

6.3: Mediation

Learning Objectives

- Learn what mediation is.
- Explore the process of mediation as an alternative dispute resolution (ADR) strategy.
- Identify disputes suitable to mediation as a form of ADR.
- Become familiar with the benefits and drawbacks of mediation as a form of ADR.

Mediation is a method of ADR in which parties work to form a mutually acceptable agreement. Like negotiation, parties in mediation do not vest authority to decide the dispute in a neutral third party. Instead, this authority remains with the parties themselves, who are free to terminate mediation if they believe it is not working. Often, when parties terminate mediation, they pursue another form of ADR, such as arbitration, or they choose to litigate their claims in court. Mediation is appropriate only for parties who are willing to participate in the process. Like negotiation, mediation seeks a “win-win” outcome for the parties involved. Additionally, mediation is confidential, which can be an attractive attribute for people who wish to avoid the public nature of litigation. The mediation process is usually much faster than litigation, and the associated costs can be substantially less expensive than litigation.

Unlike in many negotiations, a third party is involved in mediation. Indeed, a neutral mediator is crucial to the mediation process. Mediators act as a go-between for the parties, seeking to facilitate the agreement. Requirements to be a mediator vary by state. See "Hyperlink: Mediators" to compare the requirements between states. There are no uniform licensing requirements, but some states require specific training or qualifications for a person to be certified as a mediator. Mediators do not provide advice on the subject matter of the dispute. In fact, the mediators may not possess any subject-matter expertise concerning the nature of the dispute. However, many mediators are trained in conflict resolution, and this allows them to employ methods to discover common goals or objectives, set aside issues that are not relevant, and facilitate an agreement into which the parties will voluntarily enter. Mediators try to find common ground by identifying common goals or objectives and by asking parties to set aside the sometimes emotionally laden obstacles that are not relevant to the sought-after agreement itself.

Hyperlink: Mediators

<http://www.mediationworks.com/medcert3/staterequirements.htm>

Visit this site to see the various requirements and qualifications to become a mediator in the different states.

Disputants choose their mediator. This choice is often made based on the mediator's reputation as a skilled conflict resolution expert, professional background, training, experience, cost, and availability. After a mediator is chosen, the parties prepare for mediation. For instance, prior to the mediation process, the mediator typically asks the parties to sign a mediation agreement. This agreement may embody the parties' commitments to proceed in good faith, understanding of the voluntary nature of the process, commitments to confidentiality, and recognition of the mediator's role of neutrality rather than one of legal counsel. At the outset, the mediator typically explains the process that the mediation will observe. The parties then proceed according to that plan, which may include opening statements, face-to-face communication, or indirect communication through the mediator. The mediator may suggest options for resolution and, depending on his or her skill, may be able to suggest alternatives not previously considered by the disputants.

Mediation is often an option for parties who cannot negotiate with each other but who could reach a mutually beneficial or mutually acceptable resolution with the assistance of a neutral party to help sort out the issues to find a resolution that achieves the parties' objectives. Sometimes parties in mediation retain attorneys, but this is not required. If parties do retain counsel, their costs for participating in the mediation will obviously increase.

In business, mediation is often the method of ADR used in disputes between employers and employees about topics such as workplace conditions, wrongful discharge, or advancement grievances. Mediation is used in disputes between businesses, such as in contract disputes. Mediation is also used for disputes arising between businesses and consumers, such as in medical malpractice cases or health care disputes.

Like other forms of dispute resolution, mediation has benefits and drawbacks. Benefits are many. They include the relative expediency of reaching a resolution, the reduced costs as compared to litigation, the ability for parties that are unable to

communicate with each other to resolve their dispute using a nonadversarial process, the imposition of rules on the process by the mediator to keep parties “within bounds” of the process, confidentiality, and the voluntary nature of participation. Of course, the potential for a “win-win” outcome is a benefit. Attorneys may or may not be involved, and this can be viewed as either a benefit or a drawback, depending on the circumstances.

Drawbacks to mediation also exist. For example, if disputants are not willing to participate in the mediation process, the mediation will not work. This is because mediation requires voluntary participation between willing parties to reach a mutually agreeable resolution. Additionally, even after considerable effort by the parties in dispute, the mediation may fail. This means that the resolution of the problem may have to be postponed until another form of ADR is used, or until the parties litigate their case in court. Since mediators are individuals, they have different levels of expertise in conflict resolution, and they possess different backgrounds and worldviews that might influence the manner in which they conduct mediation. Parties may be satisfied with one mediator but not satisfied in subsequent mediations with a different mediator. Even if an agreement is reached, the mediation itself is usually not binding. Parties can later become dissatisfied with the agreement reached during mediation and choose to pursue the dispute through other ADR methods or through litigation. For this reason, parties often enter into a legally binding contract that embodies the terms of the resolution of the mediation immediately on conclusion of the successful mediation. Therefore, the terms of the mediation can become binding if they are reduced to such a contract, and some parties may find this to be disadvantageous to their interests. Of course, any party that signs such an agreement would do so voluntarily. However, in some cases, if legal counsel is not involved, parties may not fully understand the implications of the agreement that they are signing.

Key Takeaways

Mediation is a method of ADR in which the parties retain power to decide the issue themselves without vesting that power in an outside decision-maker. However, mediation relies on neutral mediators who facilitate the mediation process to assist the parties in achieving an acceptable, voluntary agreement. Mediation is more formal than negotiation but less formal than arbitration or litigation. Mediation is relatively inexpensive, fast, and confidential, unlike litigation. Though nonbinding mediation resolutions are not binding on the parties, these resolution agreements may be incorporated into a legally binding contract, which is binding on the parties who execute the contract. Mediation does not follow a uniform set of rules, though mediators typically set forth rules that the mediation will observe at the outset of the process. Successful mediation often reflects not only the parties’ willingness to participate but also the mediator’s skill. There is no uniform set of rules for mediators to become licensed, and rules vary by state regarding requirements for mediator certification.

? Exercise 6.3.1

1. Visit the link in "Hyperlink: Mediators" and find your state’s requirements and qualifications for mediators. What would it take for you to become a mediator in your state? Do you think that your state requirements ensure that only qualified mediators practice? Why or why not?
2. Identify a situation in which you would choose mediation as your preferred method of dispute resolution. Why is mediation the best method in this situation? What are the potential benefits and drawbacks of mediation in this situation?
3. Should mediators be required to be licensed, like attorneys or physicians, before practicing? Why or why not?
4. Visit www.sfhgroup.com/ca/training/online-training/test-your-skills.php and scroll down to Mediation game. Click on “play game” under “The Angry Neighbours.” This is a free interactive mediation exercise. After completing the mediation, answer the following questions: Were you able to successfully mediate this dispute? If you did not reach a successful resolution, go back and try it again. See if you can reach a successful resolution. What mediation strategies did you learn? What works? What doesn’t work?

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