

Mediation Times

Frequently Asked Questions

Question. For what kinds of conflicts does mediation work?

Answer. People use mediation to settle all kinds of disputes: workplace disputes, failing business partnerships, debt collection, disagreements over the care and custody of children and many others. While many cases involve disputes over very complicated issues or sizable amounts of money, most mediations involve problems between people trying to work out everyday problems.

Question. I have already hired a lawyer and entered the litigation process. May I still use mediation?

Answer. Yes. Mediation may be entered at any step of the process, including during active litigation (when a case is pending in court).

Question. Do I have to accept the decision of the mediator?

Answer. No. Actually, the mediator doesn't make any decisions. He or she works with the parties involved to create a solution that works for everyone. All parties must agree to any solution for it to become binding.

Question. Everyone says I'm right and that the judge will rule in my favor. Why should I enter mediation?

Answer. Be careful. It is not uncommon for friends and family members, those who are loyal to us, to see things from our point of view. Remember, however, that the other party might be hearing the same thing from their own friends. Until a judge makes the ruling, no one, not even an experienced attorney, can know the actual outcome. Mediation is about preventing unsatisfactory outcomes by putting the responsibility into the hands of those who care most about the solution – the parties themselves.

Question. The other party wants to enter mediation. Isn't this a sign of weakness?

Answer. A suggestion to enter mediation should be viewed as an indication that the other party is willing to work to find a solution that benefits everyone. Any proposal to enter mediation should be taken as a sign of good faith.

Question. Do I need a lawyer for mediation?

Answer. No. If you have an attorney, he or she will be part of the process, but it is not necessary to have an attorney to participate in mediation.

Question. How much does mediation cost?

Answer. While fees vary depending on the circumstances, mediation usually costs a small fraction of what litigants can expect to spend on a case that goes to trial. In many situations, such as small claims cases, there is no fee at all for mediation services.

Mediation: It's Up to You

Relationships are at the center of our lives. We build them to create families, to provide for our material well-being, and to bring us happiness. From time to time, these relationships become conflicted; usually we resolve these conflicts on our own, but once in a while we find ourselves in situations where we can't come to an agreement. Sometimes these disputes revolve around a financial relationship; often, they strike even closer to home.

When conflicts develop, several options are available. Most often, one of the parties consults an attorney and considers litigation, the process of pursuing a court case in front of a judge or jury. According to Elizabeth Kent, Director of the Hawaii State Judiciary's Center for Alternative Dispute Resolution, litigation is not always an optimal solution. "With some cases taking many months or even years to resolve in the courts, often with the costs to each party running quite high, litigation may actually be one of the least advantageous conflict-resolution options for most people.

To remedy these problems and provide for faster, more affordable and ultimately more satisfying ways of resolving conflicts, the Hawaii State Judiciary offers programs as alternatives to litigation. Available alternative dispute resolution options include arbitration, settlement conferences and mediation. Of the three, mediation is the most widely applicable to the needs of most people, according to Kent. "Our experience has been that most people prefer taking responsibility for the conflict resolution process themselves. Because it allows the parties more input in solving the conflict, mediation tends to produce more satisfying outcomes. And often, the solutions people arrive at remain satisfying long after the actual process is completed."

Most Disputes Can Be Resolved Through Mediation

In recent years, mediation has become a leading alternative to litigation in almost every area, from divorce and domestic disagreements to workplace conflicts, from small claims to high-profile, multimillion-dollar disputes. As the benefits of mediation become more widely known, companies and professional organizations are turning to the mediation process to help create solutions that work better, last longer and cost less than traditional litigation.

The majority of all litigation cases are resolved before trial. Mediation, as a method of resolving cases before the need for trial, would be appropriate in many cases.

The key lies in the willingness of the parties to work together to find a solution.

Unlike an arbitrator, a mediator does not make a decision on how to resolve the conflict; the goal of mediation is an agreement that all parties have had a role in creating. "This helps keep the process positive," says Judge Frances Wong of the Family Court of the First Judicial Circuit.

“In a mediation process, the goal is to find a solution, not to find out who’s right and who’s wrong.”

To many people, having a say in the solution makes mediation more attractive than arbitration, especially in situations where the parties have a need to continue their relationship in some way. “In situations like child custody disagreements or disputes between business partners, mediation can be an excellent way to resolve the conflict while preserving the ability of the parties to continue working together,” explains Judge Wong. She says that arbitration, like litigation, may be more appealing in the short term when both parties believe they are right, but it often leaves one or more of the parties angry and frustrated with the resolution of the dispute because they had no direct hand in creating that solution.

Mediation may not be for everyone...

Though mediation and other forms of alternative dispute resolution work for most people, no one strategy is right for every situation. Mediation may not be the right solution in the following cases:

- One or more parties want to be “vindicated” or “proved right” by a judge.
- The parties want to establish a legal precedent.
- There are no real communication problems between the parties, but they cannot agree to a solution after extensive efforts.
- A judge’s expertise with the law seems necessary to sort out legal issues.

About Mediation

In mediation, all parties (there are often more than two) agree to sit down with a neutral mediator in an attempt to resolve the conflicts between them. Cases are also referred by the court. In mediation, a settlement cannot be forced on the parties; everyone involved in the dispute must agree to any solution, and all parties reserve the right to litigate if no agreement can be reached.

The mediation process seeks to help everyone involved in the conflict to clarify his or her own needs and priorities, and to better understand the needs and priorities of the other parties. This happens in a number of ways. Early in the process, each party communicates with the mediator, in person and sometimes in writing, until the mediator understands that person’s point of view. The mediator then helps the parties brainstorm possible solutions to the conflict, often helping the parties think about ideas they had not previously considered.

By this point in the process, everyone involved has developed an understanding of what is important to all parties. The final step is for the parties to come to an agreement. The mediator does not resolve the dispute; the participants must come to an

understanding themselves. If they are able to do so, the parties put that understanding or agreement in writing. In cases where everyone cannot agree to a solution, each party remains free to pursue resolution through other means, such as arbitration or litigation.

Hawaii's mediators come from a variety of backgrounds and have expertise in many different areas.

Some, like Honolulu's Harvey Lung, have wide experience in business and commercial law. Lung has long represented companies involved in construction, real estate and other industries, and brings that experience to bear on his role as a mediator. Tom DiGrazia, a Kailua-based mediator, describes himself as "a peacemaker first and foremost." Influences on his mediation style include his work as a holistic lawyer, ho`oponopono, his Sicilio-Americano roots, as well as Native-American influences. Other mediators come from backgrounds in small business, family law, and a host of other areas.

Choosing the Right Mediator for You

Choosing the right mediator is one of the most important decisions in the entire mediation process. As word of mediation's benefits spreads in the community, more people are offering their services as private mediators, each of them with his or her own approach and area of expertise. With so many choices available, selecting the appropriate mediator can be a bit challenging. Here are a few guidelines recommended by mediators in Hawaii:

1. Define Your Own Priorities

Each mediator has his or her own style. Some like to be highly engaged in directing the dialogue between parties and act as active facilitators, while others prefer to let the disputing parties do most of the talking, offering guidance when things get stuck. Knowing what your own needs and goals are is the first step toward making the right choice.

2. Ask Others

Talk to people you know about their experiences with mediation. You may have a friend, social worker, lawyer or someone else who can refer you to a mediator or provider that has worked for them. Ask as many people as you can: What was their experience? What kind of assistance did the mediator provide?

3. Talk With the Mediators

Once you've gathered a few names, take the time to talk with more than one mediator or mediation provider. People seeking mediation services often find that just a few minutes spent with a prospective mediator or provider can be valuable. Because communication is essential to the process, take the time to find a mediator with whom you feel comfortable talking.

4. Make a Decision

Mediation is a process that often yields outstanding results. That doesn't necessarily mean, however, that it's always easy. People are sometimes tempted to switch mediators or even abandon the process entirely when things get difficult, and that's often a mistake. Once you've committed yourself to mediation, do your best to honor that commitment. In many cases, the problem isn't with the mediator or the process; the issue themselves are painful, and airing them can bring up bad feelings all over again. When that happens, it's important to stay true to your commitment and continue to work at finding a solution.

Mediation Works

Most who consider mediation are attracted by the way the process leaves control over, and responsibility for, the solution with the participants themselves. Most people want to take responsibility for their own problems. Mediation is often the best solution for them because nobody comes in from outside and tells them what to do. They receive guidance from well-trained mediators, but in the end, the parties are the ones who resolve the conflicts for themselves. There are no cameras, no court reporters, no judges – it's just the parties involved and the mediator. Experts agree that people are more likely to abide by and be satisfied with a solution they have had a hand in creating.

A Mediation Success Story (That Almost Wasn't)

The following story represents the experience of a local woman and her family. The names of those involved and some identifying details have been changed to protect their privacy. By Lynn T.

When I entered my second marriage, it was like a dream come true. I had been married only briefly to the father of my only child and had spent years as a single mom, doing the best I could to keep my career on track while playing both roles. Dan, my second husband, seemed like a great match for me, and he also had two children of his own, a boy and a girl who both my son and I immediately felt very close to. It was perfect. I had found love again, and my son had two wonderful siblings. We became a family almost right away.

When our marriage collapsed 10 years later, all of the things that made our family so strong were turned upside down. I had long ago become *hanai* mother to Dan's children, and our divorce was especially devastating to them. The oldest, Benjamin, had already moved out on his own, but Malia was only 13. She and I were like any other mother and daughter; we were very, very close. At first, Malia was extremely angry with me. She felt that by leaving her father, I had taken away the only real family she'd ever known.

As the weeks passed and Malia began to talk openly with me again, I realized that our problems were only beginning. Malia was as close to her father as she was to me, and as a teenage girl, the thought of moving to a new home with only her father there was depressingly lonely. Malia wanted to stay with me and her stepbrother even after her father left.

I knew, and most of my friends told me, that Dan would never allow such a thing. How could I expect to divorce my husband and keep his child with me? Some scolded me for even considering it and told me something like that would never be allowed. And yet, I knew in my heart that this was very important to Malia. As her words rattled around in my mind, I realized I did not have the heart to tell her no, and I agreed to talk with Dan about it.

He was furious. Our breakup had been difficult from the start, and to him, I was trying to steal his child away as well. With all the anger and frustration between us, I couldn't find the words to explain to him that all I wanted was for Malia to have a say and to make her own choice.

By that point, we were ready to go to court. I was very nervous and was afraid the judge wouldn't understand where I was coming from at all. When the judge had heard from both sides, she told us to spend time with a mediator to see if we could resolve our disagreements. I didn't have much hope – some of my own friends felt uncomfortable with the idea of Malia staying with me instead of with her father. How could I expect a mediator to understand it?

What I didn't know was that the mediator wasn't going to be the one making the decision. One of the first things that happened, after we both explained our side, was that the mediator asked us both to talk for a few minutes from the opposite point of view. It was scary, taking a risk like that with so much at stake.

I went first. Speaking from Dan's perspective, I said that it was wrong to take a child away from her father. I said it seemed cruel. While I was talking, I began to cry a little bit, realizing how painful this must be for Dan. I started to feel badly about the whole thing and wondered if I was doing the right thing after all.

Then it was Dan's turn. He took a while to get started, but when he spoke, he said that all he wanted was what was best for Malia. Speaking as me, he said that he would never try to come between Malia and her dad and that he felt badly making such a painful request. But he said that it was what Malia wanted and that she should have a say in what happened in her life.

As it turned out, we were not able to reach a settlement through mediation. The issues were too emotional, and eventually the case went to court, where Malia was sent to live with her father.

A few weeks later, Dan called. He said that the mediation process had helped him to see that I had only been trying to do the right thing for his daughter. He apologized for calling me names and for mistrusting my intentions. After a lot of discussion, Dan agreed that Malia seemed happier at my house and offered to let her stay with me three weeks out of the month. It was the right solution, and Malia enjoyed being able to keep the home she had known for so long while still spending a lot of time with her dad.

Even though mediation didn't result in the settlement of our divorce, in the end I think it was the mediation process that allowed us to solve the problem ourselves later on. Without the rebuilding of communication and trust that happened there, I don't know if we would have been able to come to an agreement that was right for Malia.

Mediation in the Family: From Crisis to Communication

Divorce and other family conflicts are among the most common problems that lead people to seek mediation. Prodding parties to participate in mediation is not always easy. When a person decides he or she no longer wishes to be married, the first phone call is often to an attorney, not a counselor or mediator. Mediators, attorneys and judges all point to the intense emotions accompanying divorce as one of the key reasons most prefer their cases be heard by a judge. "People come to court seeking validation or vindication in domestic conflicts and sometimes even vengeance," explains Judge Frances Wong of the Family Court of the First Judicial Circuit.

A 63-year-old Honolulu man reports experiencing those feelings first hand. When his wife left him for another relationship, he was confused and angry. "I was so frustrated, so upset that all I wanted was to get back at her. And what do you do to get back at someone like that? You go to court because you think the judge is going to back you up."

He found out that it wasn't quite so simple. "The judge can only do so much. A judge can't make the person talk to you, can't do anything to make you feel better. The more our lawyers went back and forth, I realized, the more angry I felt." Eventually, he took his attorney's advice and entered mediation. "It wasn't perfect. My family still fell apart, and I was still pretty hurt for a long time. But we were able to agree on the financial matters, and we started talking again. It was a lot better, and a lot cheaper, than going to court."

Judge Wong says stories like this are not uncommon and emphasizes that there is a limit to what a judge can accomplish.

"We try to teach people that solving their own problems is a good thing for them, and most especially for their children. Although judges try to be caring, we simply do not know their families as well as they do," Wong explains. "We also try to teach them that their own solutions will be the ones that endure."

Easing the Burden on Children

Mediation and other cooperative divorce strategies work to reduce the tension and anger between the parties, thereby helping both children and adults make better adjustments to the changes in the family. “The keys, always, are trust and communication. When those two things break down, that’s when families break down,” adds Wong.

Judge Wong believes in the power of mediation to make a positive difference for families in crisis. “I believe that a well-mediated agreement is more likely to succeed than a litigated divorce,” she explains. “Even if disagreements crop up later, a well-mediated agreement means that the parties have learned some communication and decision-making skills that can be applied to future problems that will inevitably arise.”

Resolving Other Family Disputes

A common source of family tension lies in relationships between teenagers and their parents. Parents often find themselves at odds with their teenage children over household chores, grades, curfews and other problems. Even in cases where the problems are not necessarily severe, families are increasingly looking for help in restoring communication and trust. According to Tracey Wiltgen, Executive Director of The Mediation Center of the Pacific, mediation often works best in otherwise stable families struggling with a clearly defined problem.

“We can’t help families who are in a serious crisis mode. In their situations, even if there are issues where mediation is viable, there are other issues going on and conflicts going on that supersede what mediation will be able to do for the family,” says Wiltgen. “The other issues need to be resolved first.”

On the other end of the spectrum, elder care has become a fast-growing source of conflict; many families find themselves “bruised and struggling” over difficult questions concerning what to do with an ailing parent or grandparent. Because many of the choices facing these families are not only emotionally difficult, but also new to everyone involved, these experts report families often fall into uncomfortable silences and find it difficult to discuss such matters as money and financial planning.

Finally, day-to-day struggles over family finances are the source of many family crises. In these and other cases, mediation can be a valuable tool in restoring communication and trust.

“Whether it is an intense debate about changing an elder parent’s home, heirs playing out a lifetime of grudges and hurt feelings, or severely negative parent-child relations, mediation can often be surprisingly effective,” explains Wiltgen. “Why? Because underlying all the hurts are individuals who seek resolution.” Because mediation involves getting everyone to agree on a solution, Wiltgen finds that the process has the power to create positive change quickly, even in long-simmering family conflicts. “The

table is set for the parties to develop an agreement that doesn't come down from on high. Sometimes when it happens, it is a swift, contagious moment no one could have predicted."

While not every conflict will end in a successful mediation – Judge Wong points to domestic violence, extreme anger, and mental illness as potential obstacles to a settlement – most families are much better served by the mediation process than they would be in litigation. Judge Wong encourages people to give it a try and to be patient: "What's important is to do well whatever it is we set out to do, and that means leveling the playing field and creating an environment of basic fairness. Enough time, and talented mediators, go a very long way."

Resources: More information is available online at www.courts.state.hi.us/cadr

Mediation and Small Business

When we think of the Better Business Bureau (BBB), many of us immediately think of customer complaints. Receiving complaints, however, is just the beginning of what the BBB does, according to Anne Deschene, President of the organization's Hawaii Chapter. Deschene hears from customers who are dissatisfied with a purchase or a service they received from a local business. Rather than focus on the complaint, however, Deschene tries to keep customer and business owner alike focused on how to solve the problem and heal the relationship between them.

"Probably the most frequent problem we hear about involves delivery," Deschene says. "For example, a customer has ordered an engraved Hawaiian-style bracelet that does not arrive on time for a special occasion." The BBB also hears from customers over quality of service, from miscommunication with employees to unmet customer expectations.

Left unresolved, such problems almost always break the relationship between business and customer and sometimes result in expensive litigation in the courts as one or both parties look to a judge for resolution. Deschene and her staff have found, however, that timely use of mediation can do more than simply resolve the problem at hand: it can restore trust and preserve the relationship between customer and business.

"If we are involved early, we immediately begin trying to defuse the emotions around the issues and to help the parties articulate the facts and come up with possible solutions," Deschene says. Her experience gives her the insight that people involved in contentious disputes often overlook. "Looming for them is more wasted time, possible loss of money, and no satisfying solution through litigation. We advocate doing whatever possible to settle out of court."

The Business Owner's Perspective

Honolulu attorney Harvey Lung, who has handled many commercial mediation cases on behalf of companies and business owners, agrees with Deschene. He says that owners are often eager to pursue litigation because they feel a judge will prove them right. Lung tries to help them see the larger consequences of litigation and to consider mediation as an option.

"Litigation is backward looking," Lung explains. "You're always looking back at something that happened months or years ago, and most people find it frustrating to be tethered to something in the past, not allowing them to move forward in their lives."

Solving Disputes Between Business

Some of the most destructive disputes are those between companies with previously strong working relationships. When a conflict arises, not only are there immediate economic pressures related to the problem at hand, but the ability of the companies to work together in the future also comes into doubt.

Deschene recalls one such incident and remembers how mediation worked to bring two very frustrated parties back together.

"One company subcontracted another company to move furniture for a customer. The customer reported damage to one piece of furniture and complained to the moving company; however, because they were 'subcontracted,' they weren't sure how to resolve the issue. At that point, one of the companies contacted the BBB."

"We suggested mediation and invited both businesses to attend," Deschene recalls. "They determined that due in part to circumstances of the move, the moving company was not at fault. However, the moving company offered a settlement to the customer as a gesture of goodwill. This was agreed upon by all parties."

The story is a favorite of Deschene's because of the way the businesses used mediation to work together to find the right solution. "In the beginning, everyone was frustrated about what to do and trying to find someone at fault," she explains. "Through mediation, the expectations of all parties changed and they were willing to work collaboratively to resolve this matter."

Contact the Better Business Bureau at:
1132 Bishop Street, Suite 615
Honolulu, Hawaii, 96813-2813
Phone: 808-536-6956
Fax: 808-628-3970
Toll-free Neighbor Islands: 1-877-628-3970
Email: info@hawaii.bbb.org (not for complaints)
www.hawaii.bbb.org

Is Your Workplace Toxic?

Experts say the following conditions may be a sign that your workplace has become toxic:

- Low morale
- Widespread negative attitudes
- High absenteeism
- Frequent arguments in the workplace
- High number of personality conflicts
- High number of customer complaints
- Tolerance for insensitive or offensive remarks
- Unusually high employee turnover

If you feel consistently unsupported or undervalued at work, or if something in your workplace makes you or a coworker feel unsafe, you may want to speak to a human resources professional for help. If your company does not have such a person, contact your community mediation center.

Did You Know? Some of the benefits of mediation:

Economic decisions

Quick settlements

Mutually satisfactory outcomes

High rate of compliance

Greater degree of control and predictability of outcome

Personal empowerment

Preservation of an ongoing relationship or termination of a relationship in a more amicable way

Workable and implementable decisions

Decisions that hold up over time

Contact the Hawaii State Judiciary Center for Alternative Dispute Resolution

Aliioli Hale
417 South King Street, Room 207
Honolulu, Hawaii, 96813
Phone: 808-539-4237
Fax: 808-539-4416
Email: CADR@courts.hawaii.gov

Or contact the community mediation center nearest you:

KAUAI
Kauai Economic Opportunity, Inc.
Mediation Program
2804 Wehe Road
Lihue, Hawaii, 96766
Telephone: 808-245-4077
Fax: 808-245-7476

HAWAII
Kuikahi Mediation Center
101 Aupuni Street, Suite 1014B2
Hilo, Hawaii, 96720
Telephone: 808-935-7844
Fax: 808-961-9727

West Hawaii Mediation Center
P.O. Box 7020
Kamuela, Hawaii, 96743
Telephone: 808-885-5525
Fax: 808-887-0525
www.whmediationcenter.org

MAUI COUNTY
Mediation Services of Maui
95 Mahalani Street
Wailuku, Hawaii, 96793
Telephone: 808-244-5744
Fax: 808-249-0905
www.mauimmediation.org

OAHU
Mediation Center of the Pacific
245 North Kukui Street, Suite 206
Honolulu, Hawaii, 96817
Telephone: 808-521-6767
Fax: 808-538-1454
www.mediatehawaii.org

The Center for Alternative Dispute Resolution is dedicated to making alternative dispute resolution processes broadly available to Hawaii citizens and agencies of state and local government. The Center works to provide neutral alternative dispute resolution processes that offer opportunities for early, participant-driven, efficient, and fair conflict resolution.

The Center was founded by Chief Justice Herman Lum in 1985 with support and assistance from the National Institute for Dispute Resolution in Washington, D.C. It became a permanent office within the state Judiciary in 1989.