

MEDIATION

FREQUENTLY ASKED QUESTIONS

WHAT IS MEDIATION?

Mediation is a way to resolve disputes outside of court. When you use mediation, the parties, and not a judge, jury, arbitrator or other third party make all the decisions in your case with the help of a mediator. A mediator is a third party who is unbiased and remains neutral to both sides. The job of the mediator is to facilitate discussion about the issues in your case in a structured way and then help you negotiate with the other side in order to resolve the issues in your case. Mediation may be court ordered, but so long as the parties are acting in good faith, you may stop the process short of reaching settlement if you feel you are unable to reach an agreement.

IF THE MEDIATOR IS A LAWYER, CAN THEY GIVE ADVICE TOO?

A mediator should never dispense legal advice even if the mediator is an attorney. If an attorney/mediator does so, she is compromising her neutrality by representing your interests. A mediator may not represent a party in the case nor advocate for either side. The purpose of mediation is to resolve the issues based on the interests and goals of the people involved in the dispute, not on whether one of the party's positions is the correct one. In that way, mediation is an interest based negotiation process, and is not positional.

SO, IF THE ATTORNEY/MEDIATOR CAN'T GIVE LEGAL ADVICE, CAN I HAVE MY OWN ATTORNEY?

Absolutely. Mediators often work hand in hand with the attorneys hired by you to represent your interests. If you need legal representation, or want to know the benefits and risks of the deal you are reaching in mediation, you should definitely get an attorney to at the very least consult with you while you are going through the mediation process. This legal advice may be obtained early in the mediation, by legal counsel's review of a near-final draft Agreement, and by counsel's review of the final Agreement. This level of consultation will dramatically elevate your comfort and confidence in the final agreement.

IS MEDIATION LESS COSTLY THAN LITIGATION?

Whether mediation is financially less costly depends on the nature of your case, whether you and the other side are hiring attorneys, and whether you are using experts for certain aspects of your case. However, mediation can be both emotionally and psychologically less costly as you, and not a judge or jury, are making all the decisions. You control the process and you control the outcome.

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WHAT IF WE DON'T SETTLE IN MEDIATION?

If you don't settle in mediation, consider another form of alternative dispute resolution before embarking on a full on battle in court. And if you need to go to court in order to litigate your issues, consider having any agreements already reached memorialized in writing and signed by the parties so at least some portion of your case has been resolved.

Please be mindful that if you do end up in court, absent express consent to release the mediator, what is said in mediation remains confidential and the mediator can not testify for one party against the other. Also, if the other side tries to bring in evidence of what was said in mediation, most courts, with very certain exceptions, will not allow that evidence since it was part of the settlement process.

IF WE DO SETTLE, WHAT DO WE NEED TO FINISH THE CASE?

Generally, if the case settles, the mediator will draft a Memorandum of Understanding which memorializes the agreements that the parties have reached. Once signed it is a binding contract.

I WANT MEDIATION BUT THE OTHER SIDE IS SKEPTICAL. HOW TO APPROACH THIS ISSUE?

Since mediation is an informal voluntary process, if the other side does not want to mediate, you cannot force the issue. However, if you approach the other party with an olive branch rather than a machine gun, chances are, you may get your opponent to be a team player. Ask your opponent if it wouldn't be prudent to have all of your issues aired in front of a neutral third party who helps you resolve your own dispute. Wouldn't it be better to get issues off your chest in a safe and productive manner versus risking presenting the same issues to a judge and having the evidence being denied and objected to.

In my experience, every dispute carries a highly charged undercurrent of emotion that a court simply cannot accommodate when it focuses on the law. A mediator can facilitate problem solving in a way that salvages relationships and reduces animosity as well as help create a global settlement addressing all of the parties needs, even if they are not necessarily issues that a judge would hear.

A FRIEND WENT TO MEDIATION AND SAID IT WAS LIKE A THERAPY SESSION. IS THAT WHAT MEDIATORS DO?

No. Mediators, even trained mental health professionals, should never act as therapists in a mediation session. The goal of the mediator is to progress the parties toward resolution of their issues, not shrink their heads. However, a good mediator will get the parties thinking about the way in which the dispute may be negatively affecting the parties emotionally and therefore hindering progress.