

Mediation FAQ

Find out what mediation is, how the process works, and how to find a good mediator.

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What kinds of cases can be mediated?

Most civil (noncriminal) disputes can be mediated, including those involving contracts, leases, small business ownership, employment, and divorce. For example, a divorcing couple might mediate to work out a mutually agreeable child custody agreement, or estranged business partners might choose mediation to work out an agreement to divide their business. Nonviolent criminal matters, such as claims of verbal or other personal harassment, can also be successfully mediated.

Finally, you may want to consider mediation if you get into a scrape with a neighbor, roommate, spouse, partner, or co-worker. Mediation can be particularly useful in these areas because it is designed to identify and cope with divisive interpersonal issues not originally thought to be part of the dispute. For example, if one neighbor sues another for making outrageous amounts of noise, the court will usually deal with only that issue. If the court declares one neighbor a winner and the other a loser, it may worsen long-term tensions. In mediation, however, each neighbor will be invited to present all issues in dispute. It may turn out that the overly loud neighbor was being obnoxious in part because his neighbor's dog constantly pooped on his lawn or his neighbor's pickup blocked a shared driveway. Because mediation is designed to look at and fix the bigger picture, it's a far better way to restore long-term peace to the neighborhood, home, or workplace than going to court.

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How long does mediation take?

Typical mediation cases, such as consumer claims, small business disputes, or auto accident claims, are usually resolved after a half day or, at most, a full day of mediation. Cases with multiple parties often last longer: Add at least an hour of mediation time for each additional party. Major business disputes -- those involving lots of money, complex contracts, or ending a partnership -- may last several days or more.

Private divorce mediation, where a couple aims to settle all the issues in their divorce -- property division, alimony, child custody, visitation, and support -- generally requires half a dozen or more mediation sessions spread over several weeks or months.

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How is mediation different from arbitration?

A mediator normally has no authority to render a decision. It's up to the parties themselves -- with the mediator's help -- to work informally toward their own agreement. An arbitrator, on the other hand, conducts a contested hearing between the parties and then, acting as a judge, renders a legally binding decision. Arbitration resembles a court proceeding: Each side calls witnesses, presents evidence, and makes arguments. Although arbitration has traditionally been used to resolve labor and commercial disputes, it is growing in popularity as a quicker and less expensive alternative to going to court.

Arbitration has its critics, however. There has been a lot of controversy lately about big businesses requiring their customers or employees to arbitrate disputes with them, rather than taking those disputes to court. Often, these arbitrations are conducted under rules that favor businesses -- for example, damages are limited, time limits for filing a claim are shortened, or information sharing is cut off. Some courts have ruled that businesses can't require consumers and employees to participate in these one-sided proceedings, although others have ruled differently.

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What are the stages of mediation?

While mediation is not as formal as going to court, the process is more structured than many people imagine. A typical mediation involves six distinct stages.

Mediator's Opening Statement: After the disputants are seated at a table, the mediator introduces everyone, explains the goals and rules of the mediation, and encourages each side to work cooperatively toward a settlement.

Disputants' Opening Statements: Each party is invited to describe, in his or her own words, what the dispute is about and how he or she has been affected by it, and to present some general ideas about resolving it. While one person is speaking, the other is not allowed to interrupt.

Joint Discussion: The mediator may try to get the parties talking directly about what was said in the opening statements. This is the time to determine what issues need to be addressed.

Private Caucuses: The private caucus is a chance for each party to meet privately with the mediator (usually in a nearby room) to discuss the strengths and weaknesses of his or her position, and new ideas for settlement. The mediator may caucus with each side just once or many times, as needed. These meetings are considered the guts of mediation.

Joint Negotiation: After caucuses, the mediator may bring the parties back together to negotiate directly.

Closing: This is the end of the mediation. If an agreement has been reached, the mediator may put its main provisions in writing as the parties listen. The mediator may ask each side to sign the written summary of agreement or suggest they take it to lawyers for review. If the parties want to, they can write up and sign a legally binding contract. If no agreement was reached, the mediator will review whatever progress has been made and advise everyone of their options, such as meeting again later, going to arbitration, or going to court.

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How can I be sure mediation will produce a fair result?

In mediation, you and the opposing parties will work out a solution to your own dispute. Unless you freely agree, there will be no final resolution. This approach has several advantages over going to court:

- Legal precedents or the whim of a judge will not dictate the solution.
- If your dispute has undiscovered or undisclosed issues, mediation -- unlike a structured court battle -- gives you the opportunity and the flexibility to ferret them out.
- Because mediation doesn't force disputants to undergo the fear and sometimes paranoia of the courtroom -- where a judge or jury can stun either party with a big loss -- people who choose mediation tend to be more relaxed and open to compromise.

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How can I find a good mediator?

Much depends on the type of dispute you're involved in. Many cities have community mediation centers that do an excellent job of handling most types of routine disputes (consumer problems, neighbor disputes, landlord-tenant fights). For more complicated disputes (business termination, personal injury, breach of contract) it is often better to turn to a private mediation center. Some organizations, like JAMS/ENDISPUTE, the American Arbitration Association, and Judicate, offer mediation services nationwide, while a number of regional groups do a good job. Private divorce mediations are usually handled by sole practitioners or small local mediation groups.

You can use a lawyer directory like Nolo's at lawyers.nolo.com, which provides extensive information about lawyer/mediators who advertise there. The profiles tell you about the lawyer/mediators's experience, education, and fees, and general philosophy. Or you can get a list from the phone book, but if all you have is a phone number, make sure to check the mediator's references carefully.

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Are there some cases that should not be mediated?

All parties to a dispute must agree to mediate, so if one party refuses or isn't competent to participate, the case cannot be mediated. Mediation may also not be the best choice if:

- One of the parties wants to set a legal precedent that interprets or defines the law according to its own point of view. Legal precedents cannot be set in mediation because mediation agreements do not establish who is "right" or "wrong," and mediation decisions apply only to the parties involved in that particular mediation.
- A person believes he or she can win a huge verdict against a big company (or even a small company with a big bank account or plenty of insurance). Because of the tendency toward compromise in mediation, hitting a legal "jackpot" is more likely in a jury trial.
- One person feels intimidated or intellectually overwhelmed by the other, in which case it's hard to arrive at a true meeting of the minds. It's often possible, however, to remedy a "power imbalance" by arranging for the more vulnerable person to participate with an adviser -- perhaps a lawyer.

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If I choose mediation, will I still need a lawyer?

In most mediations, you won't need a lawyer right there with you. This is because the parties are trying to work together to solve their problem -- not trying to convince a judge or arbitrator of their point of view -- and because mediation rules are few and straightforward. If your case involves substantial property or legal rights, however, you may want to consult with a lawyer before the mediation to discuss the legal consequences of possible settlement terms. You may also want to make a lawyer's approval a condition of any agreement you reach.

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