

# What to Expect at Mediation

## Related Professionals

John W. Davidson  
803.540.2023  
j davidson@nexsenpruet.com

## Practices

Construction Law

10.22.2020

“This isn’t what I expected.” I hear that comment frequently from people that do not often participate in mediations. If you are involved in the construction industry, you will very likely have to participate in a mediation at some point to try to resolve a dispute. It might be a construction defect case, a payment dispute, a claim involving an ongoing project, or a myriad of other issues. Lawyers participate in mediations all the time. Clients, usually not so much. In fact, many clients participate in very few mediations and may have no idea what to expect. This article will help with that.

## What is mediation?

A mediation is an in-person or virtual meeting between parties, whether individuals or companies, and their lawyers to try to settle a dispute. In order to give some structure to the settlement discussions, the meeting is run by a mediator. The mediator is neutral and does not advocate for either side. The mediator’s job is to talk to each of the parties, ask questions about each party’s position and case, and to explore areas of common ground to try to get the parties to reach a resolution.

## Is mediation the same as arbitration?

No. Arbitrations are essentially private trials that result in an award and generally a winner or loser. A mediation does not result in an award or a winner or loser. The mediation will only result in a resolution of the dispute if the parties agree to it. No one in a mediation will force a decision on you - the decision to settle is up to the parties entirely.

## What happens at mediation?

Although processes can change, a typical mediation looks like the following.

Parties will first meet together with the mediator. The mediator will likely have everyone introduce themselves and will explain the process. The mediator will then tell you that discussions during the mediation are privileged and cannot be divulged at a hearing or trial and nothing said at the mediation can be brought up later. That does not mean the facts of the

case or information learned are inadmissible later, but you cannot use something said or an offer made at the mediation later. The mediator will also remind everyone to be professional and civil.

The mediator will then give each side an opportunity to explain the dispute and their position. The plaintiff usually goes first and the lawyer will give their position. The other parties will then do the same. Although the lawyers usually do most of the talking, clients are allowed to talk if they would like. But, always discuss what you plan to say with your lawyer and decide whether it is better to talk in the opening session or later in private with the mediator.

After opening remarks, the mediator will likely have the parties go into separate rooms so he or she can privately talk with each of them. In these private discussions, the mediator will ask questions about their positions, probe into and challenge those positions, and ask parties to pay attention to and consider the other side's position.

At some point, possibly in the first private session or later, the mediator will ask the parties to begin making offers and counteroffers – to negotiate. The client will have an opportunity to discuss with their lawyer his or her response and how it will be communicated to the other side. Through discussions with the mediator, they will get insight into what the other side feels is important and what it is looking for in a settlement. The other side will get the same insight about you.

During these private sessions, the other side will be planning their next move. You will wonder what is going on with the other parties and why things are taking so long. This is where I see parties get impatient and distrustful of the process and want to leave. All of those feelings are normal. However, you should trust that the mediator is working hard to settle your dispute. He or she will let you know if things cannot be resolved.

Mediations typically do not go quickly. It takes time for everyone to get comfortable with the process and to be willing to compromise. Mediations routinely take a full day or longer.

If the mediator decides there is no opportunity to settle the dispute, he will end the mediation. However, at the end of the day, if he or she thinks there is still an opportunity to settle, the mediator may suggest you adjourn for the day, and then continue to talk to the lawyers by phone to try for a resolution.

If you reach an agreement, the parties will do a short settlement agreement at the mediation, to make it binding. The agreement will include all necessary terms of the settlement. If a longer agreement is needed, the lawyers will work on it in the following days after the mediation has concluded.

There are many other details in what happens at mediations, which I'll touch on in a later article. However, these points should help you understand the mediation process and make you more comfortable in participating in that process.