Center for
Alternative
Dispute
Resolution

Mediation. It Works!

Dispute Resolution Procedures

Prepared by the
Center for Alternative Dispute Resolution
Hawaii State Judiciary

Acknowledgments

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A MESSAGE FROM THE CHIEF JUSTICE

The mission of the Judiciary, as an independent branch of government, is to administer justice in an impartial, efficient and accessible manner in accordance with the law. We are committed to helping parties resolve their disputes as fairly, quickly, and efficiently as possible.

Cases filed in our courts present a wide range of issues and circumstances, and no single process can be expected to meet the needs of all cases. However, many cases can be successfully resolved through alternative dispute resolution (ADR). The Judiciary offers a range of ADR options. Parties have the opportunity to use the procedure that best fits the particular circumstances of their case.

As discussed in the following pages, ADR processes can offer numerous advantages over both formal litigation and direct negotiations between the parties. ADR procedures may lead to resolutions that are:

- faster
- less expensive
- more creative
- better tailored to all parties' underlying interests

We urge you to consider using an ADR process in your case. The Judiciary's Center for Alternative Dispute Resolution is available to help answer your questions about ADR and how ADR may meet your needs.

We are confident that parties who use our ADR programs can obtain satisfying results while saving significant time and money. We are therefore committed to providing opportunities for ADR, and to ensuring that ADR is conducted in a manner that is fair, transparent, and accessible.

Mark E. Recktenwald
Chief Justice
Hawaii State Judiciary

What is ADR?

Alternative Dispute Resolution (ADR) describes processes that offer alternatives to litigation (filing and proceeding with a lawsuit), and provides opportunities for early, party- driven and fair resolution of conflicts. Methods include, but are not limited to, mediation, arbitration, fact-finding, consensus-building, early neutral evaluation, and settlement conferences. The purpose of ADR is to facilitate settlements and agreements on issues defined by the parties.

How can ADR help in my case?

Most cases can benefit in some way from one or more of the ADR processes. Each ADR process offers at least some of the following advantages over traditional litigation. You should consider using an ADR process if any of the characteristics listed below could improve the resolution of your dispute.

PRODUCE GREATER SATISFACTION WITH RESULTS

After a lawsuit goes all the way through trial, even the winners may feel they have lost. The costs and time commitment on both sides may be enormous. Sometimes neither side is satisfied with the result. Relationships that may have existed between the parties are likely to have been severely strained. On the other hand, ADR may help you:

- settle all or part of the dispute much sooner than a trial
- reach a mutually acceptable solution that a court would not have the power to order
- save time and money
- preserve ongoing business and/or personal relationships
- increase satisfaction and result in a lasting resolution

CREATE MORE FLEXIBILITY, CONTROL AND PARTICIPATION

In formal litigation, the court is limited in the procedures it must follow and the solutions it might reach, and there are risks to submitting a case to a judge or jury. ADR processes are more flexible and permit parties to participate more fully and in a wider range of ways. They give parties more control by providing opportunities to:

- customize the resolution process
- expand the range of views and interests considered
- reach a business-oriented or other creative solution that may not be available from the court
- protect privacy
- eliminate the risks of litigation

LEAD TO A BETTER UNDERSTANDING OF THE CASE

In traditional litigation, the parties may stop communicating directly. Often it is only after a significant amount of time and expense that the parties come to understand how their dispute can be presented in the legal system.

ADR can expedite the parties' access to information and help them obtain an earlier and better understanding of the legal aspects of their case. It may:

- provide an opportunity for parties to communicate their views directly and informally
- assist parties to identify and focus on the core issues
- help parties understand relevant laws and evidence
- help parties understand the strengths and weaknesses of their positions
- encourage parties to exchange key information directly

IMPROVE CASE MANAGEMENT

Early in a lawsuit, attorneys sometimes find it difficult to devise a cost-effective case management plan and/or ways to limit the dispute. An ADR neutral (an impartial person) may help you:

- streamline exchange of information and other pre-trial processes
- narrow disputed issues by identifying areas of agreement
- reach agreements that limit the factual and legal issues, thereby reducing court time

REDUCE COMMUNICATION BARRIERS

Due to its adversarial nature, litigation can increase the level of tension, and often hostility, between parties. These escalated barriers to communication hamper chances for settlement. In contrast, an ADR neutral may:

- improve the quality and tone of communication between lawyers and parties
- decrease hostility between clients and between lawyers
- reduce the risk that parties will give up on settlement efforts

WHEN ADR MAY NOT BE USEFUL

Although most cases can benefit in some way from ADR, some cases might be better handled through the formal litigation process. These include lawsuits in which:

- a party wants to establish a new legal interpretation
- there is a constitutional question or a new test of the law
- a court can dispose of the case easily
- a party wants vindication
- a party wants the protections of formal litigation
- a party prefers that a judge preside over all processes

Which ADR processes does the court offer?

ADR processes the court offers include:

- Arbitration (non-binding)
- Mediation
- Settlement Conferences (conducted by judges)

Each of these processes is described separately in the next few pages. In reviewing these processes, keep your case in mind as you consider which one might be best suited for your situation.

The court also makes available other dispute resolution processes and encourages parties to consider retaining the services of the community mediation centers (see list on page 22) or private sector ADR providers.

ARBITRATION

GOAL:

The goal of arbitration is to provide parties with a decision that is earlier, faster, less formal and less expensive than a trial. Arbitration involves submission of a dispute to a neutral arbitrator who renders a decision after hearing arguments and reviewing evidence. It is usually less rigidly structured and can be concluded more quickly than formal court proceedings.

COURT ANNEXED ARBITRATION PROGRAM (CAAP) PROCESS:

All tort (personal injury) cases filed in Circuit Court with a probable jury award value of $150,000 or less are automatically assigned to CAAP. A volunteer arbitrator presides at a hearing where the parties present evidence through documents, other exhibits, and witness testimony. The rules of evidence are somewhat relaxed in order to save time and money.

Arbitration in CAAP is non-binding, that is, parties may ask for a trial in court if they disagree with the arbitrator's award (decision). The award in a non-binding arbitration becomes the judgment in the case only if a Notice of Appeal and Request for Trial de Novo is not timely filed by a party.

The CAAP process includes important, trial-like procedures:

- parties may use subpoenas (requiring witnesses to attend the hearing and/or present documents)
- witnesses take an oath to tell the truth when they testify
- the parties may conduct discovery before the hearing and, in some circumstances, use it later at trial to demonstrate inconsistencies in that witness' opinion or memory.

Arbitrators review the facts of the case against the applicable law and issue a non-binding award. Arbitrators may conduct mediations or settlement negotiations, with consent of all parties.

PRESERVING THE RIGHT TO TRIAL:

If all parties accept the arbitrator's decision, the award becomes the final judgment of the court and may not be appealed to a higher court. However, either party may reject the non-binding award and request a trial before a judge or a jury, who will not know the result of the arbitration. (However, if the appealing party does not improve on the arbitration award by 30 percent or more, the trial court may impose penalties on that party.)

THE NEUTRAL(S):

CAAP assigns an arbitrator from a panel of volunteer arbitrators after the defendant files an answer (response) to the plaintiff's complaint, and after all other "pleadings" (documents) are filed with the court.

Arbitrators on the CAAP panel:

- are attorneys who have been in practice for at least five years
- have received arbitration training by the court and sworn in to have general power of a court

ATTENDANCE:

Insurers of parties are strongly encouraged to attend the arbitration hearing. The following persons are required to attend:

- clients with knowledge of the facts
- the lead trial attorney for each party
- any witnesses ordered to appear by subpoena

CONFIDENTIALITY:

No transcription or recording is made during the arbitration. If the award is appealed, the award is "sealed." The arbitration proceeding and award are not disclosed at a later trial. The sealed award may only be opened after the jury verdict or the judge makes a trial decision.

TIMING:

The arbitration hearing is generally held within nine months after filing the last pleading that responds to the complaint.

WRITTEN SUBMISSIONS:

The parties exchange and submit written pre-hearing statements to the arbitrator before the arbitration. These statements are not filed with the court.

APPROPRIATE CASES/CIRCUMSTANCES:

All tort cases with a probable jury verdict of $150,000 or less are automatically included in CAAP, unless the parties request to be exempt or removed from CAAP. Cases that do not fall into CAAP's criteria may be included in CAAP if all parties make a written request.

COST:

There is no charge to the parties.

MEDIATION

GOAL:

The goal of mediation is to help parties explore options to reach a mutually satisfactory agreement resolving all or part of the dispute. During the mediation process, applicable evidence and laws may be examined, but more importantly, the parties' underlying interests and priorities are identified.

PROCESS:

Mediation is an informal and private process in which a neutral third person — a mediator — helps disputing parties discuss and evaluate options for reaching a mutually acceptable agreement. The mediator does not judge who is right or wrong or make decisions for the parties; the disputing parties create the agreement. Therefore, mediation is non-binding unless and until the parties reach an agreement. Mediation may be used before or after filing a lawsuit. The mediator, who may meet with the parties in joint and separate sessions, works to:

- improve communication between parties
- help parties clarify and communicate their interests and understand those of the other parties
- probe the strengths and weaknesses of each party's legal positions
- identify areas of agreement
- help generate options for a mutually agreeable resolution

There are different types of mediation. Often mediators will not give an overall opinion about the strengths and weaknesses of each party's legal position. However, by exploring the parties' interests that may be entirely unrelated to the legal issues involved, the mediator helps broaden the range of possible resolutions beyond those provided by the lawsuit.

PRESERVING THE RIGHT TO TRIAL:

The mediator has no power to impose a settlement and does not influence a party to accept any proposals. A party's right to obtain information and have court hearings on certain matters is preserved during the mediation process. The parties may agree to a binding settlement. If no settlement is reached, the case remains on the trial track.

THE NEUTRAL:

Mediators for some court programs are provided by the community mediation centers or the courts. Additionally, parties may select mediators from the private sector.

ATTENDANCE:

Insurers of the parties are strongly encouraged to attend the mediation session. Parties are strongly encouraged to participate actively in the mediation. Both may be required to attend the mediation. Requests to permit a client to be available by phone rather than in person may be granted by the mediator.

CONFIDENTIALITY:

Parties may make agreements about confidentiality. Generally, communications made in connection with a mediation are not to be disclosed in subsequent proceedings, unless otherwise agreed, or in certain limited exceptions.

TIMING:

Mediation may be requested at any time during a case — before filing a case or after an appeal is filed. For some programs, the mediator may contact the attorneys (or parties representing themselves) to schedule an initial telephone conference or meeting. The conference may include setting the time, date and location of the mediation, and an exploration of ways to fully utilize the session. Small claims and residential landlord/tenant cases are usually mediated at court on the day of trial.

WRITTEN SUBMISSIONS:

Attorneys and parties may exchange and submit written statements to the mediator before the mediation. The mediator may request or accept additional confidential statements that are not shared with the other side. These statements are not filed with the court.

APPROPRIATE CASES/CIRCUMSTANCES:

Many civil cases may benefit from mediation. Cases may be particularly appropriate for mediation when:

- the parties have a continuing business or personal relationship
- the parties want a business-oriented or other creative solution
- there are multiple parties involved
- the parties seek a non-monetary solution
- communication appears to be a major barrier to resolving or advancing the case

COST:

Fees differ. There is generally no fee for mediation provided at the courthouse for small claims and residential landlord/tenant cases referred by judges.

SETTLEMENT CONFERENCES

GOAL:

The goal of a settlement conference is to assist the parties in negotiating a settlement of all or part of the dispute.

PROCESS:

A judge helps the parties negotiate. Some settlement judges also use mediation techniques to improve communication among the parties, explore barriers to settlement, and help develop resolution options. Settlement judges might express views about the relative strengths and weaknesses of the parties' legal positions. Often, settlement judges meet with one side at a time, and some settlement judges rely primarily on meetings with the attorneys.

PRESERVING THE RIGHT TO TRIAL:

The settlement judge does not impose settlement on the parties. The parties may agree to a binding settlement. If no settlement is reached, the case remains on the trial track. The parties' rights to obtain information and to have court hearings on certain matters are all preserved.

THE NEUTRAL:

A judge conducts the settlement conference. Some judges have already issued orders concerning settlement conferences, including requirements for written documents and attendance. Questions about these issues should be directed to the staff of the assigned judge.

ATTENDANCE:

Settlement judges' orders often require the parties to attend a settlement conference or at least be available by telephone. Attorneys attending the conference without their clients are not only required to be thoroughly familiar with the case, but must have the authority to negotiate a settlement.

CONFIDENTIALITY:

Confidentiality is maintained at the conference in order to foster frank, open discussions.

TIMING:

A voluntary settlement conference may be requested at any time. Mandatory conferences are set by the court. The timing depends on the judge's schedule.

WRITTEN SUBMISSIONS:

Written settlement conference letters are submitted directly to the settlement judge. These are confidential and are not filed with the court.

APPROPRIATE CASES/CIRCUMSTANCES:

A civil case may be particularly appropriate for a settlement conference when:

- a client or attorney prefers to appear before a judge rather than a mediator
- issues of procedural law are especially important
- a party is not represented by an attorney

COST:

There is no charge to parties.

Which is the most suitable ADR process for my case?

Each ADR process meets different needs and circumstances. When selecting an ADR process, you should carefully review your own case or situation to identify the goals you hope to achieve through ADR. You may then select the ADR process that is best for your particular case.

Whether a particular ADR process will provide a specific benefit depends not only on the type of ADR process used, but on many other factors including: the style of the neutral; the type of case; the stage of legal proceedings already reached; the parties' and attorneys' attitudes and personalities; the degree of preparation; and the participants' experience with the particular ADR process.

While the court is unable to make any guarantees, the chart on page 17 summarizes the court's general observations about ADR's major benefits and the extent to which the three major ADR processes are likely to provide them. These are generalizations that the court believes are accurate in many, but not all cases.

The Center for Alternative Dispute Resolution is available to provide you with information to help you select an ADR process to meet your needs.

GENERAL FACTORS TO CONSIDER IN SELECTING AN ADR METHOD:

Mediation may be best when:

- there is a continuing relationship between the parties
- either party can benefit from hearing directly from the other party
- there are multiple parties that may benefit from being included in discussions about the case outside of a court setting
- parties would benefit from discussions about the reality of their positions
- resolving the case would be more likely if a wider range of alternatives were available, beyond those a court has the power to provide
- there is a reasonable expectation that the dispute can be resolved
- parties (one or more) would like to avoid the publicity that may accompany a court case
- there is a risk of unfavorable legal precedent
- there are problems with exchanging information
- parties seek a quick resolution of their case
- a resolution of the factual issue(s) will assist in settlement

Arbitration may be best when (in addition to the above):

- parties want a binding decision (or a non-binding decision with the possibility of penalties if the award is appealed)
- one party can benefit from hearing directly from the other party

Settlement conference may be best when:

- the judge's knowledge of the case will be useful
- problems exist with exchanging information and it is important to keep the pressure of an upcoming trial date
- a referral to ADR might delay resolution of the case
- a referral to a different ADR process might unduly increase costs to the parties

How likely is each ADR process to deliver the specific benefit?

● = Very likely ◗ = Somewhat likely ❍ = Unlikely

ENHANCE PARTY SATISFACTION	Arbitration	Mediation	Settlement Conference
Help settle all or part of dispute	◗[1]	●	●
Permit creative, party-driven solution that court could not order	❍[1]	●	◗
Preserve personal and/or business relationships	❍[1]	●	◗
Increase satisfaction and thus improve the chance of lasting solution	◗[1]	●	◗
ALLOW FLEXIBILITY, CONTROL, AND PARTICIPATION			
Broaden the interests taken into consideration	❍	●	◗
Protect confidentiality	◗	●	●
Provide trial-like hearing	●	❍	❍
Provide opportunity to appear before judicial officer	❍	❍	●
IMPROVE CASE MANAGEMENT			
Help parties agree on further conduct of the case	●	◗	◗
Streamline discovery and motions	●	◗	◗
Narrow issues and identify areas of agreement	◗	●	●
Reach stipulations	❍	◗	●
IMPROVE UNDERSTANDING OF CASE			
Help get to core of case and sort out issues in dispute	◗	●	●
Provide neutral evaluation of case	●	❍	◗
Provide expert in subject matter	◗	◗	◗
Help parties see strengths and weaknesses of positions	●	●	●
Permit direct and informal communication of parties' (as opposed to counsels') views	❍	●	❍
Provide opportunity to assess witness credibility and performance	●	◗	❍
Help parties agree to an informal exchange of key information	◗	◗	◗
REDUCE HOSTILITY			
Improve communications between parties/attorneys	◗[1]	●	◗
Decrease hostility	❍	●	◗

NOTES:

1. Arbitration may provide this benefit when the award triggers or contributes to settlement discussions.

What else do I need to know?

HOW DO I GET MY CASE INTO AN ADR PROCESS?

There are at least three ways cases can enter an ADR process:

- Some cases are automatically assigned to an ADR process (e.g., personal injury cases with a probable jury verdict of less than $150,000 go to CAAP, small claims cases are referred to mediation, etc.)
- You may submit a written agreement and proposed order to enter an ADR process with the assigned judge
- The assigned judge may order the case to ADR

WHEN CAN I GET MY CASE INTO AN ADR PROCESS?

Counsel, individually or jointly, can request an ADR referral **at any time**. The court encourages the use of ADR early as it may be potentially helpful.

WHEN IS THE BEST TIME TO USE ADR?
HOW MUCH INFORMATION SHOULD BE EXCHANGED FIRST?

You should consider ADR early, whether you are seeking assistance with settlement or case management. The cost of completing full "discovery" (the process of exchanging information) before an ADR session may outweigh the potential cost savings. If you are using ADR for settlement purposes, you should know enough about your case to assess its value and identify its major strengths and weaknesses.

WILL ADR AFFECT MY CASE'S STATUS ON THE TRIAL TRACK?

Assignment to an ADR process generally does not affect the status of your case in litigation. Judges sometimes may postpone certain actions until after the parties have had an ADR session. If your case does not settle through ADR, it remains on the trial track.

HOW MIGHT ADR BE BETTER THAN THE PARTIES MEETING ON THEIR OWN?

Getting settlement discussions started

Sometimes parties or attorneys are reluctant to initiate discussions. The availability of multiple ADR options allows parties to explore settlement potential without the perception that they are hinting at or disclosing any weakness in their cases.

Saving time and money

An ADR process can provide a safe and early opportunity to discuss settlement before (and sometimes during and after) trial. However, for various reasons, direct settlement discussions often do not occur until late in the lawsuit after much time and money have been spent. These resources may be preserved if parties actively explore settlement as early as possible.

Providing momentum, and a "back up"

Often parties successfully negotiate an early resolution on their own. Even if you are negotiating a settlement by yourself, you can consider using an ADR process as a "back up" in the event the case does not settle. Meanwhile, knowing that you have a date for the ADR process may help by providing momentum and a "deadline" for your direct settlement discussions.

Overcoming obstacles to settlement

The adversarial nature of litigation often makes it difficult for attorneys and parties to negotiate a settlement. An ADR neutral may help overcome barriers to settlement by using information from each side selectively to:

- help parties talk productively
- help each party understand the other party's views and interests
- communicate views or proposals in different, more neutral language
- assess how one party's proposals might be received by the other
- help parties realistically assess their alternatives to settlement
- help generate creative solutions

Improving case management

The process of exchanging information can be expensive, time consuming, and may fail to focus on the most important issues in the case. An early meeting with a neutral may help parties agree to a focused, cost-effective plan to exchange information according to official procedures, or may help them agree to a more informal method.

WON'T I RISK GIVING AWAY MY TRIAL STRATEGY IN ADR?

Most cases in the courts are resolved without a trial. If you don't raise your best arguments in settlement discussions, you risk failing to achieve the best result for your side. You need not reveal your trial strategy. However, you might find it useful to raise it in a confidential separate session with the neutral (available during mediation or a settlement conference). You and the neutral can discuss the significance of sensitive information and whether or when sharing it with the other side may help you in settlement negotiations.

Where can I get more information?

CENTER FOR ALTERNATIVE DISPUTE RESOLUTION

Center for Alternative Dispute Resolution
The Judiciary, State of Hawaii
417 South King Street, Room 207
Honolulu, Hawaii 96813
Telephone: (808) 539-4ADR (4237)
Fax: (808) 539-4416

Visit the Center's Website at http://www.courts.state.hi.us/cadr
Please contact the Center if you would like more information about ADR in Hawaii.

COURT ANNEXED ARBITRATION PROGRAM

Court Annexed Arbitration Program
The Judiciary, State of Hawaii
777 Punchbowl Street, 4th Floor
Honolulu, Hawaii 96813
Telephone: (808) 534-6000
Fax: (808) 534-6011

Please contact the Court Annexed Arbitration Program if you would like more information about the court's non-binding arbitration program.

ADR PROVIDERS

PRIVATE SECTOR

The court encourages parties to consider private sector providers who offer ADR services. Private ADR providers come from a variety of backgrounds and generally have expertise in dispute resolution techniques. They usually charge a fee.

Call the Center at (808) 539-4237 to request a copy of "Selecting a Mediator," a consumer guide to assist in selection of a mediator.

STATEWIDE COMMUNITY MEDIATION CENTERS

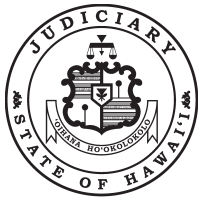
Kauai Economic Opportunity, Inc.
Mediation Program
2804 Wehe Road
Lihue, Hawaii 96766
Telephone: (808) 245-4077
Fax: (808) 245-7476
Website: www.keoinc.org

Kuikahi Mediation Center
101 Aupuni Street, Suite 1014B2
Hilo, Hawaii 96720
Telephone: (808) 935-7844
Fax: (808) 961-9727
Website: www.hawaiimediation.org

Mediation Services of Maui
95 Mahalani Street
Wailuku, Hawaii 96793
Telephone: (808) 244-5744
Fax: (808) 249-0905
Website: www.mauimediation.org

The Mediation Center of the Pacific
245 North Kukui Street, Suite 206
Honolulu, Hawaii 96817
Telephone: (808) 521-6767
Fax: (808) 538-1454
Website: www.mediatehawaii.org

West Hawaii Mediation Center
P.O. Box 7020
Kamuela, Hawaii 96743
Telephone: (808) 885-5525
Fax: (808) 887-0525
Website: www.whmediationcenter.org



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