

MEDIATION

FREQUENTLY ASKED QUESTIONS



What is Mediation?

Mediation is a voluntary, non-binding process using an impartial and neutral third-party to assist parties to reach mutual agreement and resolution of their disputes.

What is the difference between mediation and arbitration?

In Arbitration, parties engage and use third-party(ies) (usually one person, but sometimes three) to render a decision that is generally (but not always) binding upon the parties. Arbitration is private judging, “rent a judge” if you will.

In Mediation, the parties are the decision makers. Parties engage an impartial, non-aligned third-party to facilitate negotiations, identify creative options and assist parties to find agreeable and acceptable resolutions of their dispute.

The main difference is that an arbitrator generally is given the authority to make a decision that is binding upon the parties. A mediator

facilitates the negotiation process but has no authority to make decisions binding upon the parties.

The mediator guides the discussions and acts as a catalyst for productive communications during the process of negotiations, helping parties identify issues, explore possible solutions and assess how various options meet their needs and interests.

What Does a Mediator Do?

A mediator brings parties together, encourages productive communications, facilitates and accelerates negotiations, identifies options for resolution and helps parties reach mutually agreeable solutions and settlements. Sometimes, a mediator must defuse hostilities, manage strong emotions, and identify and overcome impasses in negotiations in order to keep discussions going. Often, the mediator serves as a mirror of reality and helps parties to assess how various options for settlement may meet their needs and satisfy their interests.

Each conflict is unique. A trained mediator must be flexible, creative and calm in adapting and adjusting to the needs and dynamics of each conflict and situation so that the parties can have a productive and successful mediation.

Why should you consider mediating a dispute or lawsuit?

Mediation is:

1. Effective. Across the country, mediation programs commonly report that 75% to 80% of all business, civil and commercial cases that voluntarily go to mediation are resolved through mediation.
2. Quick. Mediations usually can be arranged in days or weeks.
3. Inexpensive especially when compared to cost of litigation or arbitration.
4. Flexible and allows for creative “win-win” solutions.

5. Private, confidential and can help protect relationships from damage caused by an adversarial litigation process.

6. Safe. Parties have complete decision making control. No one can compel you to agree to any agreement unless you find the agreement acceptable.

7. Positive. Mediation focuses on the future, improves communication and seeks solutions in a collaborative spirit.

8. Durable. Solutions reached by mutual agreement tend to be more durable and lasting than decisions imposed by a court or arbitrator.

9. Accessible. Available quickly, without the formality, procedure and rules of the judicial system.

What kinds of cases are suitable for mediation?

Most civil, business and commercial matters can readily be resolved through mediation. Thus, a broad range of everyday conflicts and disputes are suitable for mediation. Conflicts and cases involving business, property, contracts, construction design and deficiency, franchises, partnership, shareholder, corporate, divorce, probate, will contests, negligence, personal injury, employment discharge, discipline and discrimination are increasingly being resolved through mediation.

Are there cases that are not suitable for mediation?

Not all disputes are suitable for mediation. An example may be when an important constitutional principle needs to be declared or legal precedent needs to be set. Some feel also that cases involving spousal abuse, abuse of a family member or mentally unstable parties may not be suitable for mediation.

What should you look for and how do you find and select a qualified mediator?

1. Determine the qualifications and experience of the mediator that you believe will be effective and suitable for your case and situation. Consider what experience, knowledge, training, technical, industry and/or legal background may be desirable.

2. Finding a competent mediator with the right mix of skills, training, education, experience and interpersonal skills depends on the context and needs of your particular dispute. Look for a mediator with proper training. Ask prospective mediators about their specific mediation training experience. See if the prospective mediator seeks continuing education and skills training and is a member of dispute resolution professional associations.

3. Review your prospective mediator's resume and written qualifications. Ask if your prospective mediator subscribes to or follows specific court guidelines and/or mediation codes of ethics.

4. Ask for references and determine what other people who have experience with the prospective mediator have to say. You can check reputable organizations who maintain lists of experienced mediators.

Are there different types or styles of mediation?

Yes, skilled mediators are trained in and apply different styles of mediation. Discuss with your mediator what your expectations and preferences are with regard to the mediation assistance you seek. Ask and consider the style that best suits the circumstances, situation, case, issues and personalities involved. The most common styles are:

1. Facilitative Mediation.

The goal of facilitative mediation is to facilitate negotiations and communications between parties and to guide the parties so that they may reach amicable and mutual solutions to their disputes.

2. Evaluative Mediation.

In evaluative mediation, the mediator uses his/her experience, education, training and knowledge and provides the parties with an assessment and oftentimes a recommendation as to an appropriate resolution.

3. “Muscle” Mediation.

In “muscle” mediation, the mediator uses his/her stature, position and experience to persuade, cajole, recommend and urge parties to resolve their disputes by accepting a proposed or recommended settlement proposal.

4. Transformative Mediation.

In transformative mediation, the emphasis is to restore, renew, strengthen and “transform” the relationship of parties who have continuing relationships so that the parties can deal with their disputes and issues with an improved productive relationship.

How Much Does Mediation Cost?

That, of course depends. A number of factors determine the cost of mediation: The nature of the dispute, complexity of the issues involved, the personality and strategic goals of the parties and advocates involved. Mediation costs a lot less than arbitration and litigation. As a rule of thumb, less than 5 to 10% of the cost of arbitration and litigation.

Must/Should A Party Hire An Attorney To Help Handle

A Dispute During The Mediation Process?

While it is not necessary to have an attorney help you through a mediation, attorney’s can be very helpful in providing critical guidance and counsel through the mediation and settlement process.

Will the mediation be confidential?

Confidentiality is an important aspect of the mediation process. Discuss your needs and expectations for confidentiality of the mediation process. Hawaii has adopted the Uniform Mediation Act, which has some

important protections with regard to protecting the confidentiality of the mediation process. It is advisable to have a clear understanding and a written agreement to mediate which addresses your confidentiality needs in the matter.

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