

## General Mediation Philosophy and Protocol

Mediation is a process and each one becomes somewhat unique to the individual dispute involved. In practice, the parties control the mediation process, by volunteering to mediate a dispute in the first place, and by agreeing to the choice of the mediator.

To provide structure, process, and to build a foundation for the greatest chance to reach resolution every mediator holds a philosophy and employs some general protocol that is direct enough to move the participants through an efficient process and flexible enough to provide a mediation suited for these parties and their dispute. Experience dictates that while no two disputes are the same, an active mediator and a well-defined procedure, communicated in advance, alleviates misunderstanding, inadequate preparation, and promotes a process most likely to assist the parties in their effort to reach an agreement. This is especially true for complex matters that require advanced work to educate the mediator to understand the facts and develop any other information necessary for identification or evaluation of settlement options.

With an understanding of a mediator's general protocol for a mediation in advance, the chances are greater that the parties will engage in a mediation that includes a thorough discussion of the facts, legal issues, and any other aspects of the dispute that will lead to a successful resolution.

## **Timing**

Most disagreements have a particular time when they are best suited for a successful negotiation that will lead to a resolution. In general terms, that time is when the relevant facts and evidence has been exchanged and both sides are in similar positions to evaluate the relative strength and weaknesses of their case and that of their opponents and to engage in a frank discussion of strengths, weaknesses, and any other constraints to settlement. That said, disputes can be mediated at any stage.

Most disputes are not resolved at their beginning. Many are resolved "on the courthouse steps". Most are resolved somewhere in the middle. But no matter when the parties agree to mediate, a process to meet the timing and idiosyncrasies of the matter can be designed and implemented.

Once the decision to mediate has been made, confirmation from all parties is necessary before scheduling an actual date for the mediation session, any pre session meetings, as well as briefing and sometimes other evidence exchanges. Most matters require only one day of mediation. Some disputes by their nature will obviously require more than one day. For those limited matters, a decision should be made in advance regarding whether the additional day or days should be consecutive or spread apart in time.

### **Exchange of Information for the Mediator**

Pre mediation exchange of briefs of some type are customary and serve 2 important roles. First, they assist each party to see the dispute as the other side sees the matter at the time the mediation takes place and what result may occur if the matter proceeds to a judicial resolution. Second, they educate the mediator to understand the nature of the matter and because the briefs are exchanged both parties and the mediator see the same version of the case.

The size and number of exchanges are normally dictated by the dispute itself. In most matters one pair of exchange briefs should be enough to advance the matter to a mediation session. In very complex matters, initial short letter briefs followed by a conference and then more detailed briefing may be required.

The parties must use judgment and common sense when evaluating what they should share in advance, especially when complexity dictates that issues withheld until the day of mediation cannot realistically be adequately evaluated in one day. Also, if a party believes that non monetary terms of a settlement might be complex or controversial, exchanging that information in advance will avoid unanticipated stalemates, as well as surface issues that may require input from others not in attendance.

In addition to exchange briefs, pre mediation confidential communications with a mediator either written or oral can be useful to learn of any possible issues that will impact the dynamic and potential for resolution. These communications also assist the mediator with an opportunity to see the matter from the perspective of someone who has been in it for a longer period and from a point of view that the mediator may not be able to see from normal preparation.

### **Agreement to Mediate, Attendance and Active Participation**

Absent a contractual agreement to mediate, there must be a voluntary agreement between both sides to agree to mediate. The single greatest determinant of success is having both sides that are motivated and committed in good faith to trying to reach a negotiated consensual resolution now. Transparency in the motivation of parties to a mediation is a must to develop the trust necessary to engage in frank discussion and move constructively through the process.

The second greatest determinant of success is having decision makers with final settlement authority personally attend and participate in the mediation. The practical reality of dispute

resolution is that parties must normally expect and be willing to change their evaluation of the dispute if they are to reach a settlement. Sometime this change arises because new facts or arguments are revealed during the mediation itself. Other times even with the same facts and evidence, an evaluation by a neutral party may cause each side to reevaluate their case. The presence and active participation of the final decision maker who experiences the reason for reevaluation increases exponentially the chances of an overall agreement.

2

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It is impossible to overstate the importance of both factors discussed above.

### **The Mediation Session**

While flexibility is a hallmark of mediation, there are some basic principles involving the session itself that improve the possibility of reaching a resolution. One guiding principle is that the parties and the mediator should start in an environment of open-mindedness, optimism, conciliation, and mutual respect. The mediator's opening remarks can help to enforce this desired environment encouraging the parties to work jointly toward resolution.

Another guiding principle is that the mediator and parties should start with the same knowledge of the current and complete position from both sides. It for that reason that an initial joint session with some style of opening statements is strongly encouraged. An effective joint session provides several building blocks to an eventual resolution. First, it may be the first or only opportunity for one party to speak about their case to the other party or hear from the opposition. Second, it is an opportunity for reflective listening. Third, it ensures both sides have "current" knowledge. Too often a party becomes entrenched in a position or viewpoint regarding a dispute that does not consider fact or evidence developments that occur during the life of a dispute or first come to light in the mediation. Finally, it allows the mediator to summarize the positions that have been presented, once, in front of all the stakeholders which helps to alleviate misconceptions or misunderstandings.

There are times when for various reasons a joint session may be inadvisable. If the parties are unable or unwilling to put aside aggressive advocacy, strong emotions, or are simply too rooted in positions, it may be inadvisable to require such a start. Part of the mediator's preparation should focus on the dynamics of the matter seeking opinions from counsel on their approach to a joint session.

In many ways, the most important part of the mediation session is the private caucus. These private sessions between each side individually and the mediator allow for a discussion of topics that a party wishes not to air in the joint session, allow the mediator to provide feedback on the party's case and provide an open environment to discuss possible roads to resolution. Often several private sessions are needed to move the parties to an eventual agreement.

### **Ending The Mediation**

The Mediation can end when both sides are willing to make commitments that will indeed resolve the dispute. If those commitments cannot be made but the mediator believes there may be a way to narrow the positions in a meaningful way that may result in a resolution the use of a mediator's proposal may be helpful. In practice, many mediations end without resolution if the Mediator uses the mediator's proposal as a vice rather than a subtle tool to provide a reasonable resolution without either side being forced to take a position that may appear to be "final". Also, the timing of such a proposal is of paramount importance. Many hours of positive progress can

3

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be lost if the mediator moves too quickly towards a proposal especially if it appears that the proposal is discussed near the end of the allotted time is an effort to resolve rather than adjourn or extend the mediation. Absent circumstances beyond the control of the parties and the mediator all participants, especially the mediator, must be willing and prepared to continue into evening hours or to another day if the prospect of a settlement is in sight. While most disputes can and should be mediated during one normal working day session, circumstances may develop that require extending the mediation.

### **Practical Issues**

Confidentiality – Confidentiality is a hallmark of mediation. The mediator must sign and then circulate to both sides for signature, a confidentiality agreement that memorializes everything discussed in confidence will remain that way.

Settlement – When a settlement is reached it is essential that the basic terms be memorialized in writing and signed by both parties at the mediation. The writing will not replace more formalized settlement agreements, but it will bind the parties to the resolution and should make clear that it may be admitted into evidence in a subsequent legal proceeding if necessary. Care must be taken at the mediation to reduce the resolution into a document that is complete enough to eliminate the chances of the agreement falling apart.

Mediator's Continuing Availability - A good mediator will make it clear that he or she remains available after the session ends to continue the discussion if the matter is not resolved but the parties remain committed to moving forward and closer, to pick up and continue if one side or the other reevaluates and seeks to reengage, and even when settlement is reached at the initial mediation session to assist with whatever administrative matters are needed to conclude the agreement for good.

