

## OK, I agreed to mediate—what happens now?

**Mediation** is a dispute resolution process in which the parties brainstorm, discuss, evaluate, negotiate, and decide the outcome of issues of a pending legal action. During this process the parties are guided by the mediator, who is a skilled, neutral person knowledgeable in the issues before them, the requirements of the law, and the realistic alternatives for resolving the matter. The mediation process is

- **Effective.** Most cases settle at mediation. And even if your case does not completely settle during mediation, you can often make some good headway towards a final resolution.
- **Confidential.** Mediations are conducted in private, rather than in public/court. What is discussed in mediation stays in mediation, and you can even agree that the settlement agreement stays private and is not filed in the court file.
- **Cost effective.** Even though your lawyer will prepare and submit materials for mediation, there is no witness preparation, pre-trial conferences, or trial preparation. This makes mediation far less expensive than litigation.
- **Efficient.** The scheduling is definite: you know you are going to mediation at the agreed-upon date and time because the mediator has blocked that time out for you, whereas if you go to trial and there is no judge available that day your trial will be bumped, and you will have spent a lot of time and effort preparing for trial only to have your case continued.
- **Satisfying.** Most of all, mediation encourages outcomes that are based on your unique circumstances and the interests of the parties, rather than the imposition of a decision made by a judge or a court. YOU control the outcome and the process.

The outcome of any dispute resolution process should be the full, fair, and complete determination of the rights and obligations of the parties. The mediation process does this in a way that rewards open dealing, good faith negotiating, respect for the others involved, and the ability of each party to apply their own values in their individual lives. Mediation is also a means of resolving or preventing future disputes, especially as to parenting plan/residential schedule issues. At its best, the process is one that increases each party's ability to determine their own future and environment, while transforming the quality of their lives.

***The Role of the Mediator.*** The mediator's role is to facilitate negotiation, to maintain a safe environment, and to facilitate the full exchange of information required for each side to make the best decisions. The mediator helps to identify the unique needs of each side, to develop choices and strategies for attaining your goals within the larger context of the entire case, to facilitate discussion and negotiations to achieve the best result possible for all parties, and to guide the parties on the path to concluding their matter with an outcome that is final and that each person can rely upon in their future dealings with each other. The mediator, though legally trained, is neutral and does not serve as a lawyer, advisor, or advocate for either party. The parties' lawyers are present at all stages, to counsel, advise, and advocate for their individual interests. If everything goes as planned, by the end of the day we will have a signed agreement memorializing your agreements.

***The Role of the Parties.*** The parties to a mediation have the hardest role of all: your job is to come into the mediation ready to negotiate. This means that you must be ready to accept that you will NOT get everything you want. You will get SOME, but not ALL, of what you want. Mediation requires that you negotiate in good faith. Think about the things that are absolutely, positively not negotiable to you—and then think about them one more time. Is there any room for movement at all?? Make sure your lawyer knows and understands your bottom line, what you absolutely must have. On the other hand, is there something you know is particularly important to the other side, something that means the world to them, but that isn't that important to you? Then make sure your lawyer knows that too, and don't argue about it. Mediation is not about "winning." It's about solving problems and moving on.

***The Nature of Conflict.*** Whether a matter is negotiated, mediated, arbitrated, or litigated, there will always be challenges. It is natural to want to avoid conflict and confrontation, yet often some degree of conflict or confrontation must occur in order for a fair and complete outcome to be achieved. One must look within, as well as without, to identify one's true needs and interests. This can be difficult, especially while evaluating damages or suffering a loss such as the ending a relationship. By managing this examination and evaluation within the safety of the mediation process rather than in a public courtroom, the values of introspection, dignity, respect, privacy and growth can be affirmed and redirect you from a "party" to a new path, healthy and free of some of the constraints that were controlling or affecting your life previously.

***So what really happens at a mediation?*** I generally provide "shuttle mediation," utilizing both facilitative and evaluative approaches. The shuttle process keeps the parties separated during the entirety of the mediation; however, there are times when it may help to have the parties together, utilizing a more facilitative approach. So sometimes I will hold a joint session at the start of mediation; if you think this would be helpful, please let me know beforehand. Sometimes I will hold a joint session during the middle of the mediation, but I usually only do this if we are very close to a settlement and I think it would be helpful if the parties could hear each other directly.

During the mediation, either in a joint session or individual "caucuses," I may express my personal opinions about the case and its potential outcome during the mediation. I will also do this if counsel asks me to do so. My opinions are based on my many years of experience, both as a lawyer and as a pro tem judge & court commissioner, and are intended to help bring you closer to resolution of your case. Sometimes it's hard to hear that what you believe to be a crucial point really doesn't have a legal impact on what you would receive if you went to trial, or that you need to "let go" of something and move forwards, but sometimes it's what you need to hear.

Mediation is hard work. But if you put in the time to prepare, and come to the mediation truly ready to come to a resolution once and for all, it WILL be worth it.

### **Steps in the Mediation Process**

1. ***Gathering Information (the Operative Facts).*** A few days before the mediation the parties will provide me with mediation packets, which should include key documents. This will allow me to identify and gather all the factual information necessary to achieve a full and final settlement of the matters at issue. If there is any information you want me to have that you do NOT want shared with the other side, please provide that in a separate document and clearly state that it is not to be shared.

2. ***Orientation to the Process/Ground Rules.*** At the start of mediation I will meet with each side separately and give you a kind of “orientation.” We will handle the paperwork and make sure everyone understands and has signed the mediation agreement, and answer any remaining questions you may have about the process. Then we will get to work.

3. ***Identification of Issues & Interests.*** Most of the time I will outline the key issues I have identified, as well any areas that do not appear to be in dispute, and give you that outline. I will probably also ask one of you to come up with an “offer” for the other side. The fact that I choose one or the other party to make the first “offer” should not be construed as a sign that I think one case is stronger than the other, or that I think one party is being more reasonable; the simple fact is that one party usually has to make the first offer, and there’s a 50/50 chance that you’re going to be the one asked to do so.

4. ***Caucuses and conferences.*** During the mediation the parties meet privately with their attorneys and the mediator in separate rooms to identify the specific issues and interests of each of the parties and the best strategies for attaining those goals. In these conferences, the emphasis is in discussing what is required to move forward toward the goals sought, not in re-hashing the past problems of the incident or relationship or in telling stories about the other party, except as they may directly affect the outcome. I will push you hard to put past transgressions aside so you can move forwards towards resolution, so be prepared for that. Sometimes it may seem like I’m spending a lot of time with the other side. That doesn’t mean I like them more, or am favoring one side over the other; I spend time where I need to, to get to a resolution. Be sure to bring something to read or to entertain yourself during the “down times.”

5. ***Negotiating the Resolution.*** The parties and their counsel negotiate a resolution by exchanging written offers via the mediator, who assists in brainstorming alternatives and outcomes, tempering requests by commonly-expected outcomes, and by answering, discussing, and evaluating the various possibilities. Negotiations proceed with offers and counter-offers being exchanged, very much like a real estate purchase and sale transaction.

6. ***Drafting the Final (Legal) Papers.*** During the mediation I will usually draft an agreement for everyone to sign when we have a deal (discussed below under “Mediation Outcome”). Sometimes one of the attorneys brings draft final documents to the mediation and we can edit those documents to reflect the agreement; if this happens, the parties can sign the documents right then and there. Otherwise, the mediator will encourage and supervise the completion

of drafts of the legal documents necessary to memorialize the agreement reached and in order to secure full court approval of the settlement.

**Mediation Outcome.** The outcome of the process is a fully binding, written agreement, either set forth in a document called a Civil Rule 2A Agreement (which is signed by the parties, their counsel and the mediator) or in the actual final documents necessary to finalize your case. “Civil Rule 2A” is the special rule adopted by the Washington State Supreme Court which authorizes the parties to enter into a binding, non-appealable, private settlement of the issues. A CR2A Agreement is a FINAL agreement of the issues and makes the settlement effective, even though the legal papers necessary to ratify the matter may need to be prepared later for court approval. If time and circumstances allow, the court papers for each of the issues resolved will be drafted, too. Once a CR2A Agreement (or the final documents drafted during the mediation), you have a done deal and there is no going back.

Occasionally a full settlement may not be reached at the first mediation session because the issues are numerous or complex. In those cases, a second session may be scheduled. In other cases the parties may agree to have the mediator arbitrate the remaining issues -- particularly if they are incidental, minor, or merely have to do with the legal drafting. If the matter was close to settling and time ran out, the mediator may leave the parties with an oral or written recommendation for resolution of the remaining issues. Finally, there are occasional cases in which a party may not negotiate in good faith or the parties simply need to have someone else decide what is best for them, in which case the matter will return to the litigation and trial track.

**Conclusion.** Life is a series of negotiations. Mediation of issues that have become legal matters will likely lead not only to a settlement of those issues but will also provide a positive model for successful future negotiations that may involve the same parties, families or relationships. By mediating, you will be spared the great emotional and financial hardship that litigation of those same issues would cause and will have a resolution you have agreed to, rather than one imposed upon you by a judge. Parties leaving a mediation setting almost always feel listened to, affirmed and relieved, even though they had to compromise to get to a settlement. Persons leaving a courtroom, to the contrary, often feel that they have not been heard or treated fairly; that they “lost” the case; or they “won” the case but in the process lost their vision, their assets and perhaps their relationships with family, friends or their support systems. Commit to the mediation process, and it will work for you. Now let’s get to work.