



Senior Legal Hotline

515 12th Street ❖ Sacramento, CA 95814

Telephone: (916) 551-2140 ❖ Toll-free: (800) 222-1753

Fax: (916) 551-2197 ❖ www.seniorlegalhotline.org

SENIOR LEGAL FACT SHEET

Mediation: An alternative to court for dispute resolution

What is mediation?

Mediation is a process in which a neutral individual, the mediator, helps two disputing parties communicate. The goal of mediation is for both parties to reach a deeper understanding of the issues in dispute and come to an agreement.

Some key elements of mediation are:

- (1) Mediation is a **voluntary** process – Nobody can force you to participate. Either party is free to end the mediation at any time and for any reason.
- (2) **Self-responsible** and **informal** – Mediation allows both parties to reach an agreement in an informal setting, without going to court. Mediation encourages parties to work together to solve their dispute(s) and to reach the best agreement possible. With mediation, no rules, regulations or judgment is forced on any party. The parties can agree upon rules and reach their own agreement.
- (3) **Confidential** – By law, any statements or proposals for settlement made in mediation are confidential. This is to encourage both sides to speak freely and share ideas for solving their dispute -- what they say cannot be used against them later in court or in some other setting outside the mediation. *(This does not prevent facts or evidence that are brought up in mediation from being used later in court if normal court rules would allow them anyway. If you're not sure whether it's a good idea to say something, get legal advice first.)*
- (4) **Impartial** – The mediator is responsible to help both parties reach their goals. The mediator cannot favor one party's interests over the other's.

What is the role of the mediator?

The mediator helps the parties reach a complete understanding of the dispute, including the interests of both parties. The mediator is neutral. He or she is not an advocate for either party. The mediator helps both parties reach an agreement in which both parties achieve some, if not all, of their goals.

The mediator helps both parties become clear about their expectations for an agreement and helps them reach their goals. To do this, the mediator may ask tough questions for each party to reflect on. The mediator also helps each party see the big picture regarding the dispute. This may keep them from focusing on irrelevant facts or legal issues.

Please turn the page

The mediator also works with both parties to separate the people from the problems. Due to the potentially high emotional impact a dispute may have, a party may need a mediator's assistance in moving past negative feelings toward the other party so the parties can work together for a solution

What types of disputes go to mediation?

Many civil disputes and some criminal cases can be mediated. The only requirement is that the parties agree to participate in the process. Mediation is not limited to legal disputes. If you are experiencing problems communicating with someone else or are unsure how you should approach someone with whom you have a dispute, mediation may be of value.

Will mediation take the place of courts in resolving disputes?

Mediation is an alternative to going to court. With some disputes, mediation may not be your best option. Also, a decision to try mediation does not prevent someone from going to court. If you participate in mediation and no agreement is reached, you can still file a lawsuit.

Courts may require mediation in some types of cases, for instance family law disputes over child custody and visitation. Some California courts may require mediation be tried in certain civil disputes.

Can an agreement made in mediation be enforceable in court?

Yes. If both parties sign a written agreement, it is enforceable in a court of law.

Where can I find a mediator?

The Senior Legal Hotline (SLH) has a mediation department. This newly formed program is free and conducts mediation by telephone. The SLH mediation department handles civil disputes that are appropriate for mediation. We do not handle any criminal matters. The SLH mediation department will only mediate cases between parties directly, not their attorneys, though we encourage both parties in a mediation to seek legal advice.

If you would like to resolve a dispute from the comfort of your own home or office, the SLH's telephone mediation may work for you. Phone mediation may be especially valuable to people who live in rural areas and lack easy access to existing community mediation services.

Most counties in California have community mediation programs. They use volunteer mediators to resolve civil disputes. Some programs do not charge a fee, while others charge on a sliding scale depending on a party's income. Please contact us to see whether your county has a community mediation program and if you would like to be referred to it.

Your county court may also have mediation programs or a referral list of local private mediators. Private mediators can be found in the Yellow Pages. They usually charge an hourly fee for both parties.

If you have questions about mediation or think your dispute would be best resolved through mediation, contact SLH. Our advocates can discuss the option of mediation and may refer you to the SLH mediation department or another resource.

If you are over 60 in California, you can get free advice by phone from the Senior Legal Hotline regarding your questions about this or any other legal issue. Hours of operation are Mon.-Fri. 9 to 12 and 1 to 4, and until 7 p.m. on Thursdays. You can also submit your question by e-mail from our web site, www.seniorlegalhotline.org.



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AGREEMENT TO MEDIATE AND TO ABIDE BY CONFIDENTIALITY RULES

Important information for the parties about to enter mediation – please read and sign

California law sets some important rules about mediation that are meant to encourage the participants to freely share information about the dispute. Unless they agree otherwise, such information shared by one party cannot be used by the other in court if the mediation fails to settle the matter.

It is important the you understand this before we begin the mediation process, and we ask you to sign at the end of this document stating that you have read and understood it. If anything is not clear, please ask your mediator.

Following are some key sections from the California Evidence Code, printed as they appear in the law books, followed by some explanation to help you understand their meaning.

1119. Except as otherwise provided in this chapter:

(a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

- ▶ **This means that anything said or written specifically for the mediation process remains there. If the dispute ends up in court, or even in arbitration (another method of resolving disputes outside of court), the other side cannot bring evidence of what you said or wrote for the mediation. The purpose of this rule is to encourage parties in mediation to think, speak and write freely about information and ideas they have that may help settle the dispute, without having to worry that suggestions for compromise they make, for instance, will be used**

against them later.

1120. (a) Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.

(b) This chapter does not limit any of the following:

(1) The admissibility of an agreement to mediate a dispute.

(2) The effect of an agreement not to take a default or an agreement to extend the time within which to act or refrain from acting in a pending civil action.

(3) Disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute.

- ▶ **These are some important exceptions: Factual evidence that could be brought before a court if the mediation is unsuccessful does not become banned just because it was mentioned in the mediation. Also, the fact that there was an attempt to mediate can be said in court.**
- ▶ **Section 1122 describes a further exception: It says that if all parties to the mediation agree, then an oral or written statement can become court evidence; or if a document was created on behalf of one or more but not all parties to the mediation, those parties on their own can agree to its use.**

1123. A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if the agreement is signed by the settling parties and any of the following conditions are satisfied:

(a) The agreement provides that it is admissible or subject to disclosure, or words to that effect.

(b) The agreement provides that it is enforceable or binding or words to that effect.

(c) All parties to the agreement expressly agree in writing, or orally in accordance with Section 1118, to its disclosure.

(d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

- ▶ **A typical written agreement signed by both sides at the end of a successful mediation can be used in court, if necessary, for instance, to enforce the settlement. This is because the whole point of such an agreement is to be binding on the parties.**
- ▶ **The law (Sections 1118 and 1124) also says that with a high level of documentation, an oral agreement can be binding and can become court evidence.**

1127. If a person subpoenas or otherwise seeks to compel a mediator to testify or produce a writing, as defined in Section 250, and the court or other adjudicative body determines that the testimony or writing is inadmissible under this chapter, or protected from disclosure under this chapter, the court or adjudicative body making the determination shall award reasonable attorney's fees and costs to the mediator against the person seeking the

testimony or writing.

- ▶ **If anyone – including, for instance, one of the participants in the mediation -- sues to force the mediator to give some information to the court, and the court decides that the information is protected, the person who sued will have to pay the mediator’s attorney fees.**

The mediator’s function is to assist the parties to communicate in order to gain a better understanding of each other and the issues that arise during the mediation. After the parties have gained a deeper understanding, the mediator will assist the parties to negotiate a resolution of the issues. The parties are the only ones who can arrive at an agreement that is acceptable to both. The parties understand that no agreement can be forced upon them.

The parties agree to make a good faith effort to mediate. This includes being open and honest about the issues that arise during the course of the mediation.

I hereby affirm that I have read the information contained in this notice, understand it and agree to abide by these ground rules.

I further understand that the mediator in my case does not advocate on behalf of either party. I and the other party are each free to obtain legal representation or assistance to review a proposed settlement agreement before it is signed.

Party 1 (enter name)

Date

Party 2 (enter name)

Date

Mediator

Date



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Waiver of Conflict

I, _____ have agreed to participate in the Senior Legal Hotline's (SLH) free Mediation program. I was contacted by the SLH in an attempt to resolve a dispute with _____ (name of other party).

I understand that the mediator _____ (name of mediator) is a SLH volunteer mediator. Prior to this mediation and pre-mediation conference, the mediator has not worked on this case or served as an advocate for either party.

The role of the mediator will be to assist both parties to achieve a settlement for each party's respective best interests. The mediator will not advocate for either party. The mediator will be educated in the general laws applicable to my case. However, the mediator will not provide legal advice or counsel for either party.

I further understand that if the mediation is not successful, neither SLH nor other offices of Legal Services of Northern California (LSNC), SLH's parent agency, will be able to further assist me beyond informing me of the relevant laws and general procedures to pursue my interests and other possible sources of help.

I further understand that SLH or other LSNC offices may have already assisted or may in the future assist the party named above in his or her dispute with me. The mediator does not have access to the notes of the SLH advocate assisting the other party nor does the mediator discuss the case with that SLH advocate. Likewise, this SLH advocate does not have access to the mediator's notes on this mediation, nor does this SLH advocate discuss the case with the mediator. **I hereby consent to such assistance, thereby waiving any conflict of interest that could otherwise thereby be created.**

Date

Signature

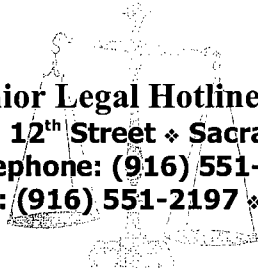


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Date:

Dear _____ (client name),

This letter is to confirm the mediation session we have scheduled for you.

Date:

Time:

Your Mediator, Name, will contact you at the above date and time in order to participate in the mediation.

Please schedule at least ___ hours for your mediation. If you have any information or documentation that you feel might assist you during the mediation, please make sure it is near you prior to the start of the mediation.

This is a reminder that you and the other party are agreeing to voluntarily participate in mediation. The SLH Mediation Program is providing free mediation services to assist you and the other party in discussing important issues and, where appropriate, creating your own settlement of the dispute. Thank you for your willingness to participate in the mediation.

If you need to reschedule the mediation, please call us at the above number at least 72 hours before your session.

Sean Rashkis
Program Director

MEDIATOR'S REPORT

For each mediation you do, please fill out this form and return it to Sean. We appreciate open and honest comments. Thanks!

Date of mediation:

Case No.:

Senior client (initial caller):

Second-party client:

The parties reached:

Full Agreement Partial Agreement No Agreement

Additional issues to be addressed:

The process took: Less than 1 hour 1-2 Hours 2-3 Hours
 > 3 Hours A second session is scheduled-Date:

The process went: Extremely well Well Not very well
 There were significant problems (Please explain)

Mediator



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Mediation Program and Mediator Survey

Senior Legal Hotline is interested in knowing if and how the mediation you participated in, met your needs. Your individual responses to the questions are CONFIDENTIAL. Your answers will help evaluate the benefit of mediation for senior citizens. The mediation program director will be the only person reviewing these statistics. Thank you for your time and opinions.

Name (optional):
Date of Mediation:
Mediator's Name:

1) Have you ever participated in a formal mediation before this one?
 Yes No

2) What did you know about mediation before this session?
 Had a complete understanding of the procedure
 Had some knowledge about mediation
 Had no knowledge about mediation

Comments:

3) Did you consider mediation and/or other alternative dispute resolution options prior to this dispute for any matter?
 Yes No. If yes, what prevented you from using it? (Check all that apply)

- I didn't know how to find someone to facilitate a resolution.
- I didn't have the financial ability to use this type of service.
- I was concerned about having someone tell me what I should do.
- I had heard from others that mediation doesn't really help people.
- I was worried about using a procedure that I really didn't understand.
- I thought going to court was the only way to get matters resolved.
- Other:

4) Were you able to completely tell your story to the mediator during the pre-mediation conference?
 Yes No. If no, was there anything the mediator could have done differently? If yes, was there anything specifically done by the mediator to allow you to tell your story? _____

5) Did the use of the telephone make you feel more or less willing to trust the mediator?
Why?

6) Did the use of the telephone make it ___ more or ___ less comfortable in resolving your dispute compared to resolving the dispute face-to-face? Why?

7) Did your understanding of the concerns of the other person change as a result of the mediation?

___ Yes ___ No

Comments:

8) If your mediation involved a three-way conference call, in which you, the opposing party, and the mediator were all on the phone at the same time, were you able to discuss fully the issues that were important to you?

___ Yes ___ No

Comments:

9) Were you satisfied with the mediation process?

___ Yes ___ No

What was the most helpful thing that happened for you?

What was the least satisfying aspect?

10) Did the mediation process: (check one)

___ Resolve your entire dispute?

___ Resolve only part of your dispute?

___ Leave the situation unchanged?

___ Make your dispute more difficult?

11) If you **reached** an agreement, please list one or two things that helped you get to that agreement.

12) If you **did not reach** an agreement, please list one or two things that were barriers to reaching an agreement.

13) Do you think the mediation outcome is a long-term or short-term resolution to the dispute?

___ Long-term ___ Short-term. Please explain your choice:

14) If you had this dispute again or if you had another dispute (Check one)

___ I would use mediation

___ I would not use mediation

If you checked that you would not use mediation, what other process might work better for you? _____

15) How would you describe the mediator(s) (circle all that apply)

Neutral Nervous Fair Impatient Sensitive

Unbiased Disinterested Competent Biased

Knowledgeable Patient Argumentative Opinionated

Rude Disrespectful

Other: _____

16) Would you recommend telephone mediation to others?

___ Yes ___ No

17) If you have any additional comments to help improve the mediation, please share them with us.

1 being very dissatisfied and 10 being very pleased.

On a scale of 1 to 10 how would you rate your experience with the mediation process?

On a scale of 1 to 10 how would you rate your mediator(s)?