

The Mediation Process and Dispute Resolution

Understand the 6 steps necessary in the mediation process

BY PON STAFF — ON MARCH 7TH, 2024 / MEDIATION

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1. Planning.

Before the mediation process begins, the mediator helps the parties decide where they should meet and who should be present.

Each side might have lawyers, co-workers, and/or family members on their team, depending on the context. Imagine a consulting firm and a printing company have decided to hire a former judge with about 10years of experience as a mediator.

(Increasingly, retired judges are starting new careers as mediators.)

Three-person teams from the two companies meet at the mediator's office. As a senior manager of the consulting firm, you bring along a colleague and a lawyer.

Two managers and a lawyer also makeup the printing company's team.

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2. Mediator's introduction.

With the parties gathered together in the same room, Kathy, the mediator, introduces the participants, outlines the mediation process, and lays out ground rules.

She also presents her goal for the mediation process: to help the parties come to a negotiated agreement on the issue of a disputed consulting fee and to resolve the business relationship amicably.

3. Opening remarks.

Following the mediator's introduction, each side has the opportunity to present its view of the dispute without interruption.

In addition to describing the issues they believe are at stake, they may also take time to vent their feelings.

Suppose that the spokesperson for the printing company begins by discussing how shocked he was to be presented with a bill for the additional consulting work.

"Since your training obviously didn't work," he says to you and your team, "I don't understand how you could charge us for the work you failed to do in the first place."

You explain that your contract clearly states that work conducted beyond the initial training session is subject to your usual rates.

"I'm sure we discussed this over the phone at some point," you say. "And in any case, a lot of your employees slacked off during the initial training. Their low motivation is not our

problem.”

4. Joint discussion.

After each side presents its opening remarks, the mediator and the disputants are free to ask questions with the goal of arriving at a better understanding of each party’s needs and concerns.

Because disputing sides often have difficulty listening to each other, mediators act like translators, repeating back what they have heard and asking for clarification when necessary. If parties reach an impasse, mediators diagnose the obstacles that lie in their path and work to get the discussion back on track.

During this stage, the mediator in our negotiation example above attempts to understand why the two sides have such different views of how training went. In response to the mediator’s questions, Jeremy, the printing company’s representative, admits that organizational morale has been low due to recent layoffs.

“That’s no excuse for not paying your bill,” you say.

“In fact, it’s all the more reason that you should pay in full, if you admit the problem lies with you, not with our training.”

“Your people didn’t do a good job of understanding who they were working with,” Jeremy counters.

5. Caucuses.

If emotions run high during a joint session, the mediator might split the two sides into separate rooms for private meetings, or caucuses.

Often, but not always, the mediator tells each side that the information they share in caucus will remain confidential.

The promise of confidentiality can encourage disputants to share new information about their interests and concerns. In caucuses with both sides of the IT training debate, the mediator learns that the printing company is in financial distress.

“We regret buying the new computer system in the first place,” Jeremy admits to the mediator.

“There’s no way we’re going to be able to pay this bill.”

When the mediator caucuses with your side, you explain that you are worried news of this failed training will affect your firm’s reputation in Chicago and beyond.

6. Negotiation.

At this point, it's time to begin formulating ideas and proposals that meet each party's core interests—familiar ground for any experienced negotiator. The mediator can lead the negotiation with all parties in the same room, or she can engage in “shuttle diplomacy,” moving back and forth between the teams, gathering ideas, proposals, and counterproposals.

When putting together your settlement proposal, Northwestern University Professor of Law Emeritus Stephen B. Goldberg recommends that you ask the mediator for her advice.

Her conversations with the other side have probably given her knowledge of its interests that you can use when packaging your proposal.

Suppose that your caucuses with the mediator have led everyone to understand that your firm is primarily concerned about maintaining its reputation, while the printing company is worried about paying its bills.

This new understanding of both party's interests leads to a round of bargaining in which you agree to cut your follow-up consulting bill in half—from \$35,000 to \$17,500.

In turn, the printing company takes responsibility for the difficult trading conditions and promises not to malign your firm to other organizations.

Though you feel you got the short end of the stick, ultimately you are glad to put the dispute behind you. About 80% of dispute mediations lead to resolution, according to Goldberg.

Depending on the complexity of the issues, mediation might last mere hours, or it could take days, weeks, or months to resolve.

Some resolutions will truly be “win-win”; others will be just barely acceptable to one or both sides—but better than the prospect of a continued fight or court battle.

If the parties come to consensus, the mediator will outline the terms and may write up a draft agreement.

If you fail to reach agreement, the mediator will sum up where you have left off and may engage you in a discussion of your non-settlement alternatives.

What do you think is most valuable to the mediation process?