

The Dispute Resolution Continuum

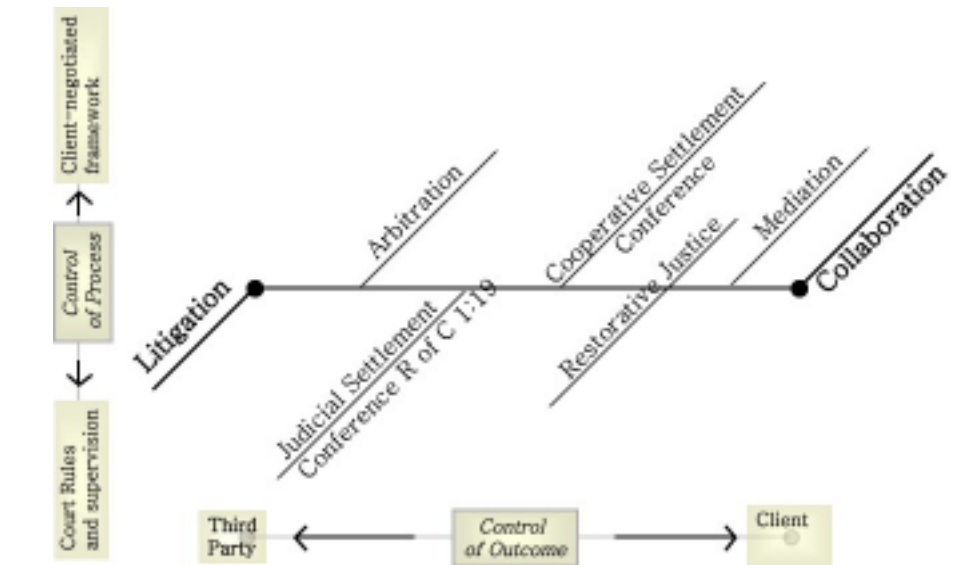
by Kimberly Fauss

Our system for resolving disputes continues to evolve as we blend other perspectives to expand the judicial option to more personal and interpersonal processes. As illustrated by the accompanying continuum, these processes often offer the participants greater control over the process and over its outcome. This article and the continuum describe the options currently available in Virginia for our clients seeking resolution of conflict.

The American system of justice is traditionally seen as one of laws, judges and enforcement. Litigation involves the hermeneutical application of past experience to particular facts to do justice case by case. This process is managed by rules regulating the exchange and presentation of information so that a third party – the judge – can evaluate the subject matter of the dispute in a uniform and detached way. The time frame of litigation is controlled by the logistics of the particular court and guidelines of that jurisdiction. The cost is shared by the litigants and by the state through its taxpayer base. This system removes control from the individual and invests it in the state through the lawmakers who create the rules and the judges who administer the courts. Over many years, litigation has become the default form of dispute resolution in America.

Other forms of dispute resolution have existed in other times and places. For example, indigenous peoples of American and Aboriginal origin use circles of members of the community to express the collective wisdom of their society. The shared value expressed by such a system is the health and continuity of the community. Relationships are the central focus. Restitution and reparation are used to bring balance between people so that the community can continue together. Just as with a court model, certain rituals and formalities provide a safe place where shared values can be applied to determine what is equitable to that community.

These other approaches to justice are more personal – removing the decision-making from neutral third parties and relying instead on the cooperation and creativity of the people directly affected. Within the last two decades many new



forms of dispute resolution, such as mediation and collaborative law, have become available in Virginia and give participants more choices in selecting the process most appropriate for their particular conflict.

The continuum of dispute resolution shown in the diagram allows us to compare different processes based on two variables: (1) the amount of control a participant or a neutral third party has over the rules and procedures and (2) the amount of control the participant or a neutral third party has over the ultimate decision. The more control a third party has over these two variables, the more the process looks like litigation. The more control a participant has over the rules and outcome the more it looks like collaboration.

The process just to the right of litigation on the continuum is the judicial settlement conference. A rule of court allows a judge to divert an active court case to a settlement judge outside the courtroom for facilitation. Many of the same procedural rules of court remain in place, but the litigants are encouraged to assume some control over the outcome by settling the case before a final ruling. Further down the continuum, a voluntary, cooperative settlement conference occurring prior to trial allows the participants even a greater degree of freedom (because there is no third party decisionmaker) to consider factors outside of the case, such as cost and length of time a court may need to dispose of the

case. The threat of litigation, however, overshadows the voluntariness of these negotiations “on the courtroom steps.”

Mediation is a process in which a neutral mediator helps participants to identify and frame the issues which are to be resolved. The mediator facilitates communication so the participants themselves negotiate settlement. Lawyers who may be consulted by the participants outside of the mediation or during the mediation in private caucus provide necessary information on the law, judicial guidelines or possible court outcomes. Litigation remains a possibility if agreement is not reached.

At the other end of the spectrum from litigation is collaboration in which the participants and their attorneys enter an agreement not to go to court or to be bound by judicial guidelines. There is no third party facilitator since the lawyers are trained in interest-based negotiation. Factors important to the participants individually can be expressed in a solution crafted and executed by them *with* the participation of their individual lawyers all working together in the process at the same time. The clients and lawyers are invested in settlement since both lawyers must withdraw from the matter if agreement is not reached and a client proceeds to court. The freedom to move beyond court solutions becomes possible when settlement is the common goal of the participants *and* lawyers.

Even certain types of criminal cases

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confront the questions sure to come from the mediator. OCM mediators ask hard questions about the full gamut of factors that affect settlement—legal and non-legal. Many times, the mediator focuses attention on the appellate perspective of the case on appeal. In turn, this often yields a different view of the value of the case. When attorneys have properly prepared their clients in this way, the mediator's questions reinforce the need for the client to squarely address these issues. This often helps clients overcome the emotional baggage and focus on the critical inquiry of whether settlement serves the client's best interests.⁴

The other area where attorneys can help improve the productivity of the conference is to refresh their familiarity with the ins and outs of the case below.

Not infrequently, cases on appeal have been litigated for years in the trial court. Thus, attorneys often need to brush up on long-ago events and arguments. This requires the attorney to be aware of the legal issues (like the record on appeal, the strengths and weaknesses of the prominent legal issues, and any new, relevant cases) AND the non-legal issues that bear on the client's decision to settle. If attorneys take the time and effort to prepare, the chances of a successful mediated settlement increase.

Conclusion

The Fourth Circuit program has operated successfully for 12 years. In addition to settlement, OCM has assisted attorneys on a variety of issues. Thus, the Court, attorneys, and parties all

benefit from such a service. If all participants continue their diligent efforts, it promises to be a productive future.

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NOTES

1. Mediation programs exist now in all of the federal circuits and are mandatory in all but the 8th Circuit.
2. While the norm is a telephonic mediation conference, OCM also conducts in-person mediation conferences in appropriate cases.
3. Fourth Circuit Local Rule 33
4. If warranted, OCM mediators can, with the attorney present, talk directly with the client.

Continuum

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can be diverted from courts or probation to a non-judicial forum that brings together the criminal offender, the victim and other affected community members. These restorative justice processes, called "circles," allow victims to hold offenders accountable for the consequences of their criminal actions and the offenders to take responsibility or make restitution or reparation in solutions generated by those directly affected. This process crosses the spectrum of judicial rules and control depending on the flexibility of the particular jurisdiction offering a restorative justice program.

The tools available to the lawyers and other participants in these various forms of dispute resolution also differ. Just as litigators must be trained in the techniques of procedure and evidence, so must facilitators of mediation, restorative justice and collaboration be trained in the techniques of communication and interest-based negotiation. Certification programs are available under the supervision of the Supreme Court or other professional organizations to assure consistent training and ethical standards of practice.

The primary means of information gathering in litigation are the rules of discovery and the procedural technicalities of notice and due process. Conflict-saturated stories are narrated in complaints filed publicly with the court creating victims and villains in the minds of the litigants. The specific legal basis which

shapes the dispute engenders expectations and feelings of entitlement. The judicial forum limits the participants to those "parties of interest" and excludes wider circles of affected interpersonal systems. Awards likewise are limited to statutory remedies or precedents from previous case law.

Alternative models focus more on communication and understanding between the participants and framing of issues to encourage creative solutions. These processes begin with shared goals and objectives which tend to shape the participants' focus on problem-solving and commitment to settlement. The facilitator creates a safe place for each participant to speak and reframes what is spoken, not only to affirm the speaker and but also to assist the listener in hearing and synthesizing the content. Clarity is sought through questioning and reframing the needs and challenges the participants face in the future into manageable proportions. In collaboration, additional techniques are featured such as transparency and sharing of all relevant information. Transparency is achieved by all participants and lawyers being together at every meeting. Voluntary full disclosure of all information and legal advice in the real time of negotiation gives participants the information they need to make meaningful decisions. Solutions which are shaped by the participants are more likely to be successful since they arise from their personal understanding and commitment. This vision-driven approach allows for confidence,

creativity and flexibility.

For centuries in the United States litigation has been the catchall for disputes. While matters of property are scheduled alongside criminal prosecutions and the dissolution of marriages, these disputes have very different interests and consequences when measured in human terms. Traditional courts may no longer be the best venue for addressing interpersonal conflicts. Which process is appropriate for a particular dispute depends on the motivation of the participant and the nature of the conflict. The processes further toward litigation lend themselves best to the historic evaluation of property and unraveling of past events. The processes further toward collaboration focus on relationships and the future. Lawyers need to become familiar with the nuances of all alternatives to dispute resolution so that they truly counsel clients to take ownership of change in their lives without the destructive consequences of conflict.

About the author: *Kimberly Fauss currently practices mediation and collaborative law in Richmond for the firm, New Growth Ventures. She attended Oberlin College, UVA Law School, and more recently, seminary as a student of theology. After clerking for the Honorable John D. Butzner Jr., she has practiced in the areas of corporate, health care, and domestic law with the Richmond offices of Hutton & Williams and Troutman Sanders. She is trained in the mediation, collaborative law and restorative justice processes. Kimberly is on the board of the statewide Virginia Collaborative Professionals (VaCP).*