



*preparing
for complex civil*

MEDIATION



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PREPARING FOR COMPLEX CIVIL MEDIATION

Individuals and businesses mediate many complex civil disputes each year involving a wide variety of issues such as contracts, real estate, intellectual property and business relationships. In mediation, parties can share their views and try to address important issues in a cooperative and constructive way. This guide provides parties with information to help them prepare for mediation so that the mediation process will be as productive as possible. It assumes that you will be represented by an attorney and will work with the attorney to prepare for and participate in the mediation.



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. A mediator helps parties understand one another's perspectives and consider 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." There are times during a mediation when the mediator meets with both parties (often called a "joint session"), and other times when the mediator meets with the 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 jurisdictions, 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 settling their dispute, the mediator may help the parties put it in writing. If attorneys are representing the parties, the attorneys typically draft any written agreement. Once the parties sign the agreement, it normally is enforceable in court.

Different states, courts, and mediation programs may have different mediation rules, so you should ask your attorney 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, discuss with your lawyer what experience and qualities in a mediator would be most important in helping the parties resolve their dispute. If you know of particular mediators, discuss 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

You are more likely to feel satisfied with mediation if you prepare carefully ahead of time. This is especially important if you have never participated in a mediation. Even if you have mediated many times, it is still important to prepare for each mediation because the issues, parties, and mediators are different in each case.

There is no one best way to prepare for mediation or to mediate. This guide describes some of the issues and procedures to think about for your particular case. You should work closely with your attorney to prepare for the mediation.

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.



WORKING TOGETHER WITH YOUR LAWYER

You should work closely with your lawyer to prepare for the mediation. In addition to helping you collect relevant information, develop a negotiation strategy, and consider the issues listed below, working together will help you have a common understanding of what to expect of each other in the mediation process. For example, you will want to discuss what roles each of you will play during the mediation.



ISSUES TO CONSIDER BEFORE A MEDIATION SESSION

Think carefully about the issues listed below in preparing for mediation. 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 consider seriously these questions ahead of time.

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What is the conflict really about?
.....

Are some of the problems caused by mistrust or miscommunication?
.....

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? What do you think that the other person needs to feel satisfied? This may involve the exchange of monetary or nonmonetary value.
.....

If you can reach an acceptable agreement in mediation, would you want to have any relationship with the other party after the dispute is resolved?
.....

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

What information, documents, cases, or rules might cause the other party to change his or her mind about the issues in dispute? What might cause you to change your mind?
.....

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

If you do not reach agreement, what is most likely to happen? What is your best possible (realistic) alternative if you do not 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 to it? 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.
.....

How comfortable are you with the risks of not reaching an agreement, such as going to court or binding arbitration?
.....

Although you may think that the other party is wrong about some things, you will be more successful if you try to understand the other party's views.



HOW TO APPROACH THE MEDIATION SESSION

In mediation, you may hear things that you will disagree with and the mediator may test your views about what is realistic. Although you may think that the other party is wrong about some things, you will be more successful if you try to understand the other party's views. Listen carefully to what he or she says and look for things that you agree on. This may cause the party person 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. Keep an open mind and be willing to consider various options for settlement.



PROCEDURES FOR THE 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 with your attorney 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. Think carefully about the procedural aspects of a mediation listed below in preparing for mediation. If you have questions about any of these, consult with your attorney.

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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, your attorney might ask the mediator to provide a copy before the mediation session so you can review it and ask any questions you may have about it.
.....

What information should you bring to the mediation session?
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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? If a person on your side with authority to settle cannot attend in person, your attorney should discuss this with the mediator before the mediation session.
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Should any professionals other than the parties’ lawyers attend the mediation? This might include financial or technical professionals, among others.
.....

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 your attorney as soon as 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 items should you reserve for a private caucus with the mediator?
.....

What can the mediator do that would be particularly helpful for you?
.....

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

How much does mediation cost, if anything? How will the parties divide the costs?
.....

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.



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 can 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.**



NEGOTIATING IN MEDIATION

There are two general approaches to negotiation. One is called “positional negotiation” and the other is called “interest-based negotiation.” People may use both approaches at different times in a mediation; they typically do not 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. It can, however, frustrate the other party and you may lose the opportunity to reach a satisfactory agreement. Interest-based negotiation provides the chance to reach the best possible agreement but some people are concerned that the other party might take advantage of them if they are too open in expressing their interests.



FOLLOW UP TO MEDIATION SESSION

If you do not resolve all the issues at a mediation session, think about whether your attorney should follow up with the mediator by phone or to 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.



For more information, see the website of the American Bar Association Section of Dispute Resolution at <http://ambar.org/disputeresources>.

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