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**USING DISPUTE RESOLUTION
WITH PRO SE LITIGANTS**

**Art Thompson
Dispute Resolution Coordinator
Kansas Office of Judicial Administration**

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The Use of Dispute Resolution With Pro Se Litigants

The increase in pro se filings is occurring at the same time that state and Federal courts are changing. In Kansas state courts, three percent of all civil cases (not including traffic) go to a judge or jury. The rest settle but often just before trial. While Kansas civil filings have increased 280% from 1978 to 2005, the number of cases going to trial have decreased 24%.¹ Courts across the country are becoming managers of the settlement process to encourage earlier settlement. The national data collected by the American Bar Association Litigation's Section points to the explosion in new case filings as one of the main reasons for vanishing trials.² The sheer time it takes to manage these large caseloads may place such pressure on court resources that there simply isn't the time to try many cases.

Since pro se cases can take longer to handle than cases with attorneys, there will add pressure for courts to find the most appropriate settlement mechanism which meets the needs of both the pro se litigants and the courts. There may be some dispute resolution methods which work better than others in addressing the interests of pro se litigants and at the same the interests of the courts.

Research from the National Center for State Courts reinforces the need for a better understanding of all the methods of resolving conflict. The NCSC reports that:

“The composition of case dispositions in the nation's state courts is changing. As the use of trials declines, knowledge of the use of non-trial dispositions becomes increasingly important as a means of maintaining public trust and confidence in the courts.”³

The National Center for State Courts reports that during 2003 thirty-nine percent of all incoming domestic relations cases were reopened or reactivated after having been closed.⁴ The disputes in these cases often involve relationship problems, not legal problems. The Conference of State Court Administrators has recommended that courts and legislatures de-emphasize the adversarial process and give greater flexibility and latitude to judges to resolve family disputes and provide needed services to families in crisis.⁵

The following partial list of dispute resolution processes is based upon the best practice determinations made by the circumstances found in Kansas courts up to this date. Kansas statutes and court rules are generally similar to other states in the region. The caveat is that some states define dispute resolution processes differently and the reader should be advised to check local laws and court rules.

Dispute Resolution generally means a process by which the parties involved in a dispute enter into discussion and negotiation with the assistance of a neutral person.

Some states give more or less control to their courts as to when to allow dispute resolution. In Kansas courts are given wide latitude:

“Upon finding that alternatives to litigation may provide a more appropriate means to resolve the issues in a case, and that the costs of the dispute resolution process are justified relative to the parties ability to pay such costs, a judge may order the parties to the case to participate in a settlement conference or a non-binding dispute resolution process.” (K.S.A. 5-509: (a))

Case Screening

The "multi-door courthouse" - a concept originated by the Harvard Dispute Resolution Program founder Frank E. A. Sander in the 1970s- offers a variety of resolution options (including litigation) to people who take their disputes to court. This process is designed to provide a more comprehensive approach to dispute resolution than individual programs can provide. For example, in Middlesex County Superior Court in Cambridge, Massachusetts, cases filed are selected for "multi-door" processing, and the disputants are offered the options of arbitration, mediation, case evaluation, or litigation.⁶ The key to the process is a trained staff person to analyze each case.

“The multi-door courthouse model provides a coordinated approach to dispute resolution with intake and referral operating under one centralized program, rather than independently. This model allows for substantial flexibility of intake and referral procedures to meet the needs and resources of each jurisdiction.”⁷

Several courts in Kansas have a domestic staff person who screens cases to determine the appropriate dispute resolution process and the best dispute resolution provider.

TYPES OF DISPUTE RESOLUTION PROCESSES

Mediation

Mediation is a voluntary and confidential process in which a neutral third-party helps people discuss difficult issues and negotiate an agreement. Basic steps in the process include gathering information, framing the issues, developing options, negotiating, and formalizing agreements. Parties in mediation create their own solutions and the mediator does not have any decision-making power over the outcome.

There is some evidence that solutions arrived at in mediation tend to last over time because the people affected by the decisions are the ones making them. Because the parties are responsible for making their own decisions, mediation may not be appropriate if a party is unable to negotiate due to substance abuse, psychological impairment, physical or emotional abuse by the other party, or ignorance.

It is becoming more common for courts to require or strongly encourage domestic parties to seek mediation in custody and parenting plan disputes. In Kansas, by statute, attorneys are encouraged not to attend these types of mediations.

Facilitative Mediation: This mediation process is oriented towards addressing the problems in the relationship as well as the immediate issues in the dispute. There is an understanding the parties may continue to have an ongoing relationship and that they will need to learn to negotiate on their own in the future. Even if the parties will not have an ongoing relationship, there may be an acknowledgement that it is necessary for the mediator to not be evaluative. For example, this process helps parents in custody and/or visitation disputes focus on the needs of their children, communicate better about their children, have more control over the process, and feel more positive about the outcome of the divorce or post divorce motion. The facilitative mediator does not make recommendations to the parties, give his or her own advice or opinion as to the outcome of the case, or predict what a court would do in the case. The mediator is in charge of the process, while the parties are in charge of the outcome. The mediator conducts sessions with all parties present so that the parties can hear each other's points of view, but may also hold caucuses with the individual participants if the parties agree and the mediator believes they will be helpful.

Evaluative Mediation: This process generally involves more legal and financial issues and lends itself to a more evaluative form of mediation. There is some controversy as to how far evaluative mediators can go in providing evaluative information but generally an evaluative mediator may assist the parties in reaching resolution by asking questions to point out the possible weaknesses in their cases, and predicting what a judge or jury would be likely to do. An evaluative mediator, if asked by one or both parties, might make formal or informal recommendations to the parties as to the likely outcome of the issues. Evaluative mediators are concerned with the legal rights of the parties as well as the parties' needs and interests, and evaluate the case based on the probable consequences of litigation. Evaluative mediation sessions generally consist of separate meetings between the mediator and the parties and their attorneys, with the mediator practicing shuttle diplomacy.

Arbitration

Arbitration is a process in which a third-party neutral, after reviewing evidence and listening to arguments from both sides, issues a decision to settle the case. Arbitration is often used in commercial and labor/management disputes. In a compendium of processes, mediation would be at one end and arbitration would be at the other.

Mediation-Arbitration

This process is a hybrid that combines both of the above processes. Prior to the session, the disputing parties agree to try mediation first, but give the neutral third party the authority to make a decision if mediation is not successful. There are a number of processes with other names that use the basic mediation/arbitration formula. One of the more common ones use in state courts is called **parenting coordination** and is generally used in high conflict domestic

disputes.

Parenting Coordinator/Domestic Case Managers

One of the highest case types where one or both parties are likely to be pro se is in high conflict domestic disputes. In recent years Kansas courts have increasingly used case management to resolve high conflict domestic disputes, usually post divorce motions. Many states call this process parenting coordination. The Association of Family and Conciliation Courts has established guidelines for parenting coordinators which can be found at their website. These types of disputes often have one or both pro se parties. The judge in a high conflict domestic dispute appoints a case manager/parenting coordinator and the parties are usually (but not always) required to meet with the case manager. The case manager is given access to all information concerning the parties and the case. They usually make binding recommendations to resolve minor parenting time disputes and makes recommendations to the court on any major changes in the parenting plan. A case manager can be assigned to a case for a number of years to hear all parenting plan or custody disputes.

Six years ago, three judicial districts in Kansas used case management and, as of December 2004, twenty-nine out of thirty-one districts utilized this process. A problem that occurs in these extra court processes is that after a case manager/parenting coordinator makes a recommendation, one or both parties may be unhappy and will stop paying the fees. Some courts will assist with the collection of these fees and others will not. This causes some providers to drop out of providing the service. In addition some parties do not have the funds to pay the fees. A few Kansas courts will use court service officers to serve as a case manager.

Limited Domestic Case Management:

This process is intended to be limited to situations where there is currently pending a motion pertaining to modification of parenting time or residency. It is a distinct and separate process from regular case management (parenting coordination) in that it is limited to a situation-to-situation service provision. It is often used in cases in which the parties have filed a large number of post divorce motions. They are often pro se. The complaining party will be required to pay a new filing fee each time they have a complaint and they also have to pay the retainer for the limited case manager before the first (and usually only) meeting.

Early Neutral Evaluation

Neutral evaluation is a process in which the parties or their attorneys present a summary of their case to a neutral who renders a non-binding opinion of the settlement value of the case and/or a non-binding prediction of the likely outcome of the case if adjudicated.

The primary purpose of early neutral evaluation is to assist the court and the parties in developing a discovery plan, narrowing issues or eliminating unnecessary parties. A secondary

purpose is to assist with case settlement. This process is not a substitute for legal advice and the neutral evaluator does not represent the interests of any party. A pro se litigant does obtain the benefit of the view of someone experienced in the legal area in question. The neutral can ask enough questions to make the parties have an appreciation of their options.

Settlement Conferences

A settlement conference is a variation of the neutral evaluation process and consists of an informal discussion among the parties to a dispute, their attorneys, and the person or persons conducting the conference, of every aspect of the lawsuit bearing on its settlement value. In a number of states it may be the second most commonly used dispute resolution process next to mediation. The person or persons conducting the settlement conference may privately express his/her view concerning the actual dollar settlement value or other reasonable dispositions of the case. A judge may assign a case to an attorney, an expert in the type of case, a panel of attorneys or experts or another judge, for the purpose of conducting a settlement conference with the litigants and counsel. Generally this process uses a judge not assigned to the case to conduct the settlement conference. Each of the parties should be prepared to discuss the current position with respect to all issues involved in the litigation. No party should be prejudiced at the trial of the action if settlement negotiations fail.

Usually, a party in a subsequent trial can use no statement made during the settlement conference. The person conducting the settlement conference will not communicate to the trial judge the confidences of the conference, except to advise the judge whether or not the case has been settled. In Kansas, judges in cases in which the parties may not be able to afford a private dispute resolution provider sometimes use settlement conferences.

Settlement conferences are recommended for cases in which the disputants have strongly held positions about the probable outcome of the case, but are willing to listen to a competent third party's view of their positions and possible trial results. Settlement conferences can help disputants analyze the issues in dispute, review the facts, and evaluate the positions of the parties in their case. The opinion received can and often does facilitate settlement of the dispute before trial.

Conciliation

Conciliation is a proceeding in which a neutral person assists the parties in reconciliation efforts. In Kansas, this process varies from mediation in that the conciliator can report back to the judge about the issues discussed in the meeting(s) with the parties. It is a process by which a neutral helps the parties settle a case by clarifying the issues and assessing the strengths and weaknesses of each side of the case, and if the case is not settled, exploring the steps which remain to prepare the case for trial. Some judges like conciliation because the conciliator will provide the judge their view of the case if the conciliator cannot get the parties to settle. A

conciliator will usually allocate more time than a judge to understanding the case, talking with the parties and contacting outside resources. A conciliator may also have more expertise in the area than a particular judge might have.

Special Master

Special master usually means a court-appointed magistrate, auditor, or examiner who, subject to specifications and limitations stated in the court order, shall exercise the power to regulate all proceedings in every hearing before them, and to do all acts and take all measures necessary or proper for compliance with the court's order. Usually the special master has specialized expertise in the issues in dispute. California use special masters in domestic disputes.

Judge Pro Tem

A variation of the special master is when a court appoints someone (usually an attorney) as a judge pro tem to handle certain types of cases. Pro tem judges can be appointed to hear pro se cases when needed or on a regular schedule. The advantage is that the person selected to be the pro tem judge, much like a special master, can have specialize knowledge of the legal issues in select types of cases and can take more time with a case. The advantage to the court is that a judge pro tem can be part time, an exempt employee and selected especially to hear one or a select group of case types.

Case Valuation

This process uses one or more attorneys or experts who have experience in a particular type of case. They provide a written, non-binding assessment of the case's value after a short hearing. The parties can accept the value and settle the case or they can go to trial. This type of process is used primarily for contract disputes, personal injury cases, and civil rights cases.

Dependency or Permanency Mediation and Family Group Conferencing

With the recent changes in child welfare laws and time frames, more state courts are searching for alternatives to the traditional lengthy, adversarial proceedings to permanency hearings. In these processes one or more mediators/neutrals are used to assist parents, family members, attorneys, caseworkers and other key people in creating permanent plans for children. These processes differ from the current system in that they are cooperative and non-coercive rather than adversarial and coercive; participation is voluntary rather than involuntary; and decisions are made by mutual agreement rather than by a court process, although a court must approve the settlement agreement.

The three major goals of this form of dispute resolution are to: (1) empower parents to make cooperative, permanent plans for their children; (2) reduce the necessity for litigation to

terminate parental rights and the related expenditure of state dollars; and (3) reduce the time children spend in foster care awaiting permanent homes. When cases result in a cooperative agreement, the processes not only reduces the trauma for children, but also preserves the integrity and self-esteem of their birth parents. It can also result in monetary savings due to fewer foster care days and fewer lengthy, expensive trials. In Kansas, some juvenile judges report that litigants are provided with more information to better understand their options in the court proceedings. This is whether they are represented by attorneys or are pro se.

Domestic High Conflict Education Courses

A growing number of courts across the country are requiring parties involved in domestic high conflict cases, many of whom are pro se, to attend select types of education courses. The most successful educational course used in Kansas is called Higher Ground.

Higher Ground, like similar programs, is a court-ordered group for separated parents that educates families about creating healthy restructured homes, provides concrete approaches to cooperative parenting, and offers peer support and learning opportunities to apply conflict resolution skills to parenting decisions. Parents must be ordered by the court to complete the program and usually both parents will participate together. The complete program consists of six biweekly sessions of 2.5 hours each. Sessions are highly structured with assigned groups and strict ground rules. The court record is checked every three months to determine if parents who have completed the program have filed new parenting motions. Seventy-two percent of parents completing the program have not filed new custody motions from March 2004 until the end of 2005.

Choosing a Neutral

In Kansas, as in many states, the local court or, where appropriate, the state court, keeps lists of individuals who conduct one or more forms of dispute resolution.

In many states, the Supreme Courts have adopted standards, ethics requirements, and guidelines on compensation for such services. These are often based on national standards established by groups like the American Bar Association, the American Arbitration Association and the Association for Dispute Resolution.

What creates a successful dispute resolution?

An Evaluation of Court-Connected Mediation Programs In Northern Illinois, American Judicature Society 1999:

“Our study of the mediation programs in these courts indicates that it is the quality of the mediation session and the individuals involved, not the characteristics of the case referred to mediation, which have the greatest effect upon a case’s propensity to be settled.”

Fees

Kansas Supreme Court's Dispute Resolution Advisory Council Recommendation: If the court can not provide free or low cost dispute resolution, any costs associated with the dispute resolution process should be prorated between the parties as determined by the parties or the court. Payment arrangements will be made directly with the neutral or as otherwise stipulated by the court. The Kansas statute has neutrals encouraged to use a sliding scale fee for lower income people.

Domestic violence cases

The National Center for State Courts studied the factors that affect the growth of domestic relations cases. The NCSC concluded that, "While many factors may affect the growth of the domestic relations caseload, one force has been the increase in civil protection/restraining order cases.⁸ In 2005, 30% of all Kansas domestic cases were protection orders. Protection from Stalking cases went from 2,390 in 2003 to 3,287 in 2005, a 38% increase.

What is domestic violence in the dispute resolution context?

Kansas Supreme Court's Dispute Resolution Advisory Council Recommendations: Domestic violence is the occurrence of violence, coercion, or intimidation by a family or household member against another family or household member. Such actions could include attempting to cause or causing physical or sexual harm to a family or household member, placing a person in fear of physical harm, causing psychological or emotional harm, or causing economic hardship by blocking access to family funds. The Dispute Resolution Advisory Council encourages neutrals to take great care in working with parties in which violence has been confirmed or alleged.

What types of dispute resolution are appropriate for cases in which domestic violence is occurring or has occurred?

There can be a difference of opinion about which cases are appropriate for negotiation and which should go immediately to court. It has been the practice in some legal communities to use the filing of a protection from abuse or protection from stalking as a legal maneuver in a domestic dispute. The consensus view of the Advisory Council is that a well-trained staff person should do an analysis of each case to determine its suitability for any form of dispute resolution and to determine the best provider of the service. If there is any question as to suitability, the case should not go to dispute resolution. Any type of court ordered dispute resolution should attempt to insure the safety of the parties, as well as the neutral and other court personnel involved in the case. Other forms of dispute resolution that may be appropriate include evaluative mediation, case management and arbitration.

Evaluative mediation uses a law-trained mediator who is aware of the laws that can affect domestic violence cases. Usually evaluative mediators conduct caucus based mediation sessions or sessions in which the parties meet separately. The mediator can ask specific questions to encourage each party to consider the legal concerns of their disputes. The mediator is not to provide legal advice and does not act as counsel to either party. It is still up to each party to seek legal information for any questions raised during the mediation sessions.

Case management uses a trained neutral to first attempt to mediate the dispute but, if that cannot be achieved, to then make a report back to the court. The report can include information obtained during the negotiations. This is different from mediation in which the confidentiality of all discussions is protected by statute. A case manager is expected to provide the court with a recommendation. A court will often use a case manager with specialized domestic violence experience to handle many of the on-going domestic disputes. They are usually used in high conflict domestic disputes.

Security: Whatever form of dispute resolution is to occur, waiting rooms and meeting places should be secure, and sessions should be scheduled to avoid victim/abuser confrontations before and after meetings. Where security or ability to negotiate face-to-face is in question, mediation sessions can be conducted by teleconference or with the parties in separate rooms. In situations where the safety of the victim is in jeopardy, mediation should be terminated.

How can a court screen cases for domestic violence?

Dispute Resolution Advisory Council Recommendations: Screening for domestic violence should be accomplished early in the case and should be incorporated into the court's regular management system as much as possible. If an in-person screening process is used, the parties should be screened separately. Mediators who have received Supreme Court approval can be expected to have had training in screening for domestic violence.

It is important to state that many states do not allow any form of domestic violence cases to go to dispute resolution. A problem that can occur is that more cases are labeled domestic violence and excluded. A best practice recommendation in Kansas is to have a well-trained person screen all cases with domestic violence allegations to determine if they are appropriate for non-litigation resolution methods.

¹ Each fiscal year, the Kansas Office of Judicial Administration submits an Annual Report to the Supreme Court of Kansas.

² American College of Trial Lawyers **The Vanishing Trial: The College, The Profession, The Civil Justice System**, (October 2004.) at 82

³ Shauna M. Strickland, **Beyond the Vanishing Trial: A Look at the Composition of State Court Dispositions**, 21, National Center for State Courts, 2005

⁴ National Center for State Courts, **Examining the Work of State Courts, 2004**, 32, A National Perspective from

the Court Statistics Project, (2005.)

⁵ Conference of State Court Administrators, **Position Paper on Effective Management of Family Law Cases**, (August 2002.)

⁶"Varieties of Dispute Processing," *The Pound Conference: Perspectives on Justice in the Future*, eds. A. Levin and R. Wheeler (West, 1979)

⁷ "Multi-Door Courthouse", Ericka Gray, National Symposium on Court-Connected Dispute Resolution Research, Oct. 1993. State Justice Institute

⁸ Ostrom, Strickland and Hannaford, **Examining Trial Trends in State Courts: 1976–2002**, 33-34, National Center for State Courts, (Nov. 26, 2003)