
DOMESTIC RELATIONS MEDIATION ATTORNEY GUIDE

How Attorneys Can Support Their Clients During Mediation

This is intended as a guide to help attorneys support their clients during mediation. Understanding the law is a good first step. Oregon statute requires that each judicial district shall provide mediation in any case in which child custody, parenting time and visitation are in dispute.¹ As a general principle, the Oregon legislature has recognized the value of mediation as a method to reduce litigation.²

Decades of empirical research in five countries assessing divorce and custody mediation have found that family law mediation, provided by trained, competent mediators, led to reduced conflict during and after the divorce, better parent communication and cooperation after the divorce, and much greater client satisfaction with the divorce process and outcome.³

For self-represented parties, mediation can be especially helpful as it gives them an opportunity to work with a skilled third-party to develop a custody and parenting time plan outside of litigation. But what about when parties have attorney representation- how can attorneys support their clients during mediation to craft a parenting time plan that will best serve them?

The Mediation Subcommittee of the State Family Law Advisory Committee (SFLAC) gathered a multidisciplinary group of stakeholders including mediators, family law attorneys, and OJD staff to develop this guide for attorneys to support their clients during mediation.

Mediation can be a powerful tool to resolve issues of custody and parenting time outside of litigation, and it is strengthened when attorneys understand and support the process. Attorneys play an important role in preparing their clients for mediation, advising them during mediation, and encouraging them to find solutions.

WHAT IS THE ROLE OF MEDIATION IN DOMESTIC RELATIONS CASES?

The Oregon legislature funds mediation to all parties in which custody or parenting time is at issue. Parties are encouraged to develop their own parenting plan with the assistance of legal and mediation professionals.⁴ When the court must make a parenting plan, it may only consider the best interest of the child and safety of the parties.⁵

When parents mediate their own parenting plan, they are able to consider factors beyond those that limit the court. Mediation allows families to create a custody and parenting plan that works for them. It provides more time in a confidential space to hear what is important to them, discuss possibilities, and find common ground.

Mediation practices vary by judicial district;⁶ this guide is intended to support attorneys and their clients as they prepare for court-connected mediation.

WHAT SHOULD ATTORNEYS DO WHEN THEIR CLIENT IS ASSIGNED TO MEDIATION?

- Be generally familiar with the mandatory mediation orientation offered in their jurisdiction⁷ and all relevant local court timelines or requirements for mediation
- Prepare their clients for mediation by explaining the full range of options that can come out of mediation, explaining the law, and focusing on the needs of the child(ren)
- Consider with their client several realistic or possible parenting plans prior to mediation and discuss the client's ultimate goals or thoughts for a parenting plan
- Prepare the client to talk about their goals and/or concerns for parenting time rather than coming to mediation with a "bottom line" position (like joint custody or 50/50 parenting time) as that can be counterproductive to the mediation process
- Be "agents of reality," helping the client to understand what is likely to happen during litigation
- Support a good-faith effort by their client to participate in mediation
- Be prepared to provide legal advice during the mediation process, be prepared to answer questions from their client after a mediation session, and be generally available for consultation during mediation rather than telling the client "I'll talk to you when the mediation is done." [This doesn't mean that attorneys must clear their schedule, but rather make clear to their clients that they are available for consultation if the client feels its needing during the mediation process.]
- Review the mediated agreement (if an agreement is drafted by the mediator) for completeness and bring any missing information to the attention of the parties
- Advise their clients about the benefits and risks of a suggested parenting plan and their legal rights

ADDITIONAL HELPFUL TIPS FOR ATTORNEYS TO ASSIST THEIR CLIENTS DURING MEDIATION:

- Mediation is an opportunity to cater a parenting time plan to specific family needs.
- Don't view mediation as a "hoop to jump through," but rather as a court service that may be helpful to the client in resolving their case. Remember, research shows that mediation improves parent communication and lessens conflict and impact on children.⁸
- Communicate with the mediator as much as is practicable and permissible under attorney/mediator confidentiality rules and local court rules and practices.

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¹ ORS 107.755(1)(c): courts are required to provide mediation services to resolve custody disputes and may provide services related to financial disputes, see ORS 107.755(4).

² See ORS 36.100: “...when two or more persons cannot settle a dispute directly between themselves, **it is preferable that the disputants be encouraged and assisted to resolve their dispute with the assistance of a trusted and competent third-party mediator**, whenever possible, rather than the dispute remaining unresolved or resulting in litigation.”

³ Joan B. Kelly, *Issues Facing the Family Mediation Field*, 1 Pepp. Disp. Resol. L.J. Iss. 1 (2000)
Available at: <https://digitalcommons.pepperdine.edu/drlj/vol1/iss1/5>

⁴ ORS 107.101

⁵ ORS 107.102(5)(b)

⁶ See chapter 12 of the various Supplementary Local Court Rules (SLRs), found here: <https://www.courts.oregon.gov/rules/Pages/default.aspx>

⁷ ORS 107.755: “The orientation session may be structured in any way the circuit court determines best meets the needs of the parties. The orientation session should be designed to make the parties aware of what mediation is, mediation options available to them, and the advantages and disadvantages of each method of dispute resolution. Parties in all cases described above (child custody, parenting time or visitation is in dispute) are required to attend a mediation orientation session prior to any judicial determination of the issues.”

⁸ Poladian, Ani R., et al. "Family mediation for divorce and parental separation." *Foundations for Couples' Therapy*. Routledge, 2017. 256-267.