

*preparing
for*

MEDIATION



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PREPARING FOR MEDIATION

Mediation may be used to help parties settle many different kinds of disputes including divorce, business, and employment disputes. This guide provides parties with information to help them prepare for mediation in all kinds of cases so that the mediation process will be as useful as possible.

Research shows that most parties are very satisfied with the mediation process and hopefully you will be too.

Using this guide to prepare for your mediation should help you have a successful experience.



WHAT IS MEDIATION?

Mediation is a process in which an impartial third party (the mediator) facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute. Mediators help parties understand each others' perspectives and discuss options for settlement. Mediators do not decide who is right and who is wrong. Whether parties choose mediation or a court orders them to try mediation, the decision whether to settle is always up to the parties. The mediator has no authority to impose a settlement on the parties.

The time when the mediator and the parties come together to mediate the case is called a mediation "session." Some of the time during a mediation, mediators meet with both parties together, often called a "joint session." Other times during a mediation they may meet with parties separately, often called "private caucuses." The amount of time that a mediator spends with a party in a private caucus can vary. Mediators may spend more time with one party than the other.

In most states, there are rules providing that mediation is a confidential process, meaning that communications made during a mediation session by any participant (whether in a joint session or private caucus) cannot be used in court regardless of whether the parties reach an agreement. These rules may also prohibit, or the parties may agree to prevent other, public disclosures of communications made in mediation. Also, these rules may provide that communications made during a private caucus involving one of the parties and the mediator will remain private from the other party unless the party who participated in the private caucus permits the mediator to disclose any of the communications to the other party. The rules sometimes create exceptions to confidentiality. Your mediator is likely to discuss all these aspects of confidentiality with you but, if he or she does not, be sure to ask.

If the parties reach an agreement, the mediator may help the parties write it down. If the parties have lawyers, the lawyers usually draft any written agreement. Once an agreement is signed by all parties, it normally can be enforced in court.

Different states, courts, and mediation programs may have different mediation rules, so you should check about any rules governing your mediation.

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SELECTING A MEDIATOR

In many cases, the parties select or participate in selecting the person who will serve as the mediator in their case. Even if a court orders parties to mediate, the court may give the parties the chance to participate in selecting the mediator. If you can participate in selecting the mediator, consider what experience and qualities in a mediator would be most important in helping the parties resolve their dispute. If you know of particular mediators, consider whether any of them have the experience and qualities you think would be most helpful in your case.



WHY AND HOW TO PREPARE FOR MEDIATION

Before mediation, people sometimes feel worried because they don't know what to expect. You are more likely to feel satisfied with mediation if you prepare carefully ahead of time. This is especially important if you have never been in a mediation before. Even if you have mediated many times, however, it is still helpful to prepare for each mediation because the issues, parties, and mediators are different in each case.



CONSIDER GETTING ADVICE

Before you start mediating, you might want to discuss the issues listed below with someone you trust and who may be able to advise you. For example, you should consider getting advice from a lawyer if the case involves legal issues, if there is a lot of money or property at stake, or you want a legal expert to advise you before and/or during the mediation.

If you have a lawyer, you should work closely with that lawyer to prepare for the mediation. In addition to helping you collect important information, develop a negotiation strategy, and consider the issues listed below, working together will help you know what to expect of each other in the mediation process. For example, you will want to discuss whether your lawyer's role will be only to help you prepare for mediation and advise you after each session or whether your lawyer will also join you at the mediation session(s). If your lawyer is going to be at the mediation with you, be sure to discuss what roles each of you will play during the mediation session. You might also decide how you and the lawyer will express your point of view during the mediation and how you will communicate with each other, for

example, what you should do if you want to talk with each other privately during the mediation.

If you don't have a lawyer and you have questions about the mediation process, you may want to talk with the mediator, an employee of the mediator, or staff working in a mediation office. Note that in some mediation programs, the mediator may be prohibited from having private conversations with the parties before the mediation session. Be aware that mediators are neutral third parties and are not allowed to provide legal advice to the parties in a mediation.



ISSUES TO CONSIDER BEFORE A MEDIATION SESSION

Even if you don't talk with anyone else before mediation, you should think about the issues listed below. You may not be able to give a definite answer to some of the following questions and your answers may change during the mediation process, but it is still helpful to seriously consider these questions ahead of time.

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What is the conflict really about for you? How does your view of the conflict change, if at all, when you think about it from the other party's point of view?
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Are some of the problems caused by misunderstandings or hurt feelings?
.....

What issues do you and the other party agree about? What issues do you disagree about?
.....

What information, documents, legal rules, or other things might cause the other party to change his or her mind about the issues you disagree about? What might cause you to change your mind?
.....

Are there objective standards the parties could agree on that might help resolve the dispute?
.....

What would you like to accomplish at the mediation? What does the mediator need to understand to help you accomplish your goals? What does the other party need to understand?
.....

What would you need to feel satisfied with the outcome of the mediation? What do you think that the other party needs to feel satisfied? This may involve payment of money, an apology, a change in behavior, or other things.
.....

Is there an ongoing relationship with the other party that should be taken into account?
.....

.....
If you don't reach agreement, what is most likely to happen? What is your best possible (realistic) alternative if you don't reach agreement? What is your worst possible (realistic) alternative? In most legal cases, this means developing a clear understanding of the strengths and the weaknesses of your case before the mediation.
.....

How would you know if a possible agreement is better than the most likely alternatives? As you compare possible agreements with your alternatives, consider the costs, time and effort required, effect on your relationships with the other party and other people, and the value of just getting the matter resolved, among other things.
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How comfortable are you with the risks of not reaching an agreement, including the risks of going to court?
.....

What would you need to feel comfortable reaching an agreement at the mediation session? Is there someone you would need to check with before you finalize an agreement? If so, talk with the mediator about the possibility of having that person attend the mediation session or at least being available by phone.
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What might the other party say or do that would make you upset, and what might you say or do that would make the other party upset? Think about what you can do to avoid getting upset and unnecessarily causing the other party to get upset.
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HOW TO APPROACH THE MEDIATION SESSION

In mediation, you may hear things that you will disagree with and you may be asked hard questions. You should keep an open mind and be willing to consider various options for settlement. Although you may think that the other party is wrong about some things, you will be more successful if you at least try to understand the other party's views. So listen carefully to what he or she says and look for things that you agree about. This may cause the other party to try to understand your views and it may help you reach an agreement. When you disagree, it helps to be respectful toward the other party, which may cause him or her to treat you respectfully as well.



PROCEDURES FOR YOUR MEDIATION

In most cases, the parties play some role in deciding how the mediation process in their case will be conducted. Many states, courts, and mediation programs have rules about these procedures, so you should check about any rules governing your mediation. The mediator may also have procedures that he or she normally follows. However, some decisions about the mediation procedures may still be up to the parties and the mediator. Questions about mediation procedures that you may want to consider and discuss include:

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Will each party provide a memo to the mediator before the mediation session outlining the issues in dispute and whatever other topics the mediator requests? Will this memo be confidential to the mediator or exchanged with the other party?

.....
Will the mediator ask you to sign an agreement to mediate? If so, you might ask the mediator to provide a copy to you before the mediation session so you can review it and ask any questions you may have about it.

.....
What information and/or documents should each party bring to the mediation session?
.....

Who will be at the mediation session? Mediation is most effective when each party has in attendance someone with full settlement authority who is knowledgeable and can make independent decisions about the case. Will anyone participate by video, telephone, or be "on call" if needed?
.....

Will the parties' lawyers attend the mediation session? Normally, if parties have lawyers, the lawyers do attend. Sometimes, lawyers advise clients outside of mediation session but do not attend, though the lawyers may talk separately with the mediator.
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Should any professionals other than the parties' lawyers attend the mediation session? This might include financial, technical, or mental health experts, among others.
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Does the mediator have a prior relationship with anyone who will be at the mediation (such as parties, professionals, attorneys)? If so, you should tell the mediator and the other side when you discover this. Despite the information you disclose, the mediator may still be able to be impartial and helpful but you, the other party, and the mediator will want to know about this from the beginning.
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What time will the mediation session begin? How late might the session last?
.....

Where will the mediation session(s) be held?
.....

Will each party present its views in a joint session? If so, what would be most helpful for you (or your lawyer) to say?
.....

What are the arrangements for keeping information confidential, including information provided to the mediator in caucus?
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What can the mediator do that would be particularly helpful for you?
.....

If the parties reach agreement, who would write it?
.....

How much does mediation cost, if anything? How will the parties divide the costs?
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WILL THE MEDIATOR GIVE SUGGESTIONS OR OPINIONS ABOUT THE CASE?

All mediators ask questions to help the parties analyze the situation and decide what they want to do. Sometimes parties also want mediators to analyze the strengths and weaknesses of the case, give opinions about what might happen in court, make suggestions about possible settlement options, give advice about making or accepting offers, or urge the parties to settle. Some mediators regularly give such opinions, some never do so, and some do so in some but not all cases. Usually, when mediators communicate this kind of information, they do so in private caucuses rather than joint sessions.

There are pros and cons to a mediator offering opinions, coaching, and giving case analysis. It depends on the dispute, the needs of the parties and the background of the mediator. Some mediators have web sites or provide bios that indicate their mediation approach. If you are represented by an attorney, your attorney may know the styles of mediators available for your case and help you choose one whose style fits your needs. Before and/or during a mediation session, you can tell your mediator whether or not you want to get his or her suggestions or opinions. **Even if your mediator gives you suggestions or opinions, you always have the right to disregard those suggestions and opinions and to make your own decisions, including a decision not to accept a particular offer or not to reach any settlement.**



APPROACHES TO NEGOTIATING IN THE MEDIATION

There are two general approaches to negotiation, sometimes called “positional” and “interest-based” negotiation. People may use both approaches at different times in a mediation; they typically don’t use just one or the other.


In interest-based negotiation, the parties describe their interests and look for options satisfying the interests of both parties. In positional negotiation, both sides try to get the best result for themselves by exchanging offers.

Some people adopt positional bargaining as their negotiation strategy because they are familiar with it as a traditional way to negotiate. On the other hand, it risks angering the other side and losing the chance to reach good agreements. Interest-based negotiation provides the chance to reach the best possible agreement but some people are concerned that the other side would take advantage if they are too open in expressing their interests.



FOLLOW UP TO MEDIATION SESSION

It may take time to work through the issues in mediation, so you may not be able to resolve them right away. If you don’t resolve all the issues at a mediation session, think about whether to follow up with the mediator by phone or schedule another mediation session. Sometimes parties need more information or time to think about a situation before they are ready to finally resolve a dispute.



Other versions of this guide that are specifically designed to help parties prepare for mediation in family and complex civil cases are available at <http://ambar.org/disputeresources>.

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