

The Art of Writing A Mediation Agreement

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Mediation is a new language. Its development relies on the process itself: each case and its dynamics, circumstances and expectations, and the needs and interests of the parties. Therefore, a standardized agreement form for all mediations is not as effective and, in fact, is contrary to the essence and spirit of the process.

While the construction of any mediation agreement is a product of a successful mediation, it is not always the case that successful mediation entails a formal agreement (whether provisional or final).

A written agreement is not necessarily the barometer of successful mediation. Sometimes, a certain dynamic develops that leads the parties to bridge their differences so profoundly that they do not feel the need for a written agreement.

A mediation agreement must stem from the mediation process itself. The operative term here is agreement, not contract. An agreement, as we use the term, reflects the joint effort of all parties. Based on the case studies and agreements in our hands, we can offer instructions to mediators on how to ferret out critical information, how to classify it and identify pivotal points. With the aid of these instructions, the mediation agreement will faithfully reflect the process that the parties themselves entered.

The agreement will be intelligible and credible to all parties and stand up to the hard experience of reality.

The mediation agreement needs to respect the mediation process's dynamic and fundamental principles. The mediation agreement is a product of the interaction of two parties willingly coming together to resolve their dispute under the guidance of a skilled mediator. The parties come to understand and then accept their own needs, to protect their common interests, and to rebuild communication, recognizing that this is the key to effective and successful agreements, both in the short and long term.

The mediation agreement is fundamentally different in content, style and language from a legal (or any other) agreement. This is due to the unique nature of each agreement since it is created by the parties themselves because of their specific conflict and the mediation process as they experienced it. There is a lack of professional, academic, and technical guidance in this area. The crafting of a mediation agreement is an acquired skill, sharpened and improved by continued involvement in the work. At the same time, a focused article accelerates the mastery of the necessary technical skills. With the experience we have gained over the past six years, we have identified seven dimensions that reappear throughout the mediation process in its different guises and forms. Embedded in these dimensions are the tools for writing the agreement.

Negotiation is based on seven basic elements (Fisher and Ury 1981). Often, when parties begin to stake out their positions in negotiation, the positions dissolve into conflict. Therefore, to identify and understand these seven elements is essential, since they organize the negotiation process.

Parallel to negotiation, the mediation process proceeds in seven stages (Harvard University model 1976) that detoxify the atmosphere, build trust, and address the misunderstanding in such a way that helps generate options for consensus and reaches joint solutions. When writing mediation agreements, there are seven dimensions to be identified as well. The same dimensions that carry us through the entire process have a significant importance that come to expression when writing the mediation agreement. The dimensions are presented sequentially; however, in reality they are employed in a more integrated manner.

The Seven Dimensions of Writing Mediation Agreements

1. Identifying and naming the parties

It is important to distinguish between private mediations and those dealing with companies and institutions. In private mediations, such as those involving family conflicts, business disputes, partnership dissolutions, or conflicts between neighbors, the identification of the parties is relatively simple. The parties represent themselves and are identified as such by their own names in the written agreement. They oblige themselves to the agreement by signing it.

The mediator's obligation is, first and foremost, to clarify the capacity of the parties. Sometimes, from the outset, the mental or emotional capacity of one or both of the parties seems limited. Often, this is due to the stress generated by the conflict. Although the diminution of their capacity is caused by their conflict and may be temporary, they nonetheless magnify emotions of fear, rage, excitement and general insecurity. However temporary, these emotions are pervasive, as they are real to the dissenting parties. A limitation in capacity may not reveal itself until a later stage in the mediation. Occasionally, such a limitation may warrant a brief hiatus in the mediation process.

For organizations and companies represented by an employee in the mediation, it is important to clarify the employee's authority. He may be a negotiator, without authority to make final decisions; he may need to check with a superior. In such a case, the mediator is obligated at the outset to identify the precise scope of the negotiator's authority. This must be done during the first meeting, gently and diplomatically, by asking simple, direct questions, such as: "If we should reach an agreement, would you be able to sign off on it?" or "Is there someone else who needs to confirm your decisions?"

The mediator must investigate this representative's position within and even prior to the conflict. Is the negotiator the salesperson who reached an agreement? The CEO of the company? The legal counsel? All this will color the mediation process. It is important to ask these questions in a straightforward, non-judgmental manner, as opposed to stating the questions in a manner that arouses suspicion. It is a good idea to precede or elucidate the questions with a clarifying comment such as:

"The reason we are asking this is because, if and when we should reach agreement, it is critical to the mediation process that the people at the table have the power and ability to implement agreements that are reached here in mediation."

The mediation process is begun with this focus on the identity of the parties because the beginning will dictate whether at the conclusion of the process, they will have both the stability and authority to reach an agreement, as well as the power to sign it. Additionally, by the parties identifying and expressing themselves as individual, negotiating entities in the process, it empowers them to accept the outcome. This empowerment is the sine qua non of a successful conclusion to the writing of a mediation agreement.

It is vital for a mediation agreement to take on a personal tone. This is done by listing the negotiator's personal names, whether they are the actual parties to the conflict or their representatives. Even more: If a negotiator is usually referred to by a nickname, use that in the agreement. This personal tone, so different from the formality of other agreements, increases the negotiator's sense of responsibility for the process. Terms like "the company" put distance between the party representing the company and the process and should therefore be avoided. On the other hand, the use of nicknames or other informal terms favored by a party allows the mediation agreement to begin to develop. This phase fosters an environment in which the parties can get comfortable with the mediation setting. This personal climate helps lead to effective and productive negotiation.

As an alternative process, mediation is intrinsically less formal than more traditional processes. As such, its internal manners are less formal. In many western cultures informality is signaled by the use of first names. This signals intimacy and familiarity, which is conducive to mediation. This is not to suggest that in all cultures the use of first names has the same meaning. Within the context of each

culture, it is up to the mediator and the parties to find appropriate means of creating a more relaxed and informal environment. When we suggest the use of first names it is meant as a proxy for informality. Meaning, in each culture, whatever expresses and communicates personalization and informality, should be incorporated into the mediation.

Personalization reinforces the obligation that the negotiators feel for any conclusions or resolutions. Personalization-not least the name of the negotiator on the agreement itself-serves to recall for the negotiator the experience, time, investment, and spirit of the mediation process. The negotiator is an essential cog in all that transpires, he influences the outcome and is influenced by the others present; he is the one who agreed to all the relevant settlements.

Thus, when the time comes to execute the terms of the agreement, first by presenting it to the company's higher-ups, the negotiator personally bears all of the give-and-take that made the agreement possible, thereby committing him to the agreement.

Personal names and other such informal references in the language of the agreement make it unique. Mediation agreements "belong" to the parties, adding a new dimension to each of their original positions and attitudes. Mediation agreements should "feel" different from a labor contract, a real estate title policy, or a divorce settlement.

2. Presenting the Framework of the Agreement

A framework is necessary not only to define the main points of the conflict. Equally important is the relations between the parties. These must be framed in such a way as to make both parties comfortable. The framework contains the basic points of the dispute that created the need for mediation.

The framework must be introduced at the very beginning of the formulation of the mediation agreement. The purpose of the framework is merely to outline the central and relevant points in dispute, to highlight the mutual interest of both parties to resolve it, and to include a general statement that resolution has been reached. All this should be stated simply and factually without entering into the details of the conflict itself. To be omitted at this stage is the history of the conflict and all the details. It is valuable to be clear about what is being dealt with right at the beginning. This ensures the parties are aligned to the common goal.

The parties themselves define the framework of the mediation. They are the ones who explain why the mediation is taking place, what the dispute is about, and what their respective interests are. They are the ones who establish the issue at hand. The framework arises from the details that unfold in the mediation process.

The framework is short and to the point, containing all the facts to which both parties already concur. The framework is separate from the complete agreement, which will emerge only as the mediation process continues. Simply: What is the dispute that must be resolved?

It is useful for several points to appear in any mediation framework; the sooner they are agreed to and formulated, the better.

- a.) The circumstance or catalyst of the present conflict. Often this is a misunderstanding or existing dispute.
- b.) A statement that both parties have a common interest in resolving the conflict.
- c.) A statement that the mediation agreement will be a by product of the present mediation process.

3. Identifying Topics and Interests In the dispute, what came first? What is relatively important, and relatively unimportant? The answers must be put in the context not only of the parties and the mediators, but of the law and any existing practices. It is important to establish a hierarchy of points

in the dispute (thus also to prioritize the points of the mediation agreement). When writing the agreement, the most difficult, more contentious, points should be dealt with first.

In the mediation process, the mediator enables the parties to understand and realize their respective interests; it becomes the mediator's job to crystallize what is most important to them in order to rank the points in the dispute. A ranking may become clear in conjunction with interim agreements the parties themselves reach as mediation proceeds.

A ranking of points in dispute responds to two questions. First, from the perspective of the parties themselves, what do they perceive as most important? For example, in a workplace dispute, an apology may need to precede any evaluation of the points in dispute, not to mention any decisions on financial compensation or other resolutions. Second, what do logic, law, and social norms say? For example, in a marital dispute governed by Jewish law, the actual granting of the get (formal bill of divorce) may need to precede the resolution of matters of custody and property settlement.

It is important that the mediator responsibly balances and harmonizes the parties needs and priorities with the legal reality.

In the prioritization of points, mediators sometimes find subtitles or outlines useful. They may aid the full construction of the mediation agreement by assuring that no point is overlooked.

4. The Interim Agreement

During the course of mediation, various ideas and solutions come up. These may reflect agreement among the parties themselves, or the parties may express the ways in which they want the dispute to be resolved. All such suggestions and declarations should be agreed to in writing. They are vital. Using them, it is possible to configure a provisional agreement. They are steppingstones to progress. They become concrete material that the parties discuss as potential resolutions and are a powerful tool in furthering the termination of the dispute.

A provisional agreement is just what it says-provisional. It does not bind the parties past the duration of time designated for a trial basis agreement. It makes no difference how insignificant any interim resolution or concession may seem. It advances the process, cultivating a receptivity toward a more conciliatory attitude, and can lead to further agreement. Provisional agreements are a fundamental methodological tool of mediation. Just as the mediation process itself should endeavor to be as transparent as possible, so should the provisional, as well as final agreement. The written language of the agreement should be simple, clear, detailed, and future oriented. Whenever possible, it is a good idea to try to capture the words of the parties themselves. This can circumvent the parties from feeling the mediator is possibly inserting or reflecting any personal agenda or bias he/she may have. Furthermore, this helps reinforce the party's connection and commitment to the agreement.

A provisional agreement helps clarify for the parties themselves their actual goals in the mediation. This, in turn, enables them to consult with friends or legal advisors productively. A provisional agreement - to which details may be added to or subtracted from - gives the parties a sense of flexibility. This helps them embrace the process and may liberate them from rigid postures. This may also calm their fears of being coerced into agreeing to something they are averse to. A provisional agreement conveys the message that this is their agreement, that the decisions they reach are, in fact, their own, thus increasing the party's sense of ownership of the agreement.

A provisional agreement builds or renews trust and gives a tangible indication as to whether a final agreement is possible. To sustain a provisional agreement is the litmus test of whether it is possible to sustain trust between the parties, and thus to reach a final agreement that holds water.

Part of reaching the stage of drafting a provisional agreement is self-scrutiny by the parties themselves. What precisely can they commit to writing? How closely have they moved toward resolution?

The ideal situation is for the final agreement to come from the parties themselves. Unfortunately, this does not often happen. This is the power of the provisional agreement: It gives the parties the tools with which to develop a final agreement that will satisfy them both.

5. Revisions

Revisions to a provisional agreement requested by the parties give the mediator an important tool - an understanding of the parties' underlying intentions toward each other, and of how they really feel about the mediation process thus far.

Throughout the drafting of the agreement, it is important to constantly revise - to view the agreement as fluid and fungible - until it is final. Formulation of the revisions is best done at a separate meeting with each party individually. Only afterwards should both parties meet to decide which clauses should be incorporated into a final agreement.

Whenever a party expresses an interest in changing an agreement, it is important to understand whether it fundamentally changes or merely "tweaks" the agreement. Further, it is important for the mediator to know the source of the proposed change. Does it express a fuller understanding of the agreement - or does it pose a new problem, or reflect regret, or a change of mind? Is it an expression of fear of going through with the agreement? It is vital to understand a party's motivation for a revision - does it advance the process or impede it? Another consideration: Should a mediator attribute the revision to the party himself, or as a joint idea of the party and the mediator?

To address necessary changes and revisions in the agreement can alleviate fears for the parties. The possibility of revision shows that it is possible to alter that which has been set. This reinforces the notion that mediation is not coercive. Revision adds credibility to the process. Revision can also show whether the ultimate agreement will stand the test of time by unveiling a party's true intentions.

6. Reading the Agreement Aloud and Other Final Steps

The mediator must be certain that each of the parties has read the agreement separately. If it seems necessary for the mediator to read the agreement with each party separately, this should be done. Subsequently, the agreement should be read while both parties are present, to confirm the accuracy of the settlements heretofore agreed upon. Moreover, during the reading after each section, the mediator should affirm that both parties understand the provisions in the same way and that there is a meeting of the mind.

It should be clear to the parties that this is the critical time to decide whether they will end the dispute by agreeing to sign the final agreement and comply with it.

A provision should appear at the conclusion of every mediation agreement that provides for resolving any future conflict between the two parties. This clause should envision a possible change of circumstances that would make the present agreement obsolete, but that also commits the parties to attempt further mediation before taking legal action.

Since the mediators do not serve as legal advocates for either party, but as neutral facilitators that advance each party's interests, the parties should consult with their legal representative prior to signing the final agreement. This helps ensure that nothing in the agreement violates or ignores their legal rights. The mediator should confirm that each of the parties has done this. Each party is encouraged to consult his legal advisor of choice; the mediation center's attorney needs not be used, although it is an option for any interested party. When consulting a private attorney, it is important that the attorney be someone who understands and appreciates the mediation process. This is so he may effectuate and support the agreement, rather than sabotage the work that was accomplished during the mediation, as is reflected in the resulting agreement. Nevertheless, the possibility of necessary legal revisions is normal, and should be expected.

7. Ceremonial Signing

This final step brings the process full circle and its purpose is twofold: First, the active signing on

behalf of the parties is a declarative action of closure to all that transpired throughout the process in order to reach this point. Second, the signature of the parties attests to their understanding and recognition that this final written agreement is the product of a participatory process and reflects the best resolutions they have arrived at in light of the contextual circumstances.

The party's signature to the agreement now ensures that the agreement's status becomes that of a binding legal document and can be approved by a court of law.

At this juncture, the mediator explains to the parties the significance of their signatures and the various logistical details that attend to giving this agreement the force of judgement. Moreover, it is essential to clarify to the parties that while this agreement is meant to resolve the present conflict, they nevertheless have the option of returning to mediation should future conflicts arise.

On a more personal note, now is the time for the mediator to acknowledge the parties' efforts invested in the process that led to this resolution. Furthermore, the mediator should express the hope that this experience and newfound awareness of conflict resolution be internalized in such a way that will empower the parties with the skills and motivation to deescalate and resolve future conflicts that may arise within their lives.