

WHY MEDIATION?

**By Donald B. Cripe, Award Winning Attorney Mediator/Arbitrator
Conflict Resolution Professional**

- What are the benefits of Mediation?

Mediation is a faster, less expensive and more efficient way to get your case to resolution. Instead of relying solely upon legal remedies that one may have if a case goes to trial, the parties in mediation can create solutions, with the help of the mediator, that fit their specific needs. Mediation is a confidential process (there is a special definition of confidential for mediation), so the parties may be more open and candid than they might be in a courtroom. Whatever is said or produced for mediation is inadmissible (with limited exception) in any subsequent proceeding, i.e., trial, arbitration, etc.) What that means that the parties can issue apologies, show evidence and made disclosures for the mediation that, if the case doesn't settle, cannot be repeated or by the opposing party at a later stage.

- What is the Mediator's role?

A mediator is strictly a Neutral who facilitates negotiation between the parties without taking sides or providing legal advice. A mediator's job is to assist the parties come to an agreement in their dispute designed to solve the problems in the mediation process, in a form or fashion that will be enforceable and that can be filed with the court.

- Does Divorce Mediation work?

Unless otherwise agreed upon by the parties the mediator will ask the parties to complete basic informational forms after which the mediator will meet with both parties in a joint session. At that session, the mediator, with the guidance of the parties, will outline the issues agreed upon and those that have not. Once the issues are identified, the mediator will begin the process of negotiation. Depending upon the mediator, during the negotiation process, the mediator will assist the parties in arriving at agreements issue by issue until an agreement resolving all issues is signed.

- Who should NOT mediate?

That is hard to say because every case is different. However, most mediators advise against privately mediating (as opposed to a court based program) family law matters in which domestic violence is a central issue, unless the parties have moved past that issue through other means. In Civil cases, anytime the parties want to "make law" on an important legal issue or in which the parties are determined that they want to litigate. Mediation is a voluntary process to which all parties must agree or it will not be fruitful.

- How long does Mediation take?

How long does a rain-storm last? Civil and Family law mediations range in length (actual mediation, exclusive of preparation) from about an hour to as long as days, weeks or months, depending upon the issues presented and the resistance of the parties to the process. However, even in a complex case, if the parties want to resolve the case but need help negotiating the conflict, most mediations can be concluded within one full day. Sometimes, the state of conflict may necessitate several short sessions of 2 hours instead of one full day session. C.A.M.S. has conducted all types and durations of mediation. The point of the mediation is not the length of the process, but resolving the case.

- How much does Mediation cost?

An important consideration is that it is the standard in mediation that the parties share the cost of the mediation, equally unless the parties agree among themselves, to a different arrangement. Most mediators want to avoid being involved in the negotiation to apportion who pays what portion of the fees to avoid any suggestion of favoritism. C.A.M.S. mediators charge \$300 per hour including prep and follow-up time (No Administrative Fee). Usually, C.A.M.S. imposes a four (4) hour minimum on each case. The reason for the minimum is that (1) rushing a mediation to beat the clock is counter-productive; and (2) most mediators charge minimum half days because of scheduling, immediate pre-mediation preparation and the exigencies of mediation, itself. Each party should look at his/her case and estimate how long the mediation may take and how much the mediation will cost. C.A.M.S. recommends that the parties reserve a full day's fees (8 hours X \$300.00) so they are not surprised at the end of the session. Also, sometimes (particularly family law) the parties frequently engage the mediator or the mediator's staff to complete court forms and finalize agreements for filing. The Parties should decide the extent of the services they are seeking and then get an estimate from the individual mediator. Finally, most mediators (at least those at C.A.M.S. do not bill by the fraction of an hour as do most lawyers. Mediators charge by the time reserved, i.e., minimum four hours; "per hour or any portion thereof."

- Why hire a Consulting Attorney?

If a party is very nervous about the process or protecting his/her rights, consulting attorneys are encouraged. The mediator's duty is to do his/her best to ensure that the process is fair, but has no duty to make certain that the outcome is "fair." In mediation, fairness is a very subjective thing that can appear in almost any form if the parties are happy. However, particularly if one party feels that he/she is somehow disadvantaged by circumstances, the attendance of or consultation with an attorney may be appropriate. Also, since private mediators are prohibited from providing legal advice (as

opposed to explaining the law or process) and since such advice may be desired by the parties, an attorney may be advisable.

- How do I choose between Mediation or Collaborative Law?

That is purely an individual decision. Also, “collaborative law” is a term used in family law/Divorce cases. But if there are many highly-charged issues such as hotly disputed child custody and visitation or complex financial issues (i.e., business property which requires evaluation), the collaborative process (employing various professionals other than a lawyer or mediator) may be favored.

- What are the differences between Mediation and Collaborative Law?

In mediation, negotiation takes place between the parties, themselves, with the mediator acting as a facilitator and is faster because the parties agree on many of the core issues and are comfortable negotiating the process through the mediator. Where there is a family owned business that is community property and one party may not be sophisticated or knowledgeable about the business or how it is operated and evaluated, and in which intricate legal issues are to be determined, the collaborative process provides for a facilitator, attorneys for both sides and the experts (Accountants, Economists, Business analysts, Psychologists, etc.) to participate in the process at the parties’ expense. Except for the consulting attorneys (who cannot represent the clients if the case must go to court), the experts are neutral consultants who provide the professional opinions and evaluations to guide the matter to settlement. The collaborative process is almost always far more expensive than mediation because of the involvement of privately engaged professionals.

- What are the differences between Mediation and Litigation?

In litigation, the parties submit the most important issues in their lives to a stranger to decide on their behalf. The decision maker (judge or jury) decides strictly in compliance with the law, which may or may not meet the needs of the parties. In litigation the Court controls the speed, pace and conduct of the entire case. Mediation is almost the opposite. Though the process and determinations are guided by the law, the parties may formulate (with the guidance and assistance of the mediator) a resolution and settlement agreement that specifically fits their needs. Mediation remains confidential (except for the actual written agreement); it is a private process; it can be completed at the leisure or at the speed that desired by the parties rather than on the schedule dictated by the Court. In mediation, “self-determination” is the goal. In a trial/litigation, “legal-determination” is the outcome.