

MEDIATION



WHAT IS MEDIATION?

- Mediation is a form of alternative dispute resolution (ADR), a way of resolving disputes between two or more parties with concrete effects.
- Mediation is **an informal but structured, confidential, non-adversarial process** during which a neutral third person (a mediator) assists those involved in disagreement or dispute to **work towards finding a mutually acceptable agreement** (resolution to their dispute) which empowers all parties taking part.
- The term "mediation" broadly refers to any instance in which a **third party helps others reach agreement** or negotiate a settlement .

WHAT IS MEDIATION cont'd?

- In mediation, the **focus** is not on winning or losing, but on **finding creative and equitable solutions** that benefit both parties and **meet the parties' personal sense of fairness**.
- It is intended to bring two parties together to **clear up misunderstandings, find out concerns, and reach a lasting win-win resolution**.
- The process is **voluntary, although** it may be urged by an agency or a court.
- Mediation is a **confidential, cooperative** problem solving process where the parties meet together with a neutral mediator
- Mediation lets **people speak for themselves and make their own decisions** (self-determination and party autonomy).
- Although a mediator cannot force an outcome, the **process is very often effective**.

TYPES OF MEDIATION

- **Evaluative mediation**
- Evaluative mediation is focused on **providing the parties with an evaluation of their case and directing them toward settlement**. During an evaluative mediation process, when the parties agree that the mediator should do so, the mediator will express a view on what might be a fair or reasonable settlement.
- **Facilitative mediation**
- Facilitative mediator facilitates the conversation. **These mediators act as guardian of the process, not the content or the outcome**. During a facilitative mediation session the parties in dispute control both what will be discussed and how their issues will be resolved. The facilitative mediator is focused on helping the parties find a resolution to their dispute and to that end, the facilitative mediator provides a structure and agenda for the discussion.
- **Transformative mediation**
- Transformative mediation **looks at conflict as a crisis in communication**. Success is not measured by settlement but by the parties shifts toward:
 - (a) personal strength,
 - (b) interpersonal responsiveness,
 - (c) constructive interaction,
 - (d) new understandings of themselves and their situation,
 - (e) critically examining the possibilities,
 - (f) feeling better about each other, and
 - (g) making their own decisions.
- Those decisions can include settlement agreements or not.
- Transformative mediation practice is focused on supporting empowerment and recognition shifts, by allowing and encouraging deliberation, decision-making, and perspective-taking.

WHAT MAKES IT A MEDIATION?

- **1. An impartial third party facilitator.**

- The third party neutral, the mediator, is the person who makes the entire process work. As long as there is a neutral facilitator, the parties can trust that they have some safety and are not being abused by an interested party. All of these programs work because the mediator in them is known to either be neutral or supportive of the parties and not an involved party.

- **2. A third party who protects the integrity of the proceedings.**

- Usually this means that the facilitator or mediator protect the **confidentiality** of the proceedings. Thus, the mediator does not usurp the parties' rights to disclose, or not disclose information. The mediator preserves the integrity of the proceedings in all ways.
- Confidentiality also means that the facilitator is not subject to subpoena and thus cannot be made a witness.

- **3. Good faith from the participants.**

- Good faith includes not only entering into the ADR method with the intent to work towards a resolution, it also includes not using the process for outside purposes.
- What makes all of the proceedings mediation is that the parties are in the process to seek solutions rather than for an ulterior purpose (e.g. to abuse the other party by use of the process). Both the behavior and integrity of the neutral are important in creating, and preserving good faith.

- **4. The presence of the parties**

- Those with full authority to act for the parties must attend so that the parties can work towards resolution. If the decision makers do not attend the process becomes something other than mediation.
- It is the parties who are being resolved as much as it is the problem that is being settled.

- **5. An appropriate site or venue.**

- Generally this means a neutral site that is conducive to the process. It must mean a place where neutrality, confidentiality and inclusiveness may be obtained. The place is some times as important as the persons and is a part of the process often overlooked.

WHY MEDIATION

- When **parties are unwilling or unable to resolve a dispute** (through negotiation), one good option is to turn to mediation.
- **Mediation may be thought of as "assisted negotiation.**
- **"Negotiation may be thought of as "communications for agreement."**
- **Hence, mediation is "assisted communications for agreement."**
- When **conflicts are seemingly intractable**, they sometimes yield to mediation.
- Mediation is of particular importance **in long-running, deep-rooted conflicts**, as this type of conflict is rarely resolved without such outside assistance.
- Even if the full range of grievances cannot be resolved, mediation is **often useful for dealing with particular limited aspects of the wider conflict.**

HOW CAN MEDIATION HELP YOU?

- **The mediation process encourages:**
 - communication,
 - identifies issues,
 - explores options and
 - assists mutual problem solving.
- This promotes positive relationships and increases participation between parties.
- **Meanwhile:**
 - increasing the involvement and understanding among the participants in the decision making process,
 - building trust and
 - improving the quality of relationship
- Can successfully address conflict and disagreements.

USES OF MEDIATION TODAY

- **Family:**

- Prenuptial/Premarital agreements
- Financial or budget disagreements
- Separation
- Divorce
- Alimony
- Parenting plans (child custody and visitation)
- Eldercare
- Family businesses
- Adult sibling conflicts
- Parent(s)/adult children
- Estates
- Medical ethics and end-of-life

- **Workplace:**

- Wrongful termination
- Workers compensation
- Discrimination
- Harassment
- Grievances
- Labour management

- **Public disputes:**

- Environmental
- Land-use

- **Commercial:**

- Landlord/tenant
- Homeowners' associations
- Builders/contractors/realtors/homeowners
- Contracts
- Medical malpractice
- Personal injury
- Partnerships

- **Other:**

- School conflicts
- Violence-prevention
- Victim-Offender mediation
- Non-profit organizations
- Faith communities

BENEFITS OF MEDIATION

No matter what form it takes: evaluative, facilitative, or transformative, private or court-connected, **mediation provides a framework for parties to:**

- 1. Speak directly to each other with the assistance of a mediator.
- 2. Exercise complete control over the resolution.
- 3. Achieve remedies that may be outside the scope of the judicial process.
- 4. Maintain privacy/confidentiality and avoid publicity.
- 5. Privately reveal to the mediator in caucus sensitive interests that may assist the mediator to facilitate broad solutions.
- 6. Preserve or minimize damage to relationships.
- 7. Reduce cost and delay of dispute resolution.
- 8. Mutuality in working towards a solution
- 9. Support from mediator in facilitating and guiding the process

WHO IS A MEDIATOR

- A mediator is the **third party neutral** who assist the parties in a conflict to determine a resolution.
- A mediator is a **necessary participant** to the mediation process
- This may take the form of an **individual or panel**
- Often, though not always, they have **a lot of background knowledge of the issues** and type of dispute.
- Though many mediators are highly trained and experienced, **not all are professionals**, and they **come from many different walks of life**.

QUALITIES OF A MEDIATOR

- The following are useful criteria for selecting a mediator:
 - Personal attributes—patience, empathy, intelligence, optimism and flexibility
 - Qualifications—knowledge of the theory and practice of conflict, negotiation and mediation, mediations skills.
 - Experience— mediation experience, experience in the substantive area of dispute and personal life experience
 - Training
 - Professional background
 - Certification and its value
 - Suitability of the mediation model
 - Conflicts of interest
 - Cost/fee

ROLE OF THE MEDIATOR

- The mediator's primary role is to act as a neutral third party who facilitates discussions between the parties.
- **A mediator role includes but not limited to:**
 - Facilitating the mediation process for the parties
 - Opening communication between the parties
 - Probe facts, position and interest of the parties
 - Promoting understanding
 - Focusing the parties on their interest
 - Keeping the negotiation process moving forward
 - Assists the parties in creating and refining settlement options.
 - creative problem solving
 - Helps parties understand ramifications if they do not reach a settlement
 - Brings closure to sessions.
 - Facilitates or monitors enforcement or execution of settlement agreement on occasion
- To enable the parties to reach their own agreement the **mediators assist participants to focus on:**
 - the real issues of the dispute and stay away from personal attacks
 - clarify misunderstandings,
 - explore solutions, and
 - negotiate a settlement.

ROLE OF THE MEDIATOR cont'd

- In addition, the mediator can contribute to the process by ensuring that all necessary preparations are complete
- Finally, the mediator should:
 - restrict pressure, aggression and intimidation,
 - demonstrate how to communicate through employing good speaking and listening skills, and
 - paying attention to non-verbal messages and other signals emanating from the context of the mediation
 - possibly contributing expertise and experience.

ROLE OF THE MEDIATOR cont'd

- The key is the ability of the mediator to **create a more productive discussion** than the parties could have had by themselves.
- To do this, mediators:
 - help the parties determine facts;
 - they show empathy and impartiality with the parties;
 - they help the parties generate new ideas.
- Mediators also exercise political skill and **use persuasion to get people to soften hard-line positions.**
- However, **the mediator does not decide who is right or wrong or issue a decision.**
- Instead, the mediator **helps the parties work out their own solutions to problems.**

MEDIATION PROCESS And SKILLS

PHASES of Mediation

- Three main phases
 - Opening Session
 - Caucus
 - Closure

THE PURPOSES OF EACH PHASE

A. Opening session:

1. Introduce the participants,
2. Review the process,
3. Establish the rules to be followed,
4. Permit the parties to tell their version of the dispute
- exchange information,
5. Allow the parties to express how they feel, and quickly identify areas of agreement and disagreement.

THE PURPOSES OF EACH PHASE

B. Private Caucus:

- B. Provides the parties the opportunity to share sensitive information** with the mediator,
 1. Vent feelings,
 2. Reveal hidden interests,
 3. Discuss settlement options and trade offers back and forth with the other side in a no confrontational manner.

THE PURPOSES OF EACH PHASE

C. Closure:

- 1. Point at which the mediator determines if the parties have reached a settlement that satisfies each of them and, if so, to hopefully commit the settlement to writing.**
- 2. If there is no closure, the mediator will declare an impasse**

Mediation Skills

- Basic mediation skills required are in the field of communication which include the following
 - Active Listening
 - Reflection
 - Reframing
 - Check-in
 - Question

ACTIVE LISTENING

- Effective listening is more than just being quiet and hearing the speaker's word.
- Active listening is a skill involving the listener active efforts to receive both verbal and non-verbal messages.
- When a listener has received a coded message and sent it through his or her translation process, the listener then has four communication choices in order to continue exchanging information:

ACTIVE LISTENING

1. Give a nonverbal, passive response and hope that the speaker will send more information;
2. Acknowledge the receipt of the message but do not make any comment on content;
3. Actively acknowledge the message by feeding back what has been heard;
4. Actively engage in a dialogue that sends back a message about the listener's concerns and views

Verbal Acknowledgement without comment

- The next level of listener communication is verbal acknowledgement of message receipt, without commenting on the content.
- Common acknowledgement responses include such verbal cues as: “hmmm” “really” “yes” “interesting” “you don’t say” “oh”
- These verbal responses are often accompanied by some of the non verbal cues listed above.

Active Listening

- The listener makes active acknowledgement of the receipt of the message and feeds back his or her interpretation of what was said.
- According to communications theory, genuine communication has not taken place until the listener uses feedback to verify understanding of the message.

Active Listening

- Verbal messages contain both content and feeling or emotion:
 - CONTENT: Refers to substantive facts or information
 - FEELING: Refers to the sentiment or emotion and degrees of importance that the sender places upon the information being communicated.

Each message is a combination of content and feelings. The listener must determine if it is more appropriate to feed back feelings, content, or a mix of the two when deciding what to communicate back to the speaker.

Reflecting

- This is an active listening skills in which the mediator mirrors to the speaker both the feeling and the words that the speaker has just said.
- Effective reflections capture the full range of what the speaker has said
- Match the rhythm, intensity and energy of what is said
- Do not soften sanitize or detoxify
 - Mediators use reflection to respond to communication of one party

Reflecting

- Everyone knows that land is mine and has always been mine.
- Reflect Statement
 - You mean everybody knows this about your land?

Reframing

- It is an active listening skills in which a mediator captures the expressed underlying needs and interests expressed by the party.
- Reframing needs to be used with care. Mediators need to be mindful that they do not direct or manipulate when using the reframe

Reframing

- Eg. My daughter already was attacked by their dog twice and her leg was seriously wounded. Our family will not content until they get ride of this animal
- Reframe by mediator
 - It sounds like your major concern here is to make sure that your daughter is safe

Check -in

- It a mediator active listening skill in which the mediator stops and makes sure each party is comfortable with the mediation and the way the mediation conversation is preceding.
- This provide the opportunity for each party to step back and assess if they want to continue with the mediation as they have been proceeding or if they prefer to change the mediation conversation.

Check -in

- Examples: Is it okay with you? I would like to check in and see if you are comfortable with the way the conversation is going.

Questions

- The purpose is to help the speaker get clearer about what they are talking about.
- The questions are from what the speaker said
 - Eg is that right?
 - Is there anything else?
 - Would like to say anymore about that?

*THREE CRITICAL MATTERS THAT EVERY MEDIATOR SHOULD
STRESS TO PARTICIPANTS AT THE
BEGINNING OF A MEDIATION*

A.

- **The mediator will not impose a settlement on the parties or make up their minds for them.**
- Mediation is a process whereby the parties themselves reach agreement rather than ask a court or other outside party to impose a solution.

*THREE CRITICAL MATTERS THAT EVERY MEDIATOR SHOULD
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- B.
- **The process will be confidential in that the mediator will not reveal to the parties** what the other side has told the mediator during private caucus.
 - Furthermore, the outcome of the mediation will be confidential whether or not a settlement is reached.
 - Finally, the mediator will not testify in court for either side about anything said or done related to the mediation. Without such confidentiality, it would be difficult if not impossible to get the parties to participate meaningfully in the process.

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C.

Decision-makers for the parties must attend the mediation.

- **Because mediation** is a process whereby the parties themselves work out a settlement, only those with the authority to settle can participate meaningfully in mediation.

THANKS FOR LISTENING

