before a judge selected randomly might be.

5. *Privacy.*

Arbitrations are conducted in private. Only the arbitrators, the parties, counsel and witnesses attend the arbitration. Confidentiality of the arbitration proceedings, including sensitive testimony and documents, can be agreed to by the parties. Furthermore, in the generally less adversarial context of a private arbitration, ongoing relationships suffer less damage.

6. *Finality.*

The grounds for court review of an arbitration award are very limited, resulting in few appeals. Therefore the award of an arbitrator is generally final and binding on the parties.

HOW THIS PERTAINS TO THE LGBT COMMUNITY

Members of the LGBT community experience disputes and may have recourse to dispute resolution techniques in virtually any situation. In many cases the fact that the parties are lesbian, gay, bisexual or transgender is of no or passing significance. In estate matters (where the document governs), real estate transactions, business deals, etc., members of the LGBT community are in a position little distinguished from non-LGBT community people. However, there are two particular areas where unique issues and concerns for LGBT parties arise. The first is employment discrimination claims based on the employee's actual or perceived connection to the LGBT community. The second is the whole panoply of family law matters—creation and dissolution of couples; procreation, adoption, separations, custody/visitation issues, etc. In these disputes mediation has proven to be invaluable.

Employment Discrimination

LGBT employees may experience discrimination of various kinds based on their sexual preference or orientation or their non-gender conforming appearance. These claims include creation of a hostile work environment; being disciplined unfairly; being terminated; being passed over for raises or promotions or denied training opportunities that might lead to them. In many of these situations the employee may prefer that her/his personal life (orientation or transgendering status, for example) be kept as private as is possible in the workplace—or that aspects of that life or identity be explained at a certain point or in a certain way. The privacy of a confidential dispute resolution process is invaluable in such a case.

Furthermore, a management person or team accused of insensitivity, at best, or actionable behavior, at worst, may be able to listen and understand the situation in the private and low-key setting of a mediation. Management might be influenced by an increased familiarity with the legal protections offered in New York State. Non-discrimination rights are conferred by the New York State Human Rights Law (NYS Executive Law, Article 15) and supplemented by some more inclusive local laws as New York City's Human Rights Law (Title 8 of the Administrative Code of the City of New York).

An open discussion of the problem can enable someone unaware of it to focus on issues s/he was not familiar or comfortable with. Ideally such a person might be brought to see the employee's complaint as legally viable and/or valid and offer some workplace changes. Changes in management attitudes and behavior are difficult to bring about. However, they are more likely to occur when management persons are not put on the defensive, as happens in litigation. Furthermore, the employee might come to see and understand something about the employer's viewpoint.

Family Law

LGBT families face the same wrenching emotional issues as non-LGBT families when separating and additional issues when dealing with adoptions, custody, surrogacy, etc. The problems of custody and visitation and property division are similar⁵, but the LGBT community has traditionally been excluded from the legal system governing other families. There was no legal structure nor expectations governing their coming together as permanent couples nor their dissolution of such bonds. In essence, the LGBT community has had to create its own extra-legal family structure. And mediators, both from and outside the community, helped clarify certain recurring family issues.

For a long time there were no laws or even guidelines for when a couple dissolved a union—for the division of assets; provision of support for a financially dependent partner or custody and visitation provisions for the non-custodial parent. Nor for a long time did state adoption laws contemplate single or couple gay adoptions (single, couple or second parent). As one mediator put it, “Most straight relationships have developed against a static legal background and a consistent set of social expectations, whereas same-sex couples are forced to navigate their personal relationships within a rapidly changing framework of social norms and, depending on what state they live in, a shifting set of legal operating rules.”⁶

This is changing, slowly. And bringing gay couple relationships into the framework of traditional family law raises as many issues as it answers. For one example, take the situation of a gay couple who lived together and shared their lives and assets fully for 35 years, marrying two years ago when that became possible. If they divorce after two years of legal marriage, how would traditional divorce law, which takes into account the duration of the marriage, apply? Surely the fact that they lived as married, but were not able to acquire that legal status until late in the relationship is of major relevance.

Some have posited that many LGBT couples have a deep distrust of the legal system which has ignored or been hostile to their needs and issues. In fact, they may have benefitted from relying largely on mediation to resolve personal disputes.⁷ The absence of a set and rigid system of family expectations, rituals and laws may have resulted in the molding of solutions more individually tailored to the people involved and their particular situation—which is one of the great benefits of mediation.

Successful LGBT Community Mediation Stories—And Who Knows What Might Have Happened In Litigation (True mediation cases with a few identifying facts changed to protect confidentiality)

***** *Two men were romantically involved and lived together briefly (less than three years) with no domestic partnership, no marriage, and no explicit understanding. There was a big difference in their professional stature and earning capability—Ted was a successful big firm lawyer and Billy a former construction worker now enrolled in college in order to become a school teacher. During their short and tempestuous relationship together they adopted one daughter. As the relationship deteriorated, Ted adopted another daughter on his own. The two men considered the girls to be sisters and Ted’s extended family provided love and back-up care for the girls, who were two and four years old at the time of the mediation. Both men viewed their romantic relationship as long over. Both were deeply committed to their roles as fathers and to raising the children as sisters.*

They came to mediation (Ted with great skepticism) to try to formulate a living plan that would last. At that point the two little girls lived with Ted in his brownstone with a full-time nanny available during the days. Billy had moved into a small shared apartment but frequently visited and sometimes stayed over at Ted’s house. Billy had one more year of college to complete and asked for financial help from Ted for that one year to become financially independent. Two mediation sessions worked it out (this was a rare poster case situation- more sessions are often necessary). Ted agreed to help Billy financially and to give him almost unlimited access to the children as long as they remained living with him.

I have heard from one of them since and was told that the family continues to do well. Both girls live with Ted, with frequent visitation by and to Billy, who now teaches elementary school in Brooklyn and has much more free time than Ted to spend with the kids.

These two men created an atypical but highly functional family. Who knows what would have happened in court.

***** *Another case involved a long-term lesbian couple, women who had spent all their life together since they were teen-agers and had thought that would continue forever. The women had two children: Karen gave birth to the first child, a daughter, and 10 years later, Brenda gave birth to a son. Karen and Brenda had conflicts but were very committed to each other and their family--- until Karen fell out of love with Brenda and into love with someone else.*

Brenda had adopted the daughter shortly after she was born. It had been intended that Karen would adopt the son, but this had not taken place before the two parents split up and Karen moved out of the family apartment.

When they started mediation, at the suggestion of a family therapist, Brenda had not fully accepted the situation. Some drama and what looked like a potential reconciliation between them followed, but eventually they stayed separated and Karen's new partner came into the children's lives. Both women were clear that the children should be raised together and they had to and would co-parent them. Also, Brenda had a successful corporate career that necessitated a great deal of travel. She had relied on Karen to provide stability and child care to back her up and she wanted this to continue.

After a long series of sessions, they worked out a fluid joint custody, with the children moving between their two apartments which were one block from each other. Assets, including a country home, were divided, as were considerable debts.

Also, and very key, the parents managed to have the second adoption take place after disclosing to the court that they had dissolved their relationship. At the parties' request, the mediator wrote a statement to the court discussing her sense of the strong family structure and supporting approval of the adoption. Again, one wonders what a litigated resolution would have entailed—and at what cost.

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¹ In an analysis of 2,054 cases that went to trial from 2002 to 2005, plaintiffs realized smaller recoveries than the settlement offered in 61% of cases. While defendants made the wrong decision by proceeding to trial far less often -- in 24% of cases -- they suffered a greater cost -- an average of \$1.1 million -- when they did make the wrong decision.
Randall Kiser, *Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients*, (Springer Science + Business Media LLC New York publ.) (2010)

² Report on the Survey of Judges on the Impact of the Economic Downturn on Representation in the Courts (Preliminary), ABA Coalition for Justice, July 12, 2010, available at <http://new.abanet.org/JusticeCenter/PublicDocuments/CoalitionforJusticeSurveyReport.pdf>

³ Irene Warshauer, *Creative Mediated Solutions* (New York Dispute Resolution Lawyer (Fall 2010)

⁴ *Judicial Business of the United States Courts 2009* Table C-5, available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2009/tables/C05Mar09.pdf>

⁵ Nancy Kramer, *The Same But Different: Mediating Separations Of Same-Sex Couples* (ACResolution Summer 2005)

⁶ Frederick Hertz, *Mediating Same-Sex Disputes: Understanding the New Legal and Social Frameworks*
(To be published in upcoming issue of Massachusetts Family Mediation Quarterly).

⁷ Mark J. Hanson, *Moving Forward Together: The LGBT Community And The Family Mediation Field*
(Pepperdine Dispute Resolution Law Journal 2006)