



What is Mediation?



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Mediation is a process in which a neutral person or persons facilitate communication between people in a dispute to assist them in reaching a mutually acceptable agreement. I reflect upon General Colin Powell's statement: "The most important factor in negotiating international diplomatic agreements is being inside the other guy's decision cycle." Mediators are experts in problem solving. Mediators are there to assist all parties throughout the process. One of the benefits of mediation is mediation allows the parties to collaboratively plan the way the dispute can be resolved. Mediators do not give legal advice and do not tell the parties what to do. The parties agree on a solution. It is the parties' choice whether to bring a lawyer to the session. The mediator is there to help the parties consider their options, and if skilled, the mediator is there to help write up an agreement if one is reached.

Mediation differs from arbitration in this regard. In arbitration the intermediary listens to the arguments on both sides and makes a decision. A mediator helps the disputants come to a solution themselves. Mediation is a private and confidential process.

While the mediator may provide ideas, suggestions, and perhaps even formal proposals for settlement, a mediator is essentially a process person who helps the parties define the agenda, identify and reframe the issues, engage in effective communication to find areas of common ground, and negotiate fairly, with the ultimate objective of reaching an agreement. A successful mediation closes with the parties themselves accepting the outcome and feeling like they own it.

Mediation is Strategic Process

A mediator's job is not to dictate, but instead to acquire information to assist in resolving the conflict. A skilled mediator can draw out the interests of the parties, shifting the dispute paradigm from steadfast positions to perhaps more mindful interests - thus shifting the perspective of "position" to one of "interests." In so doing, the mediator works to define the conflict in terms of these interests rather than in terms of set positions, which suggest an adversarial stance.

Mediation is a voluntary and collaborative process in which an impartial mediator helps the disputing participants communicate, define, understand, and resolve their conflict. Three important principles

should govern: 1) respect for the process and the participants; 2) understanding the process is secondary to the principles upon which process is based; and finally 3) making and keeping communication and connection is most important of all.

While textbooks cite three types of mediators – evaluative, facilitative, and transformative – to be most effective necessitates a mixture of all three strategies. An evaluative mediator gives an opinion as to the likely outcome of a dispute. Thus, people who seek an evaluative mediator often choose someone whose judgment they respect, for instance, a judge who has adjudicated hundreds of cases and has observed hundreds of juries. People who are engaged in a construction dispute often prefer an engineer, a general contractor, or someone else with subject matter expertise as mediator. Such persons view the opinion of these subject matter experts as most valid.

A facilitative mediator stresses the function of the mediator's job is to enable, or to facilitate, parties in the negotiations with each other in order to arrive at their own evaluation and resolution. Facilitative mediation may be more desirable for parties who wish to maintain a continuing relationship with each other. Whereas an evaluative mediator may better suit those parties who want to resolve the dispute and go on their separate ways.

A transformative mediator is one whose goal is like that of the therapist, whose aim suggests a transformation of psyche that takes place within the parties themselves and in their relationship with each other. The mediator becomes an empathetic agent whose role is to elicit understanding and empower the parties to solve their own problems through introspection and fundamental change.

I use all three types of meditative style in my mediation sessions. I believe the function of a mediator is to serve as a catalyst to enable change, with the most important type of change enabled being a change of mind.

Settling is better than going to trial. But getting to settlement demands strategic process. A mediator works as a negotiating partner, assisting with a myriad of important activities along the path towards settlement. In getting to settlement, the path of litigation to trial can be either avoided or attenuated.