

# What Is This Mediation Stuff?

## *What Mediation Is and How It Can Help You*

*by Marci R. Carroll, Esq.*

Mediation is a type of alternate dispute resolution which is becoming increasingly common in general civil and domestic relations/family law cases. Mediation is a process by which a neutral third party, often an attorney not involved in the case, assists the parties in deciding for themselves how they want to resolve their problems. This process is completed in one or more in-person sessions. The mediator has no authority to decide any issues in the case and cannot be called as a witness in the case. Further, what is discussed during mediation should be kept confidential from the court unless the parties come to a full or partial agreement and themselves tell the judge what those agreed terms are and that they both still want to be bound by their agreement.

The mediator's job is to facilitate communication between the parties, clarify issues and interests, identify information to be collected or exchanged, foster joint problem-solving, and explore settlement alternatives. The mediator often uses a variety of techniques to keep the parties on track toward resolution and to minimize personal verbal attacks and sniping and baiting between parties.

*The mediator does not function as an attorney for either of the parties and cannot give legal advice, and mediation is not a way for an attorney to represent both parties in a case, which is strictly forbidden.* Therefore, the parties may want to retain attorneys to represent them and may want their attorneys to attend mediation with them or be available for telephone consultation during the session. Further, the mediator may offer to draft a memorandum of understanding setting forth the outline of any agreements, but the memo is absolutely not a substitute for a parenting plan or an order to be filed with the court.

Mediation is a *voluntary, informal, and non-adversarial* process. It is *voluntary* because the parties keep the power during mediation to make decisions about the issues in their case instead of relinquishing that power to a judge. The Court may order the parties to mediate, but that simply means that you have a duty to try to work out your differences. Neither the mediator nor the judge can force you to settle your issues or dictate the outcome at mediation. All the Court requires is that you make a good faith effort. Mediation is *informal* because the procedures followed are flexible and can be tailored to fit your particular needs. Unlike court, there are no objections or rules of evidence that tell you something that you think is important is irrelevant or otherwise can't be considered. You have more (but not complete) freedom to talk about what you feel is important to you. Mediation is *non-adversarial* because the parties and the mediator work together to find a mutually acceptable solution. Unlike court, mediation does not entail direct examination or cross-examination. Finally, mediation also allows you to avoid the risk and uncertainty that goes along with going to a contested hearing

before the judge, who will not be as familiar with your facts, concerns, and circumstances as you are, and having the judge resolve the issues in your case.

When ordered to attend mediation, many parties tend to have low expectations, are frustrated with the additional “hoop they have to jump through,” and generally feel that mediation will be a waste of time and money. Although it is certainly true that not all parties are able to resolve their differences during mediation, many parties – even those who have very divergent positions at the outset and/or have most conversation attempts disintegrate into argumentative sniping matches – are able to achieve full or partial agreements. Agreeing to a parenting plan during mediation (or at any other time) simply for the sake of having come to an agreement is never a good solution, but the interests of the parties and children are frequently best served by the parties fashioning their own solution instead of having a court much less familiar with your family’s particular situation dictating what will happen.

A trained, skilled mediator can make the difference between resolving your disputes civilly and having to go to the financial and emotional expense of a contested final hearing where parents and other family members are perhaps placed in the position of saying nasty and hurtful things about each other to the judge. When a family court case is done, the judge and the attorneys get to go home; but the parents still have children together and need to find a way to deal with each other without making themselves and their children miserable for years to come.

**Law Offices of Marci R. Carroll • Suite 500 • WesBanco Building • Fairmont, WV 26554-3168**  
Phone: **(304) 367-9482** • Fax: **(304) 367-9633** • Internet: <http://www.mrcfamilylaw.com>  
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