

A Primer on Mediation

Mediation is a form of alternative dispute resolution. It allows parties involved in litigation to step outside of the court system and try and settle their dispute privately. Their efforts to reach a settlement are helped by a neutral third party, known as the mediator. (Usually, mediators are retired judges or lawyers with experience in estates.)

Once the parties decide to mediate, they must agree on a mediator, the time and place of the mediation, and what issues should be discussed at the mediation. Because mediation occurs outside of the court system, the issues to be settled may be broader or narrower than those raised in the litigation.

The role of a mediator is very different from that of a judge. The mediator does not make orders or impose a settlement on the parties. Instead, the mediator helps the parties to craft their own solution to the dispute. How the mediator helps facilitate a resolution differs depending on the individual style of the mediator, the type dispute, and the parties themselves. However, mediators often offer a frank evaluation of the strengths and weaknesses of each parties' legal positions, they act as a sounding board for different settlement ideas and grievances, and they act as a go-between for messages between the parties.

In estate mediation, the parties may meet in a room together at the beginning of the day to hear from the mediator before splitting off into separate rooms. The mediator will then meet with each party (and their counsel) individually. During these private meetings, specific concerns may be raised and offers to settle can be exchanged.

Mediation does not result in a "winner" and "loser" the same way that litigation does. Usually, the solution reached at mediation involves a concession from both sides. In order to increase the chances that the mediation will result in a settlement, the parties must be prepared to compromise, negotiate in good faith, and be willing to settle.

Before the mediation, the participants are asked to sign a mediation contract which, among other terms, requires the parties to keep the discussions that occur at mediation private. This means that if no resolution is reached at mediation, the parties cannot bring up what was discussed at mediation during the subsequent court proceedings until such time as the matter is resolved. In addition, the parties are prohibited from suing the mediator or calling her as a witness at trial.

The advantages of mediation include the following:

Cost Effective: even if a mediation lasts a full day or two, it is often much less expensive than proceeding to trial.

Consensual Resolution: because a resolution is not imposed on the parties, as is the case with a court decision, the parties can create a solution to their dispute which addresses their unique needs and interests.

Participation: the parties at mediation are able to voice their opinions, concerns, and ideas about the terms of a settlement in a way that cannot happen in litigation.

Privacy: unlike most court decisions, the terms of a mediated settlement are not available to the public. In addition, the parties may agree to keep the terms of the mediated settlement confidential.

Speed: taking a case to trial often takes years due to available judicial resources and the number of procedural steps involved. In contrast, mediation can be scheduled at any time and a settlement may be reached after only a day.