

# OVERVIEW OF MEDIATION

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## I. WHAT IS MEDIATION?

### A. What Mediation is Not

#### i. *Litigation* –

1. Although mediation can be used in disputes between parties who are involved in litigation, the mediator is not acting like a judge, making a decision.
2. Unlike trial, there is no “testimony” that is heard or rules of evidence.
3. Court decisions can be “appealed”, unlike mediated agreements.
4. Litigation is not a voluntary process.
5. Litigation can be an expensive process from the standpoint of attorneys’ fees and experts, if applicable.
6. In the family law context, judges can make determinations on many (but not all) issues involving a divorce. For example, courts will not decide issues of pet visitation or will get involved in enforcing certain provisions that may be important to the parties.

#### ii. *Arbitration* –

1. Arbitration and mediation are oftentimes confused. An arbitrator is more akin to a judge making a final determination.
2. The parties can decide whether the arbitration is *binding* or *nonbinding*.
3. Like a judge, an arbitrator will hear testimony and review evidence. In a sense, arbitration is a more casual form of litigation with relaxed rules of evidence.
4. Unless the contract in dispute requires *binding arbitration*, arbitration is still a voluntary process.

5. Arbitration decisions can be appealed and challenged in certain situations.
6. Oftentimes parties will agree to use an arbitration organization such as the American Arbitration Association; however, the parties may use private arbitrators.
7. Parties can choose whether to use a 1 party or 3 party arbitration panel of people who may or may not be lawyers or have specialized skillsets according to the practice areas.
8. Arbitration is viewed as an expensive form of Alternative Dispute Resolution (“ADR”).
9. In the family law context, families cannot arbitrate child custody and visitation (i.e., the allocation of parental responsibilities and parenting time).

iii. ***Early Neutral Evaluation*** –

1. This is a newer form of ADR with growing popularity in some geographic areas, depending on the type of dispute. You will see this more with matrimonial or commercial disputes.
2. A Neutral Evaluator is usually a licensed attorney with several years of experience (e.g., 10+ years of experience or a retired judge) that is paid hourly much like an arbitrator.
3. Like arbitration, Early Neutral Evaluation or “Neutral Evaluation”, focuses more on the economic issues with a dispute. In the family law context, it is unusual for a Neutral Evaluator to give opinions on custody and visitation.
4. Like an arbitrator, after reviewing the facts and submissions from each side, the Neutral Evaluator will make a *non-binding decision* on how he or she feels a jurist will rule in a particular situation.
5. This can be an effective, but not inexpensive tool, to break an impasse by getting a decision from a neutral third party. The parties may agree in writing to make this decision *binding*; however, the parties usually take this decision under advisement in settlement negotiations.

## **B. What Mediation Is**

### **i. *Mediation is a Conversation***

1. Put simply, the role of the mediator is to facilitate a conversation between the parties
2. The mediator is not there to listen to testimony like a trial or arbitration. Albeit “heated” at times, a mediation session is conversation focused.

### **ii. *Mediation Allows Parties to Get to the Heart of the Issue***

1. Parties involved in litigation are rarely arguing about what they are really arguing about. Mediation gets past the parties’ “positions” to focus on the underlying issues.
2. In the family law context, issues that may not be heard or negotiated in court may be discussed (e.g., pet visitation agreements).

### **iii. *Mediation Allow for All the Parties in the Dispute to Get Involved***

1. Mediation is not restricted to only 2 people; an unlimited amount of persons can be involved in mediation. This may be especially useful in certain situations.

### **iv. *Mediation is Not Legal Advice***

1. Many but not all mediators are also licensed attorneys; however, it is paramount that attorney mediators never wear his or her attorney hat when acting as a mediator
2. Mediators should recommend that the parties involved seek their own individual attorney (i.e., a “consulting attorney” where they can obtain legal advice according to their individual situation.
3. Attorney mediators may provide “general information” to the parties in a dispute
4. In the family law context, attorney mediators may then, upon mutual consent, draft the Marital Settlement Agreement, Agreed Parenting

Plan, etc. Each party can then take the agreement to review with his or her own individual lawyer.

*v. Mediation Allows Parties to Move At Their Own Pace*

1. Unlike the court system or arbitration, mediation allows parties involved in a dispute to move as quickly or as slowly as they wish
2. Parties may voluntarily exchange financial information or discovery at a timeline agreed by the parties

**C. Collaborative Law**

- i. Collaborative law takes mediation to the next level and is popular in the divorce context.
- ii. In the collaborative law model, there are several players involved, principally the mediator and collaborative attorneys. Other players may be involved, including but not limited to: accountants, financial advisors, parent coordinators, licensed clinical social workers/ therapists, divorce coaches, etc.
- iii. The collaborative attorneys agree in writing that they will not represent their client if either side goes to court.
- iv. Because there are a lot of players involved and mouths to feed, this can be a more expensive form of ADR. However, for families with resources, this can be a great way to transition through a divorce while seeking advice from other advisors.

**II. MEDIATION VALUES**

- A. Self-Determination** – The basic tenant of mediation is that both parties have the autonomy and feel empowered to make the decisions instead of giving up that power to a neutral third party. It is paramount that mediators not be looked as the “decision-maker” – the mediator is simply there to guide the conversation to help the parties themselves make the decision.
- B. Neutrality/Impartiality**—It is critically important that the mediator remain neutral and impartial during the process. If the mediator has a prior relationship with one person, or the attorney mediator has given legal advice to one person prior to the mediation, then the mediator should recuse themselves.

**C. Voluntary**—Mediation is voluntary. Simply because someone showed up to mediation once doesn't mean that they will come back. They can leave mediation at anytime. It is important that all parties recognize that they are there because they want to be there and work through the dispute.

**D. Confidentiality** –

- i. There are few rules governing mediation but confidentiality is a basic tenant that applies to both attorney and non-attorney mediators.
- ii. Some mediators choose to shred their files/notes after the mediation to take this promise of confidentiality one step further.
- iii. Nothing said during a mediation session can be disclosed in court.

**E. Safety** –

- i. Mediation is not appropriate in all situations. If there is a temporary or final order of protection or allegations of (domestic) violence, then mediation should cease immediately. Some mediators will still conduct “virtual mediation” in these situations where the parties are no longer in the same room or building. The mediator should make the call on whether the imbalance of power is detrimental to the process.
- ii. Mediators should sit in the middle, closest to the door in case a fight breaks out in the middle of the mediation insofar that he/she is fearful for his/her safety
- iii. If there is any physical altercation during the mediation then the mediation session should stop immediately

**F. Quality**

- i. This is a straightforward underlying value of mediation. Mediators should be cognizant to maintain the quality of the mediation session for everyone involved.
- ii. Mediators may come up with her or her own “rules” (per se) to protect the quality of the mediation (e.g., no cellphone usage)
- iii. For example, if one party is unnerved and unable to concentrate for whatever reason, then the mediation session should be postponed. If the mediator is suffering from his/her own personal conflict that makes it difficult to

perform quality work, then the mediation session should be postponed until another date when a productive mediation can be facilitated.

### III. HOW DOES IT WORK?

#### A. The Consultation

##### i. *Initial Contact.*

1. Typically, one person calls the mediator at first and requests a telephonic or in-person consultation.
2. If the initial consultation is given to only one party, then in efforts to stay neutral, private time with the mediator is also offered to the other person.
3. Some mediators choose to charge for the initial consultation.

##### ii. *Confidentiality Agreement.*

1. During this stage, a “Confidentiality Agreement” is signed noting that everything discussed in the consultation and any subsequent mediation session will be confidential.
2. Not only will the information not be disclosed to third parties, but neither party may use the information discovered through mediation in court.

##### iii. *Fees.*

1. Fees are discussed during the consultation.
2. Typically, mediators charge by the hour although some mediators charge a flat fee per mediation session.
3. The issue of who is paying what portion of the mediation fees can be a contested issue which may be mediated. The parties should decide on how the initial session will be paid prior to scheduling a session.
4. In many cases, parties to a dispute split the costs of mediation equally; however, in the *family law* context, parties often split the costs of mediation on a *pro rata* basis according to income.

iv. ***Engagement Letter or Retainer Agreement.***

1. Many but not all mediators have the parties sign an engagement letter, retainer agreement, or mediation agreement setting forth payment terms and the responsibilities of each party according to the rules of ethics in that state.
2. Fees should be clarified in the retainer agreement or engagement letter between the mediator and the parties.
3. The parties may opt to sign the engagement letter in the initial consultation.
4. Depending on the type of dispute, some mediators request an up-front retainer be paid as payment security.

**B. Mediation Sessions**

- i. The first mediation session may take place immediately after the consultation or at another time.
- ii. The mediator should begin the mediation session with laying a few ground rules. Here are some examples:
  1. Explaining his/her role in the process
  2. Reminding everyone about confidentiality and how the information used in the mediation is for “settlement purposes” and cannot be used in court
  3. Depending on preference, asking the parties to put cellphones on silent or not to speak over one another (e.g., one person speak at a time)
  4. Noting that either party may speak to the mediator privately (i.e., a Caucus). In this case, the information learned by one party will only be disclosed to the other party with express permission. Thus, in a sense, a caucus is an opportunity for one party to speak privately on issues with the mediator. However, if one party requests a caucus then a similar opportunity must be offered to the other party.
- iii. Typically, mediation sessions last for approximately 1.5 to 2.0 hours, although some mediation sessions can be as long as 3 hours or more. The

mediator should gauge his/her attention span as well as the attention span of the participants. If one party is tired, then mediation should come to a close as the productivity lowers at that point.

- iv. Parties are welcome to have their own attorney participate in mediation; however, it is uncommon in the family law context. It is more common for people to have their own attorney present for commercial mediation.
- v. Mediation sessions can be schedule as close together or as far apart as the parties wish. This is one big advantage to mediation – the parties are in charge of the pace instead of the court system or arbitration body. For example, in some situations it might be appropriate to schedule the next mediation session in a day or two while in other situations, the parties would prefer a few months between sessions.
- vi. The parties may come up with a temporary agreement at the end of a mediation session which may or may not be signed by the parties. If there is an agreement on an issue, the mediator should make sure that there is minimally an oral confirmation of the understanding of the issue.

### **C. Between Mediation Sessions**

- i. Depending on the type of dispute, parties may gather “discovery” for the other party between mediation sessions. For example, in the *family law* context, parties may complete a financial affidavit or find copies of a certain number of tax returns, paystubs, bank statements, credit card statements, etc.
- ii. Experts may need to be hired. For example, in the *family law* context, the parties may hire a real estate appraisal or a forensic accountant for a business evaluation.
- iii. The mediator may give the parties appropriate “homework”. For example, in the *family law* context, it is not unusual for the mediator to “reality test” a proposed settlement agreement or different scenarios with different budgets.

### **D. After Mediation is Concluded**

- i. Hopefully mediation concludes when the parties reach a final settlement; however, sometimes mediation concludes when the parties believe they are at an impasse and settlement cannot be reached in that forum and they require a neutral third party to make a decision for them (e.g., judge, arbitrator).

- ii. If a settlement agreement is reached, the attorney mediator may draft the final settlement agreement to be reviewed later by each party and his/her/its attorney; however, any party may request that his/her/its lawyer be the draftsman. In that case, or in the instance of a non-attorney mediator, the mediator can draft a Memorandum of Understanding to better guide the contract draftsman.
- iii. In the *family law* context, once mediation is concluded, so long as both parties sign a conflict of interest, one party may choose to hire the mediator as the filing attorney. In this instance, the mediator will attend court and file the Marital Settlement Agreement/ Stipulation of Settlement and Agreed Parenting Plan along with the remaining uncontested divorce papers. However, some parties prefer for his or her consulting attorney to prepare the final papers and submit them to court.

#### IV. WHERE CAN IT BE USED?

##### A. Types of Disputes

- i. Although mediation is popular in the family/matrimonial law context, it can be a useful form of ADR with nearly every kind of dispute. However, when there are issues of domestic violence (or alleged domestic violence) or a severe unbalance of power or control in any context, then mediation should not be utilized.
- ii. ***Family/Matrimonial Law.*** In this area of law, mediation can be used to address the following issues:
  1. Divorce or separation
  2. Post-divorce enforcement
  3. Child Custody and Visitation/ Allocation of Parental Responsibilities and Parenting Time
  4. Relocation Disputes
  5. Child Support
  6. Spousal Maintenance (whether married and living together or going through a divorce/separation)
  7. Prenuptial/Postnuptial Agreements (both sides should have their own consulting attorney)
  8. Cohabitation Agreements
  9. Pet Ownership and Visitation Agreements

iii. ***Food and Agriculture Law.***

1. This is a subset of commercial mediation. A few example disputes that can be mediated include the following:
  - a. Landlord- tenant disputes with leases (including farm/ranch/grazing leases)
  - b. Lease disputes involving livestock (e.g., bull leases) or equipment
  - c. Contract disputes
  - d. Estate and succession planning
  - e. Disputes arising in family-owned businesses
  - f. Intellectual property disputes
  - g. Noise and nuisance disputes with neighbors
  - h. Veterinary malpractice
  - i. Employment/ labor law disputes
  - j. Equine law disputes
  - k. Urban agriculture/ community garden disputes
  - l. Farmer market disputes
2. State agriculture mediation programs. Many states have agriculture mediation programs funded by the USDA for federal farm program and right-to-farm disputes (e.g., Illinois Agriculture Mediation Program, New York Agriculture Mediation Program, and New Jersey Agriculture Mediation Program).

iv. ***Animal Law.*** Here are a few examples of how mediation can be utilized in this context:

1. Pet ownership and visitation disputes
2. Veterinary malpractice
3. Estate planning
4. Pet injury/death
5. Dog bite cases
6. Pet shop lemon law

**B. Litigation Timeline**-- Mediation can take place at any stage. Mediation can take place before either party has filed a court action or is on the cusp of trial.

**C. Outside of Litigation Context**

- i. Parties do not have to be in court to participate in mediation. Mediation is useful in a myriad of contexts.

- ii. For example, here are some examples of when mediation can be used to facilitate a conversation outside of the litigation context:
  1. A dispute between employees causing unwanted friction in the workplace
  2. A family farm succession plan dispute where one sibling is taking on more managerial control of the family livestock operation than the other sibling
  3. A dispute between two parents and a child concerning the payment of college tuition
  4. A dispute among teenagers and their families that is impacting the family's quality of life
  5. A noise dispute between two neighbors in a building

**D. Virtual Mediation** – Although in-person mediation sessions are usually more productive, a virtual mediation session can be held via teleconference or videoconference. This can be especially useful if one party lives out of state.

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