

**SECTION B: DISPUTE RESOLUTION**

**CHAPTER 4**

**ALTERNATIVE DISPUTE RESOLUTION**

***SUBPART A: MEDIATION***

By Cari B. Rincker, Esq.

Mediation is oftentimes an overlooked and misunderstood dispute resolution device. Mediation can be one of the more *effective, cost-efficient* mechanisms to come to an agreement. Mediation is a voluntary process giving the participants control over the result.

**What is Mediation?**

**Mediation vs. Arbitration**

Mediation is oftentimes confused with *arbitration*. In mediation, a mediator acts as a neutral third party to help the parties reach an amicable resolution. Put simply, a mediator helps facilitate a conversation between the parties. A mediator is not a judge or a jury and does not make a decision for the parties. However, in some instances, mediators can provide general information to the parties regarding the law. To the contrary, an arbitrator acts like a judge making a decision for the parties. This is an important distinction because parties often look to the mediator to make the decision; however, that is not the role of the mediator.

**Mediation vs. Conciliation**

Some mediators focus on reconciliation, or “*conciliation*.” But most do not. If someone hopes to reconcile with his or her spouse or ex-boyfriend or girlfriend, mediation may not be the right choice. There are, however, conciliation professionals that may help the parties take strides towards reconciliation.

**What Can Be Mediated?**

In the family and matrimonial law context, nearly every type of dispute can utilize mediation in one form or another. To explain, mediation can be utilized in the following scenarios:

- Prenuptial/post-nuptial agreements
- Child support
- Spousal maintenance
- Child custody and visitation (*i.e.*, a parenting plan)
- Equitable distribution in the divorce context
- Pet ownership/custody disputes
- Family business (*e.g.*, between spouses, parents and children)

- Communication issues between family members
- Fee disputes between clients and attorneys or other professionals

In most circumstances, cases with **domestic violence** protections; however, in some be an effective settlement and the **imbalance of power** is

For example, if there is a **Temporary Order of Protection**, the parties may wish to be present in the mediation with their respective lawyers.

mediators will not mediate **allegations** or orders of instances mediation can still device so that safety issues properly addressed.

## When Does Mediation

Mediation can take place at **anytime, anywhere**. It can take place at any stage during the litigation process or it can take place before the parties have gone to court. In some cases, parties may try mediation and then later decide to litigate their dispute. However, parties can then come back and try mediation again once the parties have gained more information.

## Take Place?

## In Person vs. Virtual Mediation

Most mediation is done in person, with parties in the same room. In some cases, the parties caucus with the mediator privately (i.e., without the other person present) for equal amounts of time. However, there are some mediators who can conduct “**virtual mediation**” via Skype (or other video conferencing tool). This can be particularly helpful when the parties live geographically distant where it might be cost prohibitive to meet in person during mediation.

Mediation is always the most effective in person; however, sometimes life or finances do not allow for the parties to be in the same geographic location.

## Confidentiality

No matter the form of mediation, everything that is said during the session is always confidential. Not only is the mediator required the keep the information learned private but the parties cannot use the information learned during mediation later in court. Some mediators even destroy notes after the mediation period has concluded.

## Overview of Mediation Process

### Initial Consultation

It is recommended that parties considering a mediation first have an initial consultation with the mediator. This initial consultation can be via the **telephone or in-person**. The parties may choose to have the initial consultation together or separately.

Typically parties split the costs of mediation equally (50/50); however, parties can have other agreements. Payment for the mediator can and should be agreed to during the consultation period.

During this stage, the mediator oftentimes will have the parties sign a confidentiality agreement, explaining that everything stated during the consultation or subsequent mediation sessions will be confidential. The mediator will then describe the mediation **process and fees**. He/she may have the parties sign an initial consultation agreement and go through a client intake form with the parties.

Importantly, this is the opportunity for the parties and the mediator to get to know each other. The clients should ask questions about the mediator’s experience

and the mediation process. Similarly, the mediator will try to get a feel for the dispute and the issues that need to be mediated.

## Mediation Period

This is the meat and potatoes of the mediation process. Mediation sessions last for *approximately two hours* (can vary with mediators). Some mediators send written debriefs to clients after mediation sessions while others do not. Importantly, the mediator cannot give the parties legal advice (even if he or she is a lawyer); therefore, it is recommended that the parties have their own consulting lawyer during this period to ask him or her questions.

When *financial disclosure* is an issue (e.g., spousal/child support, equitable distribution, prenuptial agreement), the parties can agree during this period on what will be exchanged and by what method. For example, in the divorce mediation context, the parties could voluntarily decide to complete and exchange a Statement of Net Worth along with two years of financial statements. Parties may decide to get certain properties appraised. In mediation, the parties (and the mediator) make the rules instead of the court.

Parties in a divorce may agree upon a real estate appraiser or art appraiser during this period. Payment of the appraisals can be mediated as well.

How *many mediation sessions* are required? This depends on a myriad of issues. Are children involved? Are there complex financial issues? How are the parties communicating? Oftentimes, parties have to work through various emotional issues before certain financial issues can be decided. Every person and each couple during the mediation process moves at their own pace. Some couples might be able to resolve a narrow issue concerning parenting time in one mediation session where another pair of parents might require five plus sessions to come to a final resolution.

The time between mediation sessions can vary significantly. The parties can go at their own pace. In some instances, parties have “homework” after mediation session and need a few weeks to work on collecting the required information for the next mediation session. In other cases, parties don’t want to lose momentum and need only a few days before their next session. In others, parties might want to take a month or two between sessions to spend time negotiating on their own and seeing how temporary arrangements are working. Again, the parties have the control on the timing instead of a courthouse.

## Agreement or Memorandum of Understanding

The hope, but not always the ultimate goal of mediation, is to have terms for a final agreement. If the mediator is an attorney, he or she may offer to draft the final settlement agreement, parenting plan, or prenuptial/postnuptial agreement; however, it is important for the parties to then take the mediator-drafted agreement to their individual lawyers to review. Alternatively, the mediator can draft a *Memorandum of Understanding* (“MOU”) that the parties can then take to their individual attorneys – one of which will memorialize it into a formal document.

That being said, in some cases, parties do not wish (or need) a written agreement. For example, perhaps two parents are having a dispute about summer vacation and summer camp. They come to an oral agreement during the mediation session and don’t wish to amend their parenting plan (or custody and visitation agreement) or put this agreement in writing because they wish to address this issue each year as it arises.

## **Executing and Filing Necessary Documents**

The final stage during the mediation process is to *execute and file* (if appropriate) any documents with the court. The mediator may no longer be involved in this stage. The parties may be working directly with their individual attorneys.

## **Choosing a Mediator**

In closing, it is important to choose the right mediator for you and your particular dispute. Mediators vary in experience, language proficiency, subject matter expertise, style, fees, communication, and level of involvement. For example, some mediators are able to *speak fluently* in different languages or have knowledge in certain family law disputes (e.g., animal ownership disputes). Some mediators do “virtual mediation” while others do not. It is important to be thorough during the consultation process to get an honest understanding of the process.

Referrals may be the most effective method in locating a qualified mediator in a particular area. People seeking mediators should *request referrals* from his or her attorney or other professionals (e.g., accountant, financial advisor). If you are unable to get a quality lead through referrals sources, then professional mediation associations throughout the State of New York may be contacted (e.g., New York State Council on Divorce Mediation, Family & Divorce Mediation Council of Greater New York). Various bar associations throughout the state also offer referral programs (e.g., New York State Bar Association, Association for the Bar for the City of New York, New York County Lawyers Association).

Additionally, every county in New York has its own *Community Dispute Resolution Center* (“CDRC”) that can mediate some limited areas of family law disputes. A list of programs is available at <https://www.nycourts.gov/ip/adr/ProgramList.shtml>. There are also other community organizations that offer mediation services for various family law disputes. More information on those programs can be found in Chapter 4.

## **Conclusion**

Most family law disputes can be mediated. Unless there is an emergency that needs to be quickly addressed by a courthouse or a substantial imbalance in power, most couples can benefit from having a neutral third party *facilitate a discussion between them*. When two companies go to war in a courthouse, it is unlikely that those two companies will ever have a working relationship again. Similarly, if two parents go to war in a courtroom, it is difficult for the two people to have a working co-parenting relationship afterwards.

Mediation can heal communication problems and preserve family relationships. Even if parties do not have children together, it makes sound economic sense to mediate issues with a qualified professional. When people step into a courtroom, they are putting their own lives at the mercy of a judge who barely knows them. Isn't it better for someone to have more control over his or her own life?

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Cari Rincker is the principal attorney at Rincker Law, PLLC, a national law practice focusing on “Food, Farm & Family.” She is licensed to practice law in New York, New Jersey, Connecticut, Illinois and Washington, D.C. Cari was named as a Rising Star for Metro New York in 2015 by “Super Lawyers” and is an award-winning blogger. Cari is involved in several professional organizations including the Association for the Bar of the City of New York’s Matrimonial Law Committee.

In addition to her litigation practice, Cari is also a trained mediator for divorces, child custody and visitation, and commercial disputes. She was also an adjunct professor at New York University, College of Steinhardt (2013-2014), where she taught an undergraduate food law class.

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