

ORANGE COUNTY BAR ASSOCIATION

BRIDGING THE GAP An Overview of Alternative Dispute Resolution 2017

Presented by
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As attorneys, we're in the conflict business.



“Ready for your first lesson in conflict resolution?”

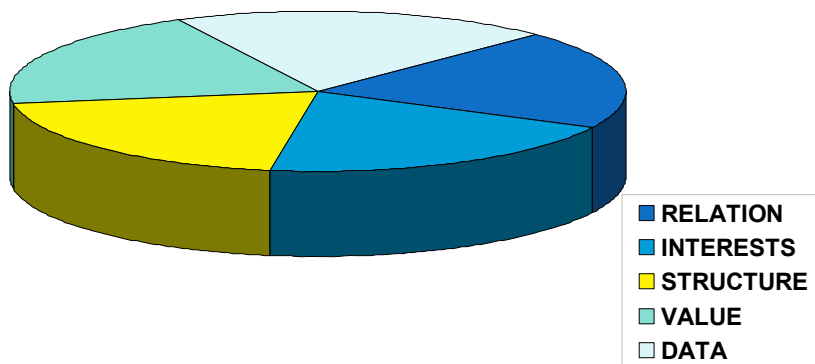


1. How many have taken a course devoted solely to the study of **mediation** theory and practice?
2. How many have taken a course devoted solely to the study of **arbitration** theory and practice?
3. How many have taken a course devoted solely to the study of **negotiation**?
4. How many have taken a **survey course** that covered two or more of these subjects?
5. How many plan to handle **civil matters** (vs. criminal)?
6. How many want to represent clients in **court proceedings** (vs. transactional practice)?

Why does conflict happen in the first place?



Christopher Moore's "Circle of Conflict"



Five Central Causes of Conflict:

1. Problems with data
2. Problems with people's relationships
3. Perceived or actual incompatible interests
4. Differing values
5. Structural factors

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Data Conflicts:

Data disputes and conflicts are caused by:

- ▶ Lack of information
- ▶ Misinformation
- ▶ Different views on what is relevant
- ▶ Different interpretations
- ▶ Different or incompatible collection procedures
- ▶ Different or incompatible interpretations
- ▶ Different or incompatible assessment procedures or standards

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Relationship Conflicts:

Relationship conflicts are caused by:

- Strong negative emotions
- Misperceptions or stereotypes
- Poor communication or miscommunication
- Repetitive negative behavior

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Interest Conflicts:*

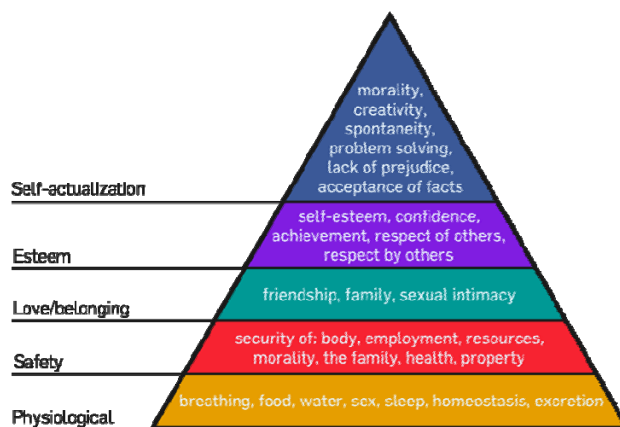
An "interest" is a judgment or view we have about what is important to us. It's a pre-existing guide-post that influences how we see things and how we make decisions. Interest disputes are caused by competition over perceived or actual wants or needs:

- Substantive (content) interests [What - frequently money or property]
- Procedural interests [How - what are the steps or rituals for resolving the dispute; who should be involved]
- Psychological interests [Why - involves perceptions of trust, fairness, respect, status, etc.]

**See chart re Maslow's hierarchy of needs.*

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Maslow's Hierarchy of Needs



An "interest" is an underlying need that must be met in order for a person to move forward to his / her next set of goals or aspirations at the next level. In the context of negotiation, having a critical or priority need met is frequently more important than being "right" or "winning" with regard to a staked out legal position. I.e., interest-based bargaining.

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Structural Conflicts:

Structure disputes and conflicts are caused by *oppressive* patterns of human relationships and the cause may be *external* to those involved:

- Limited resources or authority
- Geographic constraints
- Time (too little or too much)
- The structure of an organization
- Unequal control, ownership, or distribution of resources
- Unequal power and authority

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Value Conflicts:

Values are matters of the heart and head. They are an expectation based upon our personal / cultural "rules" that guide and give meaning to our lives. We use values to explain and justify what is "good," "bad," "right," "wrong," "just," "unjust," etc. Value disputes and conflicts are caused by perceived or actual incompatible belief systems or when someone tries to impose his or her set of values on someone else:

- Different criteria for evaluating ideas or behavior
- Exclusive intrinsically valuable goals
- Different ways of life, ideology, and/or religion

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Learning Points

- Many (if not most) disputes and conflicts have multiple causes.
- The challenge is **a.** identifying the underlying cause(s), and **b.** developing an appropriate intervention to address the cause(s) and resolve the conflict.

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How do people respond to conflict?



Psychologists and social scientists have identified the following as the 5 primary responses people use to respond to conflict:

- Avoidance
- Accommodation
- Competition
- Compromise
- Collaboration

Avoidance

- When the situation is not addressed until later or not addressed at all.
- This person does not have much in the way of "coping" mechanisms.

This person does not have much in the way of "coping" skills, and is uncomfortable with confrontation. This person's general orientation to delay in dealing with a dispute. At its most extreme level, the avoider denies / does not see the conflict.



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Avoider's response to conflict...

- Primary interest: avoid confrontation.
- Has a negative perception of conflict; fears the consequences of raising issues
- Says, "If I ignore the issue it will go away."
- Feelings get pent up.
- Views go unexpressed.
- Unresolved issues fester until too big to ignore.
- Resentment/anger grow until they severely damage the relationship.
- Expectations, needs, interests, and feelings go unexpressed causing confusion about what went wrong in the relationship.

Note: This response is inappropriate when problems are such that they need to be addressed and leaving them unaddressed may cause resentment to build and negative feelings to linger and escalate.

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Accommodation

- When one person lets the other person have their way.
- "Whatever you want is OK with me."

The primary motivation behind an "Accommodator" is to please others. This person overlooks the other's short-comings, faults or attacks. This person ignores his / her own goals and deals with disputes and conflicts by giving into others... so long that such accommodation does not interfere with this person's primary goals, needs or interests.



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Accommodator's response to conflict...

- Primary interest: peace.
- Yields expectations, needs, interests, and feelings to others.
- Tends to allow the expectations, needs, interests, and feelings of others to overwhelm their own.
- Preserving the relationship is paramount, the accommodator may never state *their* expectations, needs, interests, and feelings.

Note: This response is inappropriate when the accommodator could offer valuable information, observations or perspectives that could have a positive effect on the quality of the resolution.



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Competition

When one person wants to have their way and does not allow for compromise on matters that would subtract from he/she has defined as his/her "due."

This person's knee-jerk reaction to conflict is to resort to aggressive behavior and to "resolve" disputes by getting what he/she wants. That is how "resolution" is defined. This person is highly "goal" oriented and has a strong sense of entitlement.



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Competitor's response to conflict...

- Primary interest: winning.
- "My way or the highway."
- Advocates own expectations, needs, interests, and feelings to the exclusion of the other party's.
- Fears loss of control will result in an outcome that fails to address his/her expectations, needs, interests, and feelings.
- Relies on aggressive communication style and exercise of coercive power. Responses tend to increase the level of threat.
- Has low regard for the relationship.
- Low self-esteem, so needs control as a sign of due respect

Note: This response is inappropriate when it results in the "other" being disrespected / disenfranchised. Also inappropriate when it results in the only option being one person wins and the other loses.

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Compromise

When at least one party is willing to accept something less than his/her ideal outcome because he/she places or finds value in amicable resolution.

Adjectives to describe this person are wily, strategic, good poker player. This person is willing to sacrifice some of his/her goals AND is able to persuade others to give up part of theirs in exchange. This person plays the game of tit for tat very well.



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Compromiser's response to conflict...

- Primary interest: to get as much as possible while giving up as little as possible.
- Focus is on own expectations, needs, interests, and feelings, but prioritizes and is willing to give up items of lesser value to get concessions on items of greater value.
- Strategic thinker / negotiator.
- Willing to engage in a series of "give and take" tradeoffs.
- Somewhat risk averse; may retain a lack of trust and seeks to risk as little as possible.

Note: This response is inappropriate when the compromiser cannot live with the concessions required of him/her. Also not appropriate when dealing when the "other" is competitive.

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Collaboration

When at least one party is interested in searching for an outcome that takes into consideration all parties' expectations, needs, interests, and feelings and is willing to make the concessions and/or adjustments in thinking to achieve that end.

Adjectives that describe this person are "wise" and "having a broad perspective." This person views conflicts as problems to be solved. Finding solutions / problem-solving / brainstorming with input from all directions is this person's general orientation.



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Collaborator's response to conflict...

- Primary interest: to achieve a mutually satisfactory outcome through cooperation rather than competition.
- "How can we solve this problem together?"
- Integrates own expectations, needs, interests, and feelings with those of the other party.
- Gathers information; willing to look at various alternatives regardless of whose suggestion it is; engages in dialogue; willing to listen to differing views.
- Seeks to make the outcome meaningful by bringing new energy and ideas to the discussion.

Note: This response is inappropriate when time is of the essence and/or there are finite (insufficient) resources to create a solution that meets everyone's needs or interests.

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Learning Points

- ▶ There are fundamentally different responses to conflicts, and those differences can contribute to the conflict at hand.
- ▶ Contending parties may use more than one response.
- ▶ When engaging in dispute resolution, we should be aware/appreciative of the different response styles of the parties involved.
- ▶ We should be mindful of our personal orientation in terms of our response style to conflict.

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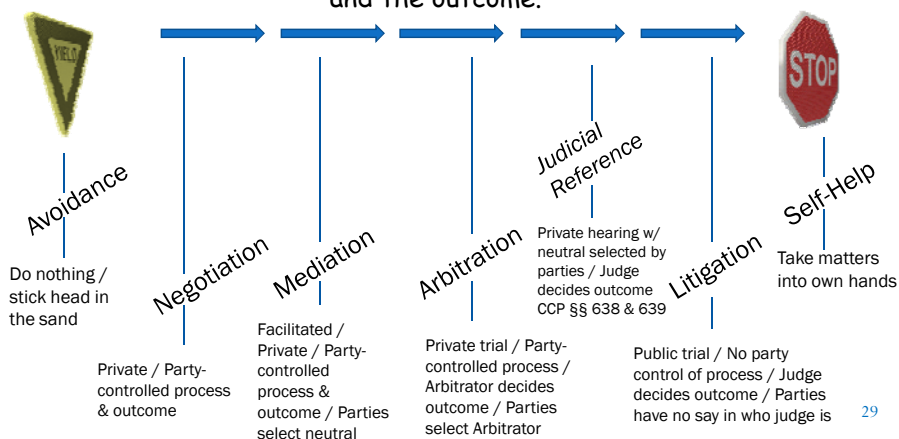
What dispute resolution procedures are available?



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Dispute Resolution Continuum:

As you move to the right, the dispute resolution process becomes more expensive in terms of transaction costs - time, money, stress, strain - and disputants have less control over the process and the outcome.



Negotiated Outcome

- ❖ Voluntary - both/all sides must agree to sit down at the bargaining table
- ❖ Proceedings are private - no "record" of what is said
- ❖ Informal
- ❖ Parties define the "rules of engagement"
- ❖ Decisions based on party needs, interests, objectives
- ❖ Parties communicate directly
- ❖ Scheduling - when to sit down - is based on the parties' calendars
- ❖ Outcome is "decided" by the parties
- ❖ Outcome is binding - but legal action may be necessary to enforce in the face of breach
- ❖ No decision-maker other than the parties
- ❖ Efficient and economical in terms of party and attorney time
- ❖ Process moves as quickly as the parties are able to meet, make decisions and agree



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Mediated Outcome

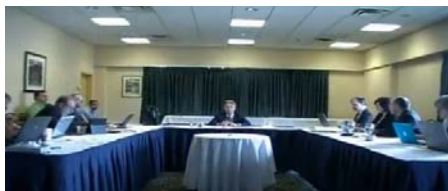
- ❖ All of the characteristics of Negotiation because mediation is a *facilitated negotiation*
- ❖ Third party neutral is at the table to help the parties talk about the problem, explore possible solutions, negotiate a deal, and close with a firm agreement (negotiated resolution)
- ❖ Only works if decision makers and sometimes other stakeholders (e.g., insurers, guarantors, spouses) are at the table
- ❖ Tends to move more quickly than private negotiation because a day (or more) is reserved to talk through the issues and try to negotiate a deal
- ❖ Intense focus on the problem and reality factors that influence what is possible re a negotiated agreement
- ❖ *Broad and strict confidentiality protections for what is said during and in connection with - Evid. Code §1119*
- ❖ *Special requirements for agreements reached during the mediation - Evid. Code §§1118, 1119, 1123*



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Arbitrated Outcome

- ❖ Many of the same characteristics as mediation because it is a private, voluntary, party-controlled process. Both sides agree to arbitration by a pre-dispute arb clause in business contract OR via submission after dispute arises
- ❖ Proceedings are private - but *not* confidential unless contracted for and so ordered
- ❖ Formal, but parties pick their rules and define their procedures
- ❖ Equitable in the sense that decisions are not required to conform to law unless the contract provides otherwise
- ❖ Outcome is binding-but need to confirm award as a judgment to enforce
- ❖ No appellate review unless contracted for - and then may be limited to *arbitral* appellate review process if the provider has such a thing
- ❖ Parties tend to communicate with each other and with the arbitrator indirectly through counsel
- ❖ Scheduling based on the parties' needs/desires; can be more efficient than court litigation
- ❖ Decision-maker's time is paid for
- ❖ *Key: Scope of hearing and decision-maker's power is defined by contract*



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Litigated Outcome

- ❖ Involuntary - one party can initiate without the other's consent
- ❖ Proceedings and record are open to the public
- ❖ Formal with strict rules and procedures defined by governing bodies and case precedent
- ❖ Decisions based on law / remedies defined by law
- ❖ Parties communicate with each other and with the court indirectly through counsel
- ❖ Scheduling based on the court's calendar and needs - not the parties'
- ❖ Outcome is binding and imposed
- ❖ Decision-maker's time is *usually* free, but expensive in terms of fees for attorney time
- ❖ Time-consuming / requires multiple proceedings to get to trial and then no court room and continued
- ❖ Not particularly efficient
- ❖ Protracted "end" because of right to appeal trial court's decision and petition for review / rehearing³³



Variations and Hybrids:

1. **Med-Arb** - where parties start in mediation and get part of the deal done, but agree to submit to binding arbitration some issue that will tie to / determine the settlement amount. Frequently combined with "hi-lo" and "Night Baseball."
2. **Arb-Med / Binding Mediation** - where parties start in arbitration and decide they want to go to mediation and may even agree that if they get stuck, the mediator will have the "power" to decide the outcome.
3. **Arbitral Appellate Review** - completely a matter of contract, but is being recognized and accommodated by major providers such as JAMS and the AAA in terms of select panels and special rules.



With so many dispute resolution processes to choose from

What process is the "right" intervention strategy?

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..... it depends!

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1. What are the parties' goals?
2. What are the parties' interests / needs?
3. Are the parties seeking / expecting fairness? If so, how do they measure fairness (law, equity, morals)? Are they using the same measuring rod?
4. Do the parties want or need privacy?
5. Do the parties have any constraints in terms of time? Money? Geography? Other stakeholders? Other logistics?
6. Is there an ongoing relationship and/or project in place? If so, do the parties want /need to preserve it?
7. What is the estimated dollar value of what is in dispute? How much are the parties willing to pay for dispute resolution?
8. Is something other than money at stake? Is that non-monetary relief available under the law or only by party agreement?

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Circumstances where mediation might be preferred over other alternatives?

1. Need / desire for privacy
2. Preserve / foster relationships
3. Preserve harmony in a close / shared community
4. Where the law does not provide the remedy or relief the parties want or need
5. Where there is a narrow window of opportunity and the time need to go through the litigation process exceeds that window
6. Money is a factor - the litigation alternative is too expensive because a. one or both parties cannot afford it, and/or b. the cost exceeds the value of what is in dispute

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Worth Noting:

Something to keep in mind at the front-end when you find yourself stepping into a dispute to prosecute or defend a litigated or arbitrated case: Statistics maintained by the California Judicial Council show that **over 90%** of all civil filings are resolved by means other than trial on the merits. Some matters are abandoned. Some are resolved by dispositive motion. But the vast majority of the 90% of matters not tried are resolved by **settlement** - many facilitated by mediation or a hybrid of mediation and arbitration.

And statistics maintained by the American Arbitration Association show of the arbitrations it administers, over 40% of all commercial arbitrations are settled without a hearing.



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Closing Remarks - There are some simple truths - axioms - that should be considered at the front-end...



1. a self-evident truth that requires no proof.
2. a universally accepted principle or rule.

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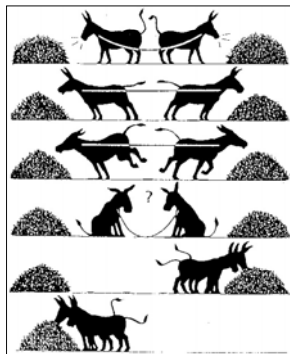
Dispute Resolution Axiom #1:



A dispute belongs to ...
...the parties who created it.

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Dispute Resolution Axiom #2:



The parties most directly
affected by a dispute -
given the right
circumstances - are the
ones who are best able to
resolve it.

Therefore, the best
resolution is likely to flow
directly from ...

...the parties themselves.

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Dispute Resolution Axiom #3:



The two most powerful warriors are patience and time.

- Leo Tolstoy

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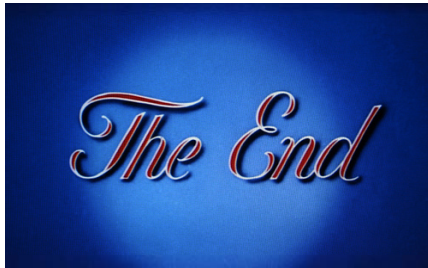
Dispute Resolution Axiom #5:



There is no "one size fits all" process!

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Dispute Resolution Axiom #4:



All disputes end...
...sometime.