

## **MEDIATION**

Mediation is one type of Alternative Dispute Resolution (ADR) in which a neutral third party, the mediator, meets with parties in a dispute to help them peacefully resolve their differences. The mediator acts only as a facilitator and does not have the power to make decisions or issue orders.

In some counties, including Greenville County, mediation is required before a hearing may be requested and a final order is issued in a Family Court case in which the parties are unable to reach an agreement. The result has been that many cases settle either during or soon after the mediation, thereby easing the courts' caseloads and saving litigants time and money. Like many good ideas, however, mandatory mediation has an unintended consequence in that parties with little or no financial resources now face an additional expense.

Mediation is often referred to by local mediators as the last opportunity for parties to a domestic case to work out the case on their own before the case is set for a trial where the judge is going to determine the outcome. It is important to remember that it isn't the judge's job to be fair to either party. It is the judge's job to fairly administer the law of South Carolina based upon the facts of the case. Trial involves a lot of risk, time, and stress.

Mediation is a process by which you can work with a trained neutral third-party to attempt to settle your case. The mediator will try to work with you and your spouse to find a common ground among the issues in your case, and help you to balance the risks and rewards with the mediation and trial process.

The mediator is not a judge and cannot force you to do anything. Mediation typically lasts for several hours, but if successful, can save you and your attorney much more time and definitely a lot of money.

Unlike court proceeding, the mediation process is completely confidential. The parties are free to work out their own unique and sometimes very creative solutions to their problems and are not bound by procedural rules or case law, as a judge would be. Private mediators in the Greenville area charge from \$150 to \$350 per hour.

## **BENEFITS OF MEDIATION**

There are no guarantees that mediation will produce any specific outcomes. The professional standard is that it will at least "do no harm". However, the following benefits often result from the use of mediation. While the resolution of any particular conflict may not produce all of the benefits listed below, many of them often occur.

- 1) **ECONOMICAL:** Mediation is usually less expensive than traditional litigation or arbitration processes.
- 2) **QUICK:** Court dockets are reported to be backlogged in all areas. Mediation often provides a more timely way to resolve a dispute, enabling the parties to get on with their lives.
- 3) **SATISFACTION:** Parties are generally more satisfied with agreement to which they have mutually agreed than to a decision handed down by a third party (judge, arbiter, or administrator, etc.)

- 4) **COMPLIANCE:** Parties tend to follow through with the terms of a mediated agreement. The compliance rate is higher with mediated agreements than with those imposed by a third party (judge, arbiter, or administrator, etc.)
- 5) **CUSTOMIZATION:** Because the parties develop the agreements themselves, they are able to tailor the agreement to their own needs. Mediated agreement often covers procedural and psychological issues which are not covered by law, and to address the specific nature of their situation in a more comprehensive way.
- 6) **LEARNING:** Education is an inherent part of mediation. As the disputants learn to communicate differently in the mediation process, they often learn new skills for communication and problem- solving.
- 7) **CONTROL OVER OUTCOME:** Parties are better able to determine the gains and losses of settlement or resolution when they negotiate their own agreements.
- 8) **SELF ESTEEM / EMPOWERMENT:** Demonstrating competence in problem-solving and experiencing participation in their own conflict resolution often produces an enhancement of self-esteems and feeling of personal empowerment.
- 9) **RELATIONSHIP:** Many conflicts occur within on-going relationships. Mediation addresses all parties' interests and focuses on a win-win agreement that preserves the relationship. The process may actually improve the relationship in some cases. When the relationship terminates, mediation often facilitates a more amicable termination.
- 10) **PREVENTION OF INCREASING CONFLICT:** Mediation can occur at any time in the development of a conflict. It can often serve as early intervention preventing the escalation of conflict into a more intractable state.
- 11) **PRESERVATION:** Mediated agreements tend to hold up over time. Because the parties have reached their own terms, they are more likely to either abide by them, or to be able to adjust to changes without further legal intervention.
- 12) **CONFIDENTIALITY:** Parties in mediation sign an agreement that information provided in the mediation process will not be used in court, and that the mediator will not be called as a witness in any legal proceeding. In South Carolina, offers of compromise or settlement made in mediation are not admissible in court. Participation in mediation does not preclude any other dispute resolution process.
- 13) **SUCCESS:** SCCMADR reports that 60 – 90% of parties who participate in custody and visitation mediation agree that the process helped them focus on the needs of the children. According to the Better Business Bureau, 80% of submitted disputed are mediated successfully.

## **PREPARING FOR MEDIATION**

Mediation is a non-adversarial process which is most effective if the parties involved work within the following guidelines.

- 1) Leave fault and blame aside. Accusations only hinder the process and are not relevant to the issues to be discussed in mediation. Mediation differs from litigation in that the parties, with the assistance of the mediator, reach their own agreement. The mediator will not make the decisions for the parties. The mediator will lead the negotiation in assisting the parties to reach a decision which is acceptable to all.
- 2) The mediator's role is to (1) control the process, insuring that no one is exploited or intimidated; (2) help generate options and offer suggestions for solutions where appropriate, and (3) generally facilitate communication between the parties so as to help them reach agreements in a neutral atmosphere. The mediator will not serve as a therapist or legal counsel to the parties either prior to or during the mediation.
- 3) Accept responsibility for yourself. State what you want and need. Include your intent, reasons and feelings. This helps facilitate the process.
- 4) The parties agree to notify the mediator at the first session if the history of their relationship included physical abuse, alcohol or substance abuse, or severe emotional disorder of either party. These issues shall be taken into consideration in the mediator's decisions on how to process with mediation. They shall not, in any way case be held against a party or used in any future litigation process.

If it is determined at any point that unreported child abuse is an issue, the parties recognize the mediator's obligation to notify the appropriate authorities in the interest of child protection. The mediator also has the duty to warn intended targets of threats made against them when the threat has been made in the presence of the mediator.

- 5) The mediator is not acting in the capacity of an attorney and does not offer legal advice. All parties are encourages to have an independent attorney look over any completed agreements. The final Mediated Agreement is not considered legally binding until it is made an Order of the Court. The mediator shall not render nor shall they be held responsible for legal decisions as well as for having their Agreement reviewed by an attorney and presented to the court for approval and incorporation into an Order of the Court. All parties are also responsible to have their own accountant or tax advisor look over tax ramifications of agreement reached.
- 6) There may be time when the mediator feels a "caucus" is needed. This is when the mediator will need with each party separately for clarification of issues. The caucus is the only time during the mediation process that information could be confidential between the parties. Information shared in caucus will not be shared unless permission of that party is obtained.
- 7) The party's signature on the Agreement to Mediate a Divorce affirms that he/she will fully disclose all assets and liabilities. The mediator may require the parties to produce a notarized Family Court Financial Declaration, bank statements, appraisals, tax returns, pension statements, insurance information and any other information the mediator deems relevant to the negotiations. The parties are further affirming that neither will transfer nor dispose of any

real or personal property during the mediation process without the consent of the other party. Any violation of these agreements could bring the validity of the document into question.

- 8) Information gathered in the mediation process is confidential and privileged. The communications made during the mediation are considered negotiations and settlement offers by all parties. Neither the mediator nor any court designee shall willingly testify for or against either party in the event that the mediation fails, and the parties litigate the matter. All parties are advised that they may not subpoena the mediator or any court designee to testify concerning this mediation nor may they subpoena records of the mediator in any subsequent court actions.
- 9) It is understood that confidentiality of the mediation process shall not excuse the mediator's duty to report any abuse or to warn intended targets of threats revealed during the process. It is also understood that the mediator may reveal a confidence if necessary to establish a claim or defense in a controversy between the mediator and one of the parties.
- 10) All parties acknowledge that they are under court order, from Greenville County Family Court, to mediate. All agree to participate, in good faith in each scheduled mediation session. All parties agree to work towards resolution of the issue.