

## **MEDIATION WORKSHEET**

More and more, courts are amending their rules of civil procedure or their local rules to require that parties to a lawsuit participate in mediation. While many contracts require that disputes be arbitrated, mediation is quite different. Arbitrating a lawsuit is similar to actually litigating in court. The parties present evidence and have witnesses testify. The arbitrators are usually familiar with the law and frequently have some experience as judges.

Mediation, in contrast, brings opposing sides together and tries to find a solution both parties can live with. It is a cooperative effort rather than an adversarial proceeding. It is frequently used in divorce cases, landlord and tenant matters, and matters pursued in small-claims court. This worksheet is intended to help you collect your thoughts and feelings so that you feel more comfortable during the mediation. In understanding your emotions about the case --litigation can be very emotional -- you may become more sensitive to your opponent's feelings, and better able to agree to a mutually satisfactory solution. In answering the questions, try to put yourself in your opponent's position as best you can.

1. In your own words, summarize what this lawsuit is really about (not legal injury and damages, but the nature of the dispute and its source).

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2. What specifically is the plaintiff complaining about? Answer even if you are not the plaintiff; just pretend you are the plaintiff.

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3. If you are the defendant, how do you feel about the plaintiff's assertions? Check all that apply.

- |                          |                        |                          |             |
|--------------------------|------------------------|--------------------------|-------------|
| <input type="checkbox"/> | Angry                  | <input type="checkbox"/> | Surprised   |
| <input type="checkbox"/> | Insulted or offended   | <input type="checkbox"/> | Blind-sided |
| <input type="checkbox"/> | Confused               | <input type="checkbox"/> | Justified   |
| <input type="checkbox"/> | Impatient              | <input type="checkbox"/> | Sorry       |
| <input type="checkbox"/> | Resigned               | <input type="checkbox"/> | Indifferent |
| <input type="checkbox"/> | Irritated              | <input type="checkbox"/> | Ashamed     |
| <input type="checkbox"/> | Other (please explain) |                          |             |
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4. If you are the defendant, what parts of the plaintiff's complaint would appeal to your sense of justice if you were not actually involved in the lawsuit? Why?

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5. If you are the defendant, what parts of the plaintiff's description of the case would make you sympathize with the plaintiff if you were not actually involved in the lawsuit? Why?

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6. What is the defendant's response to the plaintiff's complaints? Answer even if you are not the defendant; just pretend you are the defendant.

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7. If you are the plaintiff, how do you feel about the defendant's response?

- |                          |                        |                          |             |
|--------------------------|------------------------|--------------------------|-------------|
| <input type="checkbox"/> | Angry                  | <input type="checkbox"/> | Surprised   |
| <input type="checkbox"/> | Insulted or offended   | <input type="checkbox"/> | Blind-sided |
| <input type="checkbox"/> | Confused               | <input type="checkbox"/> | Justified   |
| <input type="checkbox"/> | Impatient              | <input type="checkbox"/> | Sorry       |
| <input type="checkbox"/> | Resigned               | <input type="checkbox"/> | Indifferent |
| <input type="checkbox"/> | Irritated              | <input type="checkbox"/> | Ashamed     |
| <input type="checkbox"/> | Other (please explain) |                          |             |

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8. If you are the plaintiff, what parts of the defendant's response would appeal to your sense of justice if you were not actually involved in the lawsuit? Why?

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9. If you are the plaintiff, what parts of the defendant's response would make you sympathize with the defendant if you were not actually involved in the lawsuit? Why?

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10. If you are the plaintiff, what would be your ideal resolution? Check all that apply.

\_\_\_\_\_ Damages. What *realistic* amount do you have in mind? \$\_\_\_\_\_

\_\_\_\_\_ Return of money spent or advanced

\_\_\_\_\_ Return of property

\_\_\_\_\_ A return to the way things were before the dispute (if possible)

Explain \_\_\_\_\_

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\_\_\_\_\_ Some change in your status

Explain \_\_\_\_\_

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\_\_\_\_\_ An apology

\_\_\_\_\_ Other \_\_\_\_\_

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11. If you are the defendant, what would you be willing to do for the plaintiff to resolve your dispute? Check all that apply.

\_\_\_\_\_ Payment of a reasonable amount of money. What would that be?  
\$\_\_\_\_\_

\_\_\_\_\_ Return of money plaintiff spent or advanced on your behalf

\_\_\_\_\_ Return of property the plaintiff claims is his or hers

\_\_\_\_\_ A return to the way things were before the dispute (if possible)

Explain \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_ Some change in the plaintiff's status

Explain \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_ Apologize. Are you a little sorry about what has happened?

\_\_\_\_\_ Yes \_\_\_\_\_ No

\_\_\_\_\_ Other \_\_\_\_\_

\_\_\_\_\_

12. If you are the defendant, what would you like the plaintiff to do to help resolve the dispute?

\_\_\_\_\_ Repay money he or she owes. How much? \$ \_\_\_\_\_

\_\_\_\_\_ Vacate the premises (landlord-tenant)

\_\_\_\_\_ Restore property to the way it was before the dispute

\_\_\_\_\_ Abandon some claim or demand. Explain \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_ Stop some act or behavior. Explain \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_ Apologize.

\_\_\_\_\_ Other \_\_\_\_\_

\_\_\_\_\_

13. If you are the plaintiff, what would you be willing to do for the defendant to resolve the dispute?

\_\_\_\_\_ Repay money you owe. How much do you think that is? \$ \_\_\_\_\_

\_\_\_\_\_ Vacate the premises (landlord-tenant)

\_\_\_\_\_ Restore property to the way it was before the dispute

\_\_\_\_\_ Abandon some claim or demand. Explain \_\_\_\_\_

\_\_\_\_\_ Stop some act or behavior. Explain \_\_\_\_\_

\_\_\_\_\_ Apologize. Are you a little sorry about what has happened?

\_\_\_\_\_ Yes \_\_\_\_\_ No

\_\_\_\_\_ Other \_\_\_\_\_

14. Is there anything the other party might want from you that you absolutely refuse to do?

\_\_\_\_\_ Yes \_\_\_\_\_ No

15. If you answered "Yes" to question 14, please explain your answer.

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16. What other concerns do you have that you want to have the mediator address?

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17. How would you feel about considering other solutions than the ones suggested above?

- \_\_\_\_\_ Whatever it takes
  - \_\_\_\_\_ Mildly interested or curious
  - \_\_\_\_\_ OK
  - \_\_\_\_\_ Suspicious
  - \_\_\_\_\_ Fearful
  - \_\_\_\_\_ Other (please explain)
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18. How would you feel about talking to the mediator without your lawyer present?  
(Remember, mediation is not adversarial and it is not binding.)

- \_\_\_\_\_ Whatever it takes
  - \_\_\_\_\_ Mildly interested or curious
  - \_\_\_\_\_ OK
  - \_\_\_\_\_ Suspicious
  - \_\_\_\_\_ Fearful
  - \_\_\_\_\_ Other (please explain)
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19. Are there any other disputes that are lurking and not being addressed?

- \_\_\_\_\_ Yes                      \_\_\_\_\_ No

20. If you answered "Yes" to question 19, please explain your answer.

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21. What questions do you have for your lawyer about mediation?

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22. What questions do you have for the mediator about mediation?

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23. Can you stand being in the same room, seated at the same table, as your opponent?

\_\_\_\_\_ Yes \_\_\_\_\_ No

24. If you answered "No" to question 23, why not?

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25. Here's a true story for you to consider:

Two old friends became embroiled in a dispute after one of them, an accountant, made a \$30,000 mistake in preparing the other's tax return. The other friend had a huge windfall that year that triggered special provisions in the tax code, which is why he had asked the accountant to do his taxes that year. The taxpayer sued the accountant seeking to recover the \$30,000. The case went to trial, and the judge tried to get the two to settle beforehand. The defendant made an offer, but the plaintiff refused. The judge was confused, as the offer was clearly a serious one, and asked the plaintiff's lawyer what was wrong with it. The plaintiff, it turned out, was not willing to enter into an agreement in which the defendant did not have admit he made a mistake. The plaintiff's lawyer was not concerned about going to trial, though the case was hardly open-and-shut, which also confused the judge.

"Aren't you going to receive a percentage of the recovery? You'll have more time into the case than it is worth."

"No," the lawyer replied, "I'm being paid by the hour."

Suddenly, the judge understood that something other than money was at stake. The plaintiff was willing to pay lawyer's fees that would swallow half his recovery if he were 100% successful at trial, which struck the judge as unnatural.

The jury heard the case and awarded exactly \$30,000, but also found that the plaintiff was 49% at fault for the \$30,000 mistake, reasoning that he, too, was an accountant and should have caught it. The plaintiff was thrilled, even though he recovered only \$14,700. He paid his lawyer's fee on the spot. (His lawyer was *very* happy about that!)

What was going on? The plaintiff wanted nothing more than an admission that his friend had made a mistake and an apology. When the friend refused to concede that he had made a mistake, the plaintiff was willing to settle for a jury verdict saying he was right.

**Moral:** Think carefully about the real story lying beneath the legal framework of your dispute. Is it just about money? Or is something more complicated, like human emotion, at work? Recognizing the underlying human story can lead to humane solutions rather than face the brutality of a legal judgment saying, "you're wrong, go home," or "you're wrong, pay up."