Statewide Civil Mediation Program - Frequently Asked Questions

What is mediation?

Mediation is a dispute resolution process in which an impartial third party - the mediator - facilitates negotiations between the parties to help them reach a mutually acceptable settlement. The major distinction of mediation is that a mediator does not make a decision about the outcome of the case. The parties, with the assistance of their attorneys, work toward a solution with which they are comfortable.

How is a mediator selected for a case?

A roster of mediators is maintained by the court system and is posted on the Judiciary's website at njcourts.gov in a searchable format. When a case is referred to mediation, the parties have 14 days to select a mediator whom they feel is suitable, whether on the roster or not. If the parties do not select a mediator in a timely manner, the court-appointed mediator named in the Order of Referral will serve as the mediator. Court-appointed mediators have been approved for inclusion on a roster after careful screening to ensure that they meet educational, training and mentoring requirements set forth in *Court Rule* 1:40-12.

How much does mediation cost?

Under *Court Rule* 1:40-4(b), any mediator who is on the roster will provide the first two hours on a case, including an initial one hour session, without charge before a party may opt out of mediation. Thereafter, mediators will generally be paid their market rate fee which is to be shared by the parties. Fees will be waived in any case covered by *Court Rule* 1:13-2(a). Any mediator selected by the parties who is not on the roster may negotiate a fee with the parties from the outset and need not provide the free time.

What happens in mediation?

There are certain ground rules the mediator will ask participants to follow. The first, and most important, is that with a few exceptions covered in *Court Rules* 1:40-4(c) and (d), what goes on in mediation is confidential. That is, what is said in mediation cannot be discussed outside of the mediation process unless the parties consent. Prior to mediation, the mediator will usually ask the attorneys to prepare a brief summary of the issues in dispute. Then, at the mediation session, the mediator will ask attorneys and their clients to make brief presentations about the issues from their own perspectives. After that, the mediator will help the parties to explore areas of possible compromise and to develop a solution that meets everyone's interests. Sometimes, the mediator may meet with the parties separately for a private discussion that might help move the parties toward a resolution. If an agreement is reached, a document will be prepared detailing the terms of the agreement. Thereafter, the mediator will notify the court that the case can be dismissed. If the case is not resolved, the mediator will advise the court, and the case will remain on the docket.

What about pretrial discovery?

Generally, pretrial discovery is not stayed while a case is in mediation. The case will be placed on the trial calendar at the end of the discovery period. If, however, the court determines that a stay of discovery is necessary, the court shall only provide for a stay of discovery by court order. Even if formal discovery is stayed, the mediator is authorized to facilitate the informal exchange of information materials needed to enhance the effectiveness of the mediation process.

What are the roles of counsel and litigants in mediation?

The goal of mediation is to reach an amicable resolution. Attorneys and parties are required to make a good faith effort to cooperate with the mediator and engage in constructive dialogue toward this end. Attorneys should prepare their clients prior to mediation by explaining what will happen, and particularly what the roles of both attorneys and clients are. They should also agree on who will be the principal spokesperson in presenting the party's view early in the mediation session. Throughout the process, attorneys act as advocates for their clients' interests. For example, attorneys may make brief opening summaries of the issues as they see them, but clients should also be given an opportunity to speak. In mediation, understanding is often promoted when the parties explain their positions directly to each other. When it comes to discussing terms of settlement, the litigants must play an active part, for it is their case and their settlement. During this process, attorneys should provide counsel on the advisability of settlement options, suggest options and be available for any further consultation with their clients.

How does a case get into mediation?

Appropriate cases for referral to mediation can be identified by judges, court staff, or the parties themselves, at any point in the life of a case. A form of order for referral is prepared and signed by the judge. Parties desiring their case to be referred to mediation should contact the Civil Division Manager in the county in which the case is pending.

What are some of the advantages of mediation?

Some advantages of mediation include:

- confidentiality;
- the result may benefit both or all sides and thus present a win/win solution;
- the outcome can be tailored to meet the unique needs of the case and the particular parties;
- specially trained mediators assist the parties in fashioning more creative solutions not customarily occurring with other CDR techniques; and
- mediation can be a more cost-efficient, less formal and more meaningful alternative to the traditional trial process.

What kinds of cases could benefit from mediation?

Mediation has been used successfully in a broad range of cases which exhibit characteristics such as: the parties have an ongoing business or personal relationship or have had a significant past relationship; communication problems exist between the parties; the principal barriers to settlement are personal or emotional; parties want to tailor a solution to meet specific needs or interests; cases involve complex technical or scientific data requiring particular expertise; the parties have an incentive to settle because of time, cost of litigation, or drain on productivity; the parties wish to retain control over the outcome of the case; or the parties seek a more private forum for the resolution of their dispute. While there is not any case type that could not potentially benefit, commercial, construction, environmental, Law Against Discrimination (LAD) cases, and certain General Equity and Probate cases are particularly suited to mediation because they tend to exhibit some of the characteristics described above.

At what time in the court process should a case be referred to mediation?

The earlier that a case can be referred to mediation, the greater the likelihood that parties can resolve their dispute at a cost savings to themselves and the court. Parties should feel they have enough information to discuss the dispute, which may mean that some information exchange should be completed. Mediators also can help the parties determine how much informal discovery is needed. Even if discovery has been completed, settlement negotiations have been unsuccessful, or the parties are close to a trial date, the mediation process may still help the parties reach a mutually acceptable agreement.

What if the case is not resolved in mediation?

Sometimes the parties are unable to reach agreement or only agree on certain aspects of the dispute. If certain aspects of the dispute remain unresolved, the parties can submit that portion to an expert for an opinion (binding or non-binding) or use some other creative means. The case also can be returned to court and continue on track towards trial. Even in these cases, the mediation process may have helped the parties clarify their positions and also move toward settlement.