



What Is Private Mediation?

Private mediation and court-based mediation are very different, and it is important that you understand how and why.

Court-based mediation is typically a mandatory process where both parents are ordered to appear at the court house and meet with a mediator. In the time allotted, the mediator's job is to help both parents work out an agreement. If an agreement is not reached, many jurisdictions require that the mediator then make written recommendations to the

judge suggesting possible solution options. In deciding the case, the judge may or may not agree to order the mediator's recommendations.

Court-based mediation can be an effective resource for parents in a lower-conflict custody dispute that can be worked out in one hour or less. For parents in a moderate- to high-conflict dispute, court-based mediation is typically ineffective, and in some cases makes things worse. There are five reasons for this.

Lets play beat the clock. The length of time allotted for the court-based mediation process is usually one hour. In a typical moderate- to high-conflict case, both parents have between five and eight issues that they feel need to be resolved. Trying to do this in a one-hour session means that each parent will have approximately five minutes to present each of their concerns and negotiate a resolution. It's not realistic.

No one said I had to come prepared. Too few parents prepare for their court-based mediation session. They don't take the time to learn the basics about negotiating or how to share custody effectively. Instead they go into the process nervous, blind, and tired, because they couldn't sleep the night before. As a result things go poorly, and little if anything is actually accomplished.

One size fits all. Given the overwhelming number of cases that court-based mediators see and the volume of shared-custody plans that they help build, they tend to use the same basic template with everyone. I often ask the question in my workshops, "If I had each of you tape to the wall the custody plan your court-based

mediator gave you—one next to the other—and then each of you walked by and looked at them, what would you notice?” The answer of course is that they all look practically identical. Each parent’s situation is unique—but everyone has the same plan.

Watch what you say. In many jurisdictions, when a mediation session doesn’t produce an agreement, the mediator stops acting as a neutral helper and becomes an evaluator who makes written recommendations to the judge. This is an important dynamic, because it changes the process from one where the parents can be open and honest with each other to one in which they need to be careful what they say so as not to be seen in a negative light by the “soon-to-be” evaluator.

The possibility of the mediator turning into an evaluator can change the process into something resembling a public-relations exercise, where the parties are more focused on winning favor with the mediator than on actually working things out. Changing hats from mediator to evaluator is also problematic, because of the time issue. Is one hour really enough time for the mediator-turned-evaluator to make sense of the many variables in a custody dispute and thoughtfully make recommendations that will genuinely help improve things? Of course it isn’t.

Don’t agree to anything. It is not uncommon for parents to tell me that their lawyer instructed them not to agree to anything in court-based mediation. Instead, they are encouraged to stay focused on winning. Obviously, this tactic completely undermines the mediation process.

For the five reasons listed above, many parents conclude that mediation won’t work in their situation. Who can blame them? They’re right. Well, sort of. What they should be saying is *court-based* mediation won’t work. There is a big difference between court-based mediation and private mediation. The problem is that most parents don’t know that private mediation even exists.

How is Private Mediation a Better Option?

Private child-custody mediation is a voluntary process where a neutral third party (usually an attorney or a mental health professional) assists the parents in reaching a fair agreement. The parents make the decisions, not the mediator. During the

process, the focus is on helping both parents create a lasting agreement that meets their needs, goals, and interests. When a final agreement is reached, it is filed with the family law court and becomes a court order. If the process proves unsuccessful, and a final agreement is not reached, the parties can choose to go to court.

Private mediation has several distinct advantages over court-based mediation:

It's confidential. In the 1960s' television show *Get Smart*, Agent 86 (Maxwell Smart) would use a "dome of silence" when discussing top secret information. Private mediation is a little bit like negotiating under the *Get Smart* "dome of silence." At the beginning of the private mediation process both parents sign a confidentiality agreement making it clear that: nothing said during the mediation sessions can be admitted into court, that the mediator cannot be called to testify on behalf of either parent, and that the mediator will not make recommendations to the court.

Under the "dome of silence" parents are free to speak openly and directly with each other without worrying that one will use what is said against the other in court. Or that, once his or her shoe-phone starts ringing, the mediator will turn into an evaluator and start making all kinds of recommendations to the court.

Parents are in control. One big advantage of private mediation is that parents remain in full control. Only parents decide on the issues that are important to them. Then with the help of the neutral mediator, they negotiate an agreement. No one makes decisions for them.

The process is quick. Private mediation is more time-efficient than a drawn-out court battle. On average, parents participate in three to six sessions, each lasting between one and two hours.

Create a plan that fits and lasts. The emphasis in private mediation is on producing a plan that uniquely fits the needs of the children and both parents. By doing this there is a much greater chance that the agreement will last.

Your legal rights are protected. It is recommended that each of the parents review the final agreements with their own attorneys before signing them, so as to ensure that their rights are being protected by law.

It can be used anytime to solve implementation problems. Private mediation can be used at the start of a separation or divorce to hash out an agreement on finances, property, and child custody issues. It can also be used at any point thereafter to work out a custody issue before it blows up into something that has parents wanting to return to court. In such cases, once the new issue is resolved an amendment to the overall custody plan is filed with the court.

It is much less stressful than going to court. In private mediation, instead of presenting your case to a judge, your job is to explain your concerns to your ex and use the neutral mediator to help you work out solutions. This makes things much less stressful and far more productive.

Saves you thousands of dollars. Compared to the heavy financial outlay of a court battle, the cost of private mediation is a drop in the bucket. Usually parents share the mediator's fee equally and then pay for the consult with their own attorney. Depending on how complicated the mediation process turns out to be, each parent could spend 95 percent less on private mediation than what they would have spent fighting in court.

Finally, private mediation is not appropriate in all situations. In some cases, because of a history of violence within the relationship, a parent won't feel comfortable in the same room with his or her ex and might even be afraid of reprisals or physical harm. Even in such cases, accommodations can be made that allow parents to try the mediation process. For example, parents might attend the sessions individually or participate by telephone or video conference.