

# **Alternative Dispute Resolution Techniques for Estate Planning and Administration**

**Southeast Denver Estate Planning Council**

**September 11, 2012**

**Maggiano's on Belleview**

# **RELATIONSHIP ISSUES PLANNERS FAIL TO ADDRESS**

- ◆ **2<sup>nd</sup> and 3<sup>rd</sup> Marriages (“blended families”)**
- ◆ **Siblings**
- ◆ **Parents/Children**
- ◆ **Burial**



**Sibling Conflict**

# Drafting to avert conflict

## Traditional approaches

ignore potential problems and “hope for the best”  
*in terrorem* clauses

## Aspirational messages

## ADR Provisions

mandatory arbitration clauses  
mediation clauses

# **Unresolved “Planning” Issues become . . . .**

- ◆ **Disappointed Expectations**
- ◆ **Anger**
- ◆ **Resentment**
- ◆ **Revenge**
- ◆ **Litigation**
- ◆ **Frustration**
- ◆ **Dissatisfaction**

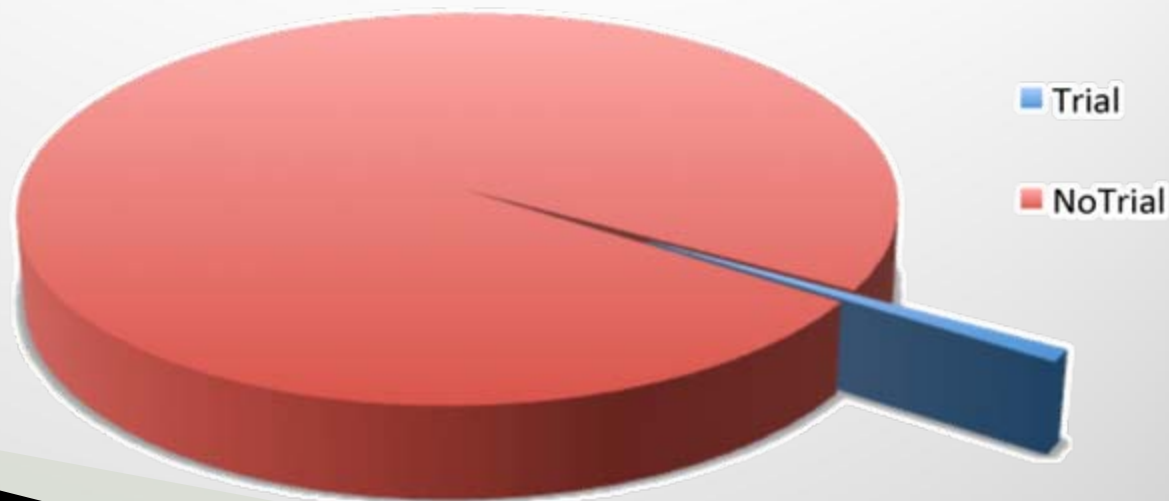
# Facilitation

- ▶ Facilitator can identify issues and interests and assist families to anticipate and avert conflicts
- ▶ Helps people move away from “principles”
  - “I don’t need the money”
  - “I don’t want the money”
  - “Parent(s) always liked you better”



# The Public Trial Model

- ◆ **Statistics reveal that the use of the civil public trial has fallen into disuse.**
  - Less than 1% of cases filed in Colorado currently go to trial
  - Majority of procedure is taken up with motions, discovery, pre-trial maneuvering, etc.





# **Dissatisfaction with Public Tribunals**

- ◆ **Congested**
- ◆ **Slow**
- ◆ **Delays/continuances**
- ◆ **Expensive**
- ◆ **Stressful**
- ◆ **Non-permanent (appeals)**
- ◆ **Public**
- ◆ **Mismatched abilities**
- ◆ **Too formal, rule-based**





# Alternative to Public Tribunal



# Rules of Professional Conduct

## ◆ Rule 2.1 Advisor

....In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution that might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.

# **Alternative Dispute Resolution**

- ◆ **Problem-solving methods or techniques**
- ◆ **[Appropriate] Dispute Resolution**



# Alternatives by Category

- ◆ **Adjudication**
- ◆ **Negotiation**
- ◆ **Evaluation**
- ◆ **Facilitation**



# ADJUDICATION ALTERNATIVES

- ◆ **Appointed Judge**
- ◆ **Binding Arbitration**
- ◆ **Special Master**



# **Appointed Judge**

- ◆ Referred to in some states as “private judge”
- ◆ CRS § 13-3-111 and Rule 122 CRCP
  - At least 6 years on state or federal bench
  - Consent of the parties
  - At “no cost to the state”
  - Jury may be impaneled

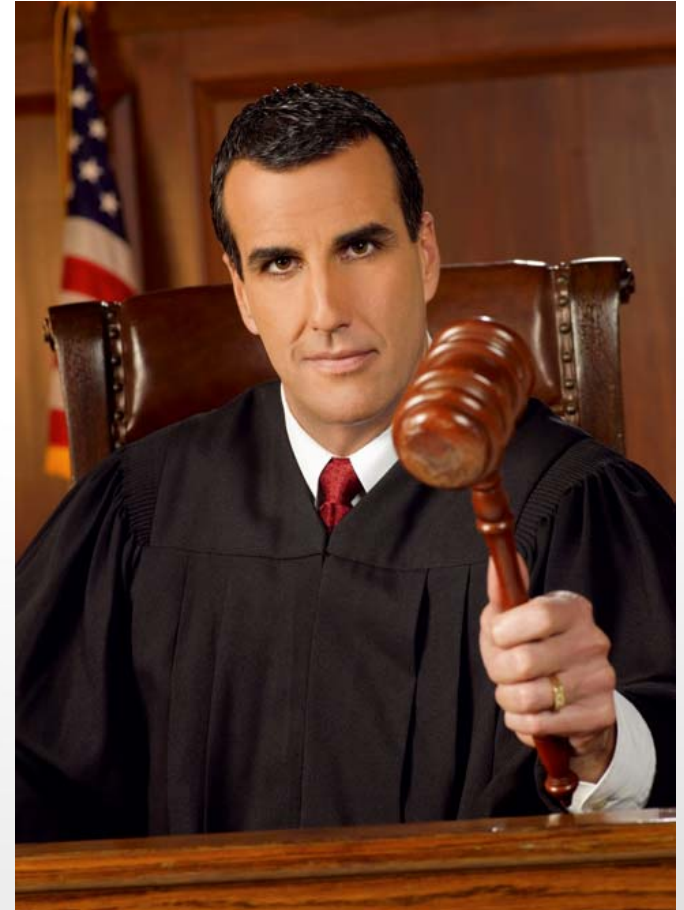
# **Appointed Judge cont'd**

- ◆ **Best used: when parties want to preserve appellate rights**
- ◆ **When special substantive expertise or procedural experience in tribunal is desired**
- ◆ **When speed, efficiency and scheduling are considerations**
- ◆ **When privacy is a concern-although a “record” is preserved, the parties have more control over what is made public**



# Advantages/Disadvantages of Private Judge Model

- ◆ **Expense-quantifiable**
- ◆ **Timely**
- ◆ **Subject matter experience**
- ◆ **Ideal for:**
  - Complex matters that require management
  - Simple matters that deserve expeditious disposition



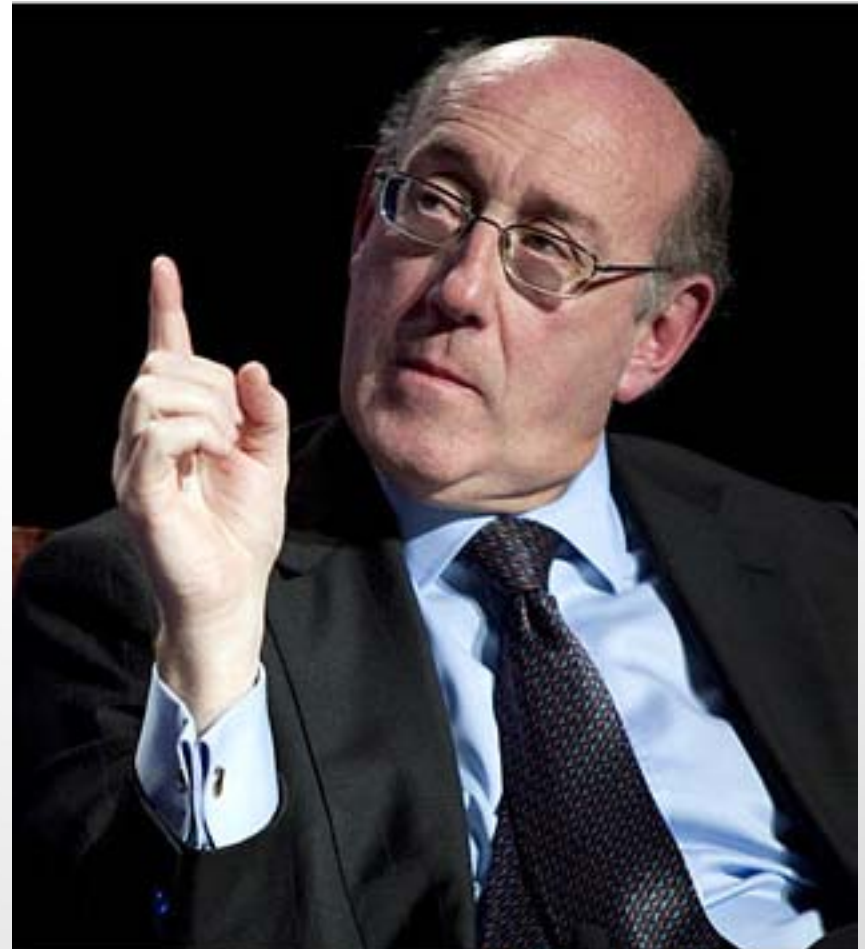
# **Special Master/Master/Discovery Master**

- ◆ **Rule 53 CRCP, Rule 53 FRCVP**
- ◆ **The exception, not the rule**
- ◆ **Special expertise, calculation of damages, findings of fact, special circumstances**



# Advantages/Disadvantages of Master

- ◆ Expertise
- ◆ Efficiency
- ◆ Specialization



# Fact-Finding

- ◆ A process by which a neutral determines the facts relevant to a dispute
- ◆ May be a Special Master



# Binding Arbitration

- ◆ A process where an acceptable third party or a panel of acceptable third parties listens to the information presented by all sides to the dispute and renders a decision
- ◆ Non appealable





# Advantages/Disadvantages of Binding Arbitration

- ◆ **Finality**
- ◆ **Relative Informality**
- ◆ **Expense**



# Negotiation





# Negotiation

- ◆ **Negotiation is direct, private, efficient, cost effective, fashioned to meet the individual needs of the parties**
- ◆ **Attorneys may or may not be involved**



# NEGOTIATION

## **Attorneys are poor predictors of outcomes**

- ◆ Overestimate chances of success
- ◆ Higher confidence level was lower predictor of outcome
- ◆ Older, more experienced attorneys fared poorest
- ◆ Female attorneys better than male counterparts

Goodman-Delahunty, Jane; Granhag, Pars Anders; Hartwig, Maria; Loftus, Elizabeth F., *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, Psychology, Public Policy and Law

# NEGOTIATION MODELS

With or without third party neutral

- ◆ **Mediation**
- ◆ **Collaborative Law**
- ◆ **Facilitation**



# **MEDIATION/Conciliation**

**A process where a neutral third party facilitates a discussion between disputants for the purpose of resolving a conflict**



# **MEDIATOR**

**– a neutral third party, trained to assist the parties in negotiating an agreement. The mediator has no independent authority and does not render a deciding opinion, but rather assists the parties in creating solutions that reflect their interests and goals.**

# Facilitation

- ◆ When a system or a process for handling something has gone awry
- ◆ Remediation





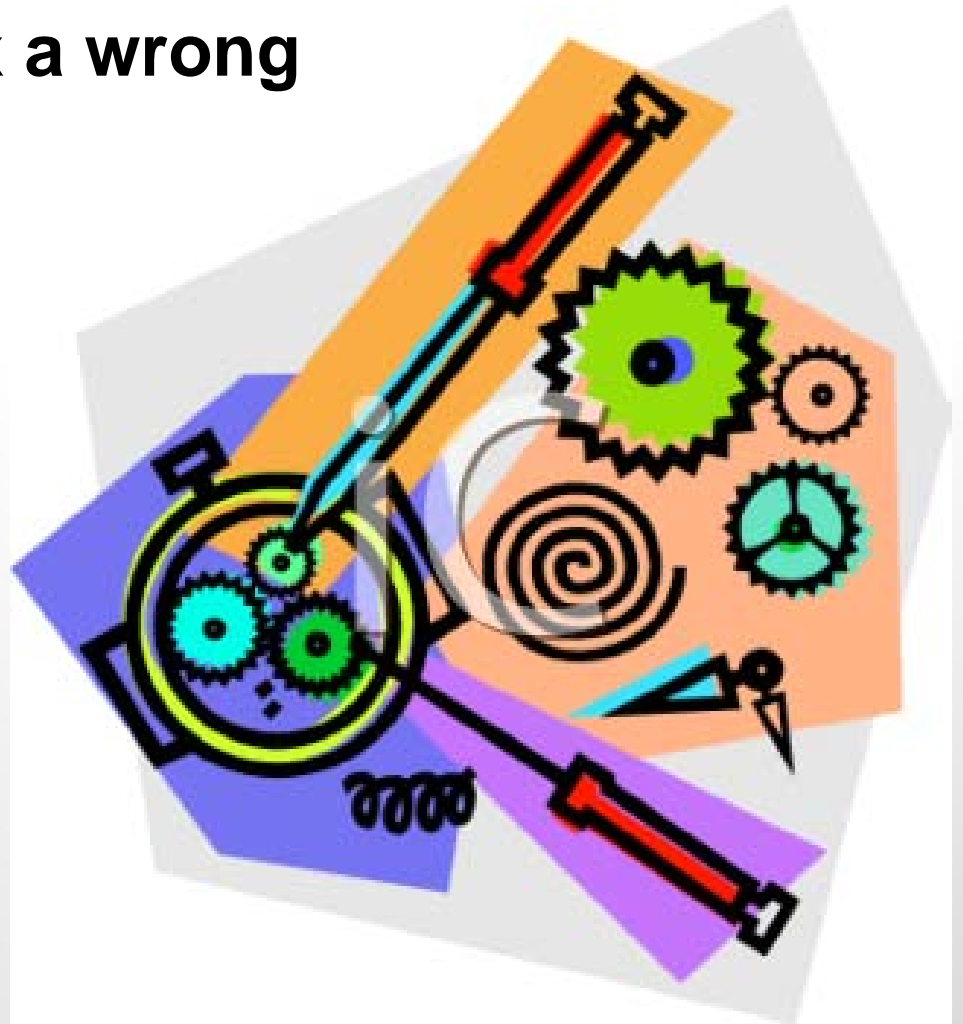
# Facilitation Situations

- ◆ **Remediation-”defendant” seeks to repair the alleged damage and avoid litigation, award of damages, etc.**
- Estate where Personal Representative was not properly guided by the attorney and both were facing a surcharge/malpractice action.



# REMEDIATION

- ◆ Finding a way to fix a wrong



# **EVALUATION MODELS**

- ◆ **Third party neutral serves as an “evaluator”**
- ◆ **Advises the interested parties about the possible, potential and probable outcomes if the case were to proceed to trial**
- ◆ **Third party neutral assists by assigning dollar amounts to the projections**
- ◆ **Evaluator may also prompt and persuade to urge interested parties to move towards compromise**

# EVALUATION MODELS

- ◆ Settlement Conference
- ◆ Summary Jury Trial or Mini-Trial
- ◆ Non-binding Arbitration
- ◆ Early Neutral Case Evaluation



# **EARLY NEUTRAL CASE EVALUATION**

**Evaluator hired by the lawyers/parties or appointed by the court:**

- **narrows the issues in the case**
- **assists with development of a discovery plan**
- **works with attorneys/parties to conduct appropriate case management, including development of CMO, if needed**
- **evaluator may assist parties negotiate a settlement, if asked**

# **Early Neutral Case Evaluation**

- ◆ **Best used: where case issues are complex and the services of a neutral expert on substance or process would be valuable; where discovery and motions could become unwieldy**

# **SETTLEMENT CONFERENCE**

- ◆ **Typically conducted by a retired judge; in federal court (until recently) by Magistrate Judges**
- ◆ **Parties are separated and neutral shuttles back and forth delivering offers, counteroffers and applying pressure to parties to reach a settlement number**
- ◆ **Sometimes referred to as “mediation” or “evaluative mediation”**

# **Settlement Conference**

- ◆ **Best Used: Where the impartial expertise of a substantive expert can aid the parties in negotiation by evaluating case strengths and weaknesses**



# Summary Jury Trial/Mini Trial

## ◆ Summary Case Presentation

- to a jury (may be provided by court or hired)

Jury provides an advisory verdict

## ◆ Summary Case Presentation

- to a neutral or panel selected by the parties or by the court
- Neutral/panel provides an advisory decision/opinion

Summary Jury Trial

Mini Trial

# NON-BINDING ARBITRATION

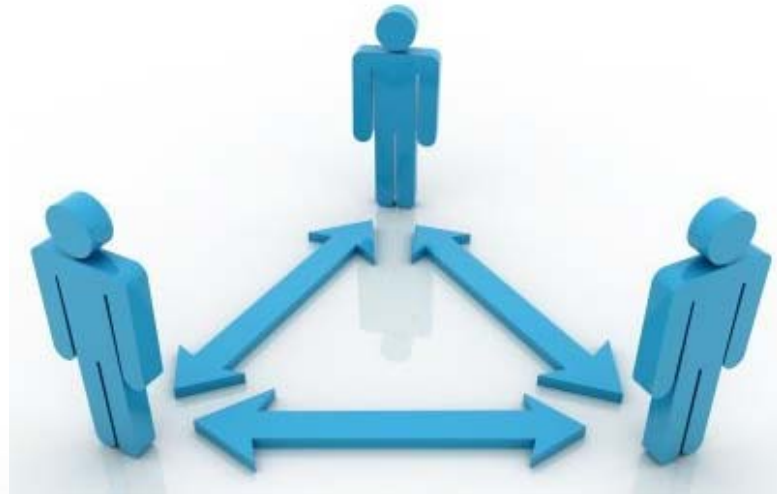
- ◆ Arbitrator or panel hears adversarial presentations and issues an award that is not binding on the parties; although they may be free to accept and apply it



# Combination ADR Methods

- ◆ Med/Arb

- ◆ Arb/Med



- ◆ Neutral Fact Finding followed by Mediation

- ◆ Mini-Trial or Summary Jury Trial followed by Mediation

# Characteristics of Alternative Dispute Resolution Practice

- ◆ Clients are almost exclusively other attorneys



# Resources

- ◆ **Colorado State Courts: Office of Dispute Resolution See Dispute Resolution Act, C.R.S. §13-22-301 et seq.**
- ◆ **Federal Courts: Civil Justice Reform Act of 1990 provides that federal courts must consider the possibility of referring appropriate cases to ADR programs**
- ◆ **Tenth Judicial Circuit – pre-argument Conference Program**



## ◆ **Strengthen Your Settlement Posture**

- Case Valuation and Settlement Recommendation
- Settlement Statement Recommendations
- Settlement Video
- Mediation Assistance, including witness prep
- Case Settlement/Case Valuation Mock Trials

## ◆ **Prepare for a More Persuasive Arbitration**

- Mock Arbitration
- Arbitration Message Preparation
- Witness Preparation for Arbitration