

An Introduction to Mediation

A. DEFINITION

In its simplest form, mediation is a process in which a neutral third party assists disputants to reach a voluntary, negotiated settlement of the issues in dispute. The mediator facilitates communication between disputants so they can more clearly understand their differences and craft a mutually acceptable settlement, but has no power to impose a decision upon the parties.

B. TYPES OF MEDIATION

Mediation can have different objectives and can take a number of forms.

Some forms of mediation have been described from the perspective of the objectives they seek to attain:

- Evaluative mediation: The mediator evaluates the claims or rights of the parties having regard to the applicable legal rules.
- Facilitative or problem-solving mediation: The mediator helps the disputants to resolve their differences by facilitating communication and the search for creative (mutual gain) solutions.
- Therapeutic mediation: The mediator helps parties "heal the hurt" caused by disputes and may facilitate a "reconciliation" between the disputants.
- Transformative mediation: The objective of mediation is to transform the disputants, both individually and in relation to one another through "empowerment" (disputants improve or learn new skills to resolve their own disputes) and "recognition" (understanding the other side's perspective, thereby creating "empathy" for the other).

C. CHARACTERISTICS OF MEDIATION

- Voluntary - right to terminate
- Private and confidential
- Assisted or facilitated negotiation
- Flexible (relatively unstructured)
- Self-determining
- Creative and practical
- Future focussed
- Without prejudice to participation in other processes

D. ROLE OF THE MEDIATOR

Although mediators may have different “styles” of mediating, their roles commonly include:

1. Setting the tone for joint problem-solving by establishing and maintaining a rational and productive atmosphere for negotiation.
2. Encouraging full disclosure of information.
3. Assisting the parties to understand each other’s perspectives (needs, concerns, values, fears) and trying to build empathy between the parties.

4. Facilitating communication between the parties by keeping the discussions “civil”; allowing parties to vent if appropriate; taking the “sting” out of loaded or angry statements by, for example, reframing them in neutral way or in a way which reveals the underlying interest.
5. Maintaining balance in the process by ensuring that the parties have an equal opportunity to speak.
6. Identifying and seeking clarification of misunderstandings, assumptions, and discrepancies.
7. Probing for interests underlying positions taken by the parties in order to expand the opportunity for creative solutions.
8. Assisting parties to identify common interests.
9. Assisting the parties to explore and assess their alternatives to a negotiated resolution.
10. Acting as a “reality check” by challenging parties on their positions (usually in caucus) and by reminding them of the costs of not settling.
11. Assisting the parties to generate options for settlement and to develop criteria by which to evaluate those options.
12. Assisting the parties to evaluate the advantages and disadvantages of each option and encouraging the selection of an option which maximizes satisfaction of both of their interests.
13. Keeping the parties focused on the future and their goal of resolving the dispute.
14. Maintaining optimism that an agreement can be reached and sustaining commitment to assist parties achieve resolution.