

## **FAQs For Parties & Attorneys Considering Mediation of Family Law Matters**

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### **1. What are the benefits of mediating a family law case?**

- Private and confidential
- Informal process, less stress on parties
- Conserves client resources
- More flexible resolution options
- The parties control the outcome by structuring a settlement agreement that benefits both parties and their family
- Successful resolution helps preserve family relationships
- Results in quicker, more cost-effective resolution of the case
- Mediated settlement agreements increase the likelihood of compliance

### **2. How is a mediator selected?**

- Agreement of the parties
- Assignment by the ADR Clerk
- MCR 2.411(B): Upon request of the parties, the court may recommend a mediator

### **3. Do we need a mediator with family law experience?**

- In most cases, a mediator with family law experience is preferred, although a skilled mediator *without family law experience* will be able to assist the parties in defining the issues, facilitating negotiations, and generating settlement options.
- A mediator with family law experience can assist the parties and counsel in identifying and resolving specific issues involving minor children (custody, parenting time, child support), spousal support, property division, and procedural issues which may not be readily apparent to the parties.

### **4. When is the best time to mediate a family law case?**

- Anytime. Before filing, immediately after filing, or during pending action.
- Mediating early in the process can minimize acrimony and emotional obstacles to settlement resulting from protracted litigation.
- The mediator can assist the parties in resolving “discovery” issues such as the production of pertinent documents, obtaining appraisals, and other information prior to and during mediation.

**5. What issues are appropriate for mediation in a family law case?**

- All issues
- Pre-trial motions
- Discovery issues
- Custody, parenting time, and child support
- Spousal support
- Property settlement
- Attorney's fees
- Post-judgment issues

**6. Are there cases that may not be appropriate for mediation?**

Yes. For mediation to be effective, the parties need to be able to express their needs, to feel safe, and to negotiate freely on their own behalf. Mediation is not appropriate where one party uses fear, threats, violence, or intimidation against the other party in order to achieve a desired outcome. Also, the existence of a personal protection order (PPO) limits the court's authority to order mediation. If there is a PPO in effect or if the parties are involved in an ongoing child abuse or neglect case, the court must hold a hearing to determine if mediation is appropriate before ordering the parties to mediation. See MCR 3.216(C)(3).

**7. My client is a survivor of domestic violence who wishes to try mediation. How can my client's safety needs be addressed?**

First, thoroughly explain the mediation process to your client and discuss other available options for resolving the issues.

Second, if your client still wishes to mediate, consider taking the following steps:

- Choose a mediator with training and experience in handling cases involving domestic violence.
- Advise the mediator in advance about the domestic violence. The mediator will conduct the required screening to determine whether it is safe to proceed with mediation. If mediation is deemed appropriate, the mediator will assist in structuring the mediation process in a safe and non-coercive environment.
- Assure the client that mediators are neutral, keep matters confidential, will not disclose information without permission of the client and strive to maintain a safe and non-coercive environment for negotiating a settlement.
- Either you or another support person will attend the mediation with the client.
- Request that the parties remain in separate rooms during mediation and the mediator shuttle between the parties. In some cases, the abused party may desire to face the other party in the same room and negotiate for herself/himself. The mediator, in consultation with the parties, must be assured of the safety of the parties and each party's ability to negotiate without fear or intimidation.
- The mediator screens cases for domestic violence using the SCAO mediation screening questionnaire and is trained to handle cases involving domestic violence.

- Remind your client that mediation can be terminated at any time your client feels unsafe.
- Throughout the mediation, you and the mediator must continually evaluate your client's safety and ability to freely negotiate.

Third, if you represent a survivor of domestic violence, consider the safety of your client during and after mediation and whether the mediation settlement agreement contains sufficient details to assure your client of a fair and safe resolution of the issues.

#### **8. What are the differences between mediation, arbitration, and trial?**

- The parties may agree to mediate or the court may order mediation. See MCR 3.216(C). Mediation is voluntary, informal, private, and non-binding until the parties sign (or make a recording of) a settlement agreement. See MCR 3.216(A)(2).
- The parties must agree to arbitrate one or more issues in their case. Prior to arbitration, the parties must sign an Arbitration Agreement (to be filed with the court in the form of a stipulation and order) in compliance with MCR 3.602 and MCL 600.5070. An arbitrator serves as the trier of fact in place of the trial judge. The arbitrator may decide only those issues set forth in the Arbitration Agreement. Arbitration is voluntary, private, and the decision of the arbitrator is binding with very limited rights of appeal. If either party is subject to a PPO or if the current case includes allegations of domestic violence or child abuse, the court cannot order arbitration unless each party enters into an informed waiver. See MCL 600.5702.
- A trial takes place in the courtroom, on the record, and testimony and exhibits must be presented in compliance with the rules of procedure and rules of evidence. Trial proceedings are generally open to the public, formal, frequently interrupted by other matters that come before the judge, and may take several days to complete. The judge's decision is binding, subject to the parties' right to appeal.

#### **9. Why pay a mediator when the judge will decide a case for free?**

- While most mediators charge a fee for their services which normally is divided between the parties, the cost of mediation is almost always less than the cost of trial.
- A mediated settlement can be structured to meet the needs of the parties, preserves the privacy of the family and their relationships, and in most cases, brings finality to the proceedings.
- Trial is expensive, stressful, and can lead to further post-judgment proceedings, including appeals.

#### **10. The opposing party/counsel says they won't settle the case so why bother with mediation?**

- A skilled mediator can help bridge the gap between highly polarized parties and seemingly unresolvable issues.
- Even if mediation does not result in a settlement agreement and trial is inevitable, mediation can help narrow the issues to be decided by the court.

**11. If the parties refuse to sit in the same room, is mediation still appropriate?**

- Absolutely. The parties define the mediation process.
- Although a “joint session” often helps the mediator more quickly define issues with feedback from the parties, the mediator can facilitate settlement negotiations when the parties are in separate rooms (referred to as “caucusing”).

**12. How should I prepare for mediation?**

- MCR 3.216(H): Each party may submit a mediation summary setting forth the facts and circumstances, describing the issues, identifying the assets and debts, providing exhibits, and a proposal for settlement.
- Prior to mediation, explain the process to your client, identify issues to be resolved and discuss possible settlement scenarios.
- Review with your client MCR 2.412 regarding the confidentiality of communications during mediation, and the exceptions to confidentiality.

**13. How long do we have to stay at mediation?**

Mediation is a voluntary process and will continue until a settlement is reached, when the parties decide to end the session, or when the mediator determines settlement is unlikely. (MCR 3.216(H)(5).

**14. If we don’t settle at mediation, will the mediator submit a settlement recommendation?**

- Upon completion of every domestic relations mediation, the mediator is required to advise the court only as to the date of completion of the process, who participated, whether settlement was reached, and whether further ADR proceedings are contemplated. (See MCR 3.216(H)(6) and SCAO Form MC 280)
- In facilitative mediation, the mediator normally does not make recommendations for settlement. At the conclusion of mediation, the parties may ask the mediator to provide a recommendation for settlement.
- In evaluative mediation, the mediator will provide a proposed recommendation to the parties for settlement purposes only. See MCR 3.216(I).
- The mediator’s recommendation is not binding on the parties and may not be made available to the court without the consent of both parties.
- The court may not sanction a party who rejects the mediator’s recommendation.

**15. When is a mediation settlement agreement binding?**

MCR 3.216(H)(7): The agreement is binding when the terms of settlement are reduced to a writing signed by the parties, or when the terms of settlement are acknowledged by the parties on an audio or video recording.

**16. Where can I obtain additional information?**

- The State Court Administrative Office (SCAO), Office of Dispute Resolution Center has domestic violence screening protocols as well as brochures for the general public that explain mediation and alternative dispute resolution methods in family law cases.

- SCAO also supports a network of Community Dispute Resolution Program centers, which provide low-cost mediation services in many types of disputes, including family law cases.

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