

CHAPTER 12 ALTERNATIVES TO LITIGATION: ARBITRATION AND MEDIATION

PART ONE: ALTERNATIVES TO LITIGATION:

ARBITRATION AND MEDIATION

I. (§12.1.1) INTRODUCTION

II. (§12.1.2) MEDIATION FOR CIVIL CASES

- A. (§12.1.3) THE AGREEMENT TO MEDIATE.
- B. (§12.1.4) ADMINISTRATIVE AGENCIES.
- C. (§12.1.5) HOW TO PREPARE FOR A MEDIATION SESSION/DISCOVERY.
- D. (§12.1.6) THE MEDIATION SESSION.
- E. (§12.1.7) WHY MEDIATION WORKS.
 - 1. (§12.1.8) *Mediation Brings the Parties to the Bargaining Table.*
 - 2. (§12.1.9) *Mediation Educates the Participants.*
 - 3. (§12.1.10) *The Mediator can Work Behind the Scenes to Develop a Settlement.*
- F. (§12.1.11) HOW TO SELECT CASES TO SEND TO MEDIATION.
 - 1. (§12.1.12) *It has been three months since the parties discussed settlement; or the case is over 2 years old.*
 - 2. (§12.1.13) *The disputants in a case have an ongoing relationship.*
 - 3. (§12.1.14) *Your phone calls or letters to the other side go unanswered.*
 - 4. (§12.1.15) *You — or the other side — are having client control problems.*
 - 5. (§12.1.16) *A lawsuit will soon be filed.*
 - 6. (§12.1.17) *The case is in litigation and a substantial round of discovery is coming up.*
 - 7. (§12.1.18) *The case is in litigation and it is time to begin preparing for trial.*
 - 8. (§12.1.19) *The other side is not furnishing you with the information you need in order to discuss settlement.*
 - 9. (§12.1.20) *The case involves a large number of parties, and you are having trouble putting together a comprehensive settlement.*
 - 10. (§12.1.21) *The case involves co-defendants or co-plaintiffs who are unable to agree among themselves on settlement possibilities.*
 - 11. (§12.1.22) *One party to a case — or their attorney — is driving up everyone's litigation costs by engaging in unnecessary discovery or procedural maneuvers.*
 - 12. (§12.1.23) *You are handling numerous similar cases.*
 - 13. (§12.1.24) *Your experience tells you that this case will settle.*
- G. (§12.1.25) LEGALITIES OF THE MEDIATION PROCESS.
 - 1. (§12.1.26) *Is a Mediated Settlement Agreement Legally Binding?*
 - 2. (§12.1.27) *Is the Mediation Process Confidential?*
 - 3. (§12.1.28) *Does Mediation Toll the Statute of Limitations?*
 - 4. (§12.1.29) *Is a Mediation Clause in a Contract Enforceable?*
- H. ETHICAL CONSIDERATIONS IN MEDIATION.
 - 1. (§12.1.30) *Good Faith Participation Requirement.*
 - 2. (§12.1.31) *Mediator Neutrality.*

III. (§12.1.32) MEDIATION FORMS

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FORM 2 - MEDIATION CLAUSE

FORM 3 - SAMPLE MEDIATED SETTLEMENT AGREEMENT (INJURY CASE)

IV. (§12.1.33) ARBITRATION

- A. (§12.1.34) INTRODUCTION TO PRIVATE ARBITRATION.
 - 1. (§12.1.35) *Arbitration is Statutory and Contractual in Nature.*
 - 2. (§12.1.36) *Court Enforcement of the Arbitration Process.*
 - 3. (§12.1.37) *What Disputes Can Be Arbitrated?*
- B. (§12.1.38) THE ARBITRATION PROCESS.
 - 1. (§12.1.39) *Initiating the Arbitration Process.*
 - 2. (§12.1.40) *Role of the Arbitration Organization.*

3. (§12.1.41) *Appointment of an Arbitrator.*
4. (§12.1.42) *The Arbitrator's Powers.*
5. (§12.1.43) *Failure to Proceed.*
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- C. (§12.1.46) THE ARBITRATION AWARD.
 1. (§12.1.47) *The Award.*
 2. (§12.1.48) *Enforcing the Award.*
 3. (§12.1.49) *Legal Effect of an Arbitration Award.*
 4. (§12.1.50) *Scope of Review.*
 5. (§12.1.51) *Vacation, Modification or Correction of an Award.*
 6. (§12.1.52) *Arbitration Expenses and Attorney Fees.*
- D. (§12.1.53) SELECTING ARBITRATION.
 1. (§12.1.54) *Advantages of Arbitration.*
 2. (§12.1.55) *Disadvantages of Arbitration.*

V. (§12.1.56) ARBITRATION FORMS

FORM 1 - ARBITRATION AGREEMENT

FORM 2 - SAMPLE ADR CLAUSES

FORM 3 - NOTICE OF INTENT TO ARBITRATE

FORM 4 – RESPONSE TO NOTICE OF INTENT TO ARBITRATE

FORM 5 – GUIDELINES FOR DRAFTING ARBITRATION CLAUSES

FORM 6 – HIGH/LOW ARBITRATION AGREEMENT

PART TWO: MEDIATION OF FAMILY LAW MATTERS

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- A. (§12.2.1) MEDIATION — DEFINITIONS.
- B. (§12.2.2) MEDIATION AND THE PARENTING ACT.
- C. (§12.2.3) MEDIATION: HISTORICAL USE AND CULTURAL PREFERENCE.
 1. (§12.2.4) *The Promise of Mediation.*
 - a. (§12.2.5) Harm of the Adversarial Process.
 - b. (§12.2.6) Cost.
 - c. (§12.2.7) Control.
 - d. (§12.2.8) Growth and change.
 2. (§12.2.9) *The Perils of Mediation.*
 - a. (§12.2.9) Mediation assumes trust and is vulnerable to deception by parties or mediators.
 - b. (§12.2.10) Psychologically abused clients often deny their abuse.
 - c. (§12.2.11) Some mediators lack proper background and experience.

II. (§12.2.12) THE OBJECTIVES & PRINCIPLES OF MEDIATION.

- A. (§12.2.13) OBJECTIVES.
- B. (§12.2.14) PRINCIPLES OF MEDIATION.

III. (§12.2.15) THE MEDIATION PROCESS

- A. (§12.2.16) NO SINGLE METHOD.
- B. (§12.2.17) INTAKE AGREEMENT.
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 3. (§12.2.20) Representation & Ethics.
 4. (§12.2.21) Fees, Suspension & Termination.
- C. (§12.2.22) MEDIATION PROCESS — ASSESSMENT & ISSUES.
 1. (§12.2.23) Issue Assessment.
 2. (§12.2.24) Power Assessment.
 3. (§12.2.25) Prioritize and Set Agenda.
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 5. (§12.2.27) Reassess the Remaining Problems and Repeat Steps 1-4.
- D. (§12.2.28) THE GOALS OF MEDIATION — THE THREE SATISFACTIONS.

1. (§12.2.29) Economic Satisfaction.
 2. (§12.2.30) Psychological Satisfaction.
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- E. (§12.2.32) MEDIATOR'S ROLE IN DRAFTING FINAL AGREEMENTS.

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- A. (12.2.34) ASSESSING COUPLE CONFLICT TYPES.
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 2. (§12.2.36) The Limited Communication Skills Couple.
 3. (§12.2.37) The Direct Conflict Couple.
 4. (§12.2.38) The Disengaged Conflict Couple.
- B. (§12.2.39) ASSESSING CLIENT CAPACITY TO MEDIATE.
- C. (§12.2.40) FINDING A MEDIATOR FOR YOUR CLIENT.
- D. (§12.2.41) MEDIATOR SKILL AND COMPETENCIES — AN ASSESSMENT.
- FORM 1: AUGUST 2005 ABA MODEL STANDARDS OF CONDUCT FOR MEDIATORS
FORM 2: RCW 7.07, WASHINGTON UNIFORM MEDIATION ACT
FORM 3: MODEL MEDIATION AGREEMENT

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- II. (§12.3.2) DEFINITION OF ENVIRONMENTAL AND TOXIC TORT LITIGATION**
- III. (§12.3.3) WHY MEDIATION IS EFFECTIVE IN ACHIEVING SETTLEMENT OF ENVIRONMENTAL AND TOXIC TORT CASES**
- IV. (§12.3.4) PREPARING AND CONDUCTING MEDIATIONS**
- V. (§12.3.5) CONCLUSION**