

MEDIATION: A MISUNDERSTOOD PROCESS

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INTRODUCTION

Mediation is a consensual process in which the parties voluntarily agree to participate. The mediator is an engaged but impartial participant. The mediator’s role is to assist the parties in arriving at a mutually agreeable solution to their problem or dispute.

MEDIATION CHECKLIST

Initially, a mediator needs to monitor his biases and prejudices. Just as a pilot and copilot go through a preflight checklist **every** time they fly in order not to overlook anything of importance, a mediator should perform the same mental task. He should also go through this reflective process with the participants. The mediator needs to consider whether he has sufficient information concerning the parties’ particular problem. Does he understand the subject matter well enough to offer insights that the parties might not readily see or appreciate? The mediator should explain to the parties the process upon

which they are about to embark. The mediator's role should be discussed. The concept of impartiality should be reviewed so that each party understands the role of the mediator.

He is not a judge, an arbitrator or a referee. He is there to assist the parties in a consensual process. The goal is a mutual meeting of the minds. Many participants may be totally unfamiliar or only vaguely aware of the mediation process. Stating the obvious has value if only to insure that everyone begins the process with the same expectations. This technique will likely minimize misunderstandings and reduce friction as the parties grapple with their problems.

A mediator needs to self-monitor his position of power in the mediation. He must resist the temptation to impose his views upon the parties. He must guard against manipulating them into a solution that he advocates instead of one that they desire or agree to adopt. There may be times in which the parties agree upon a resolution to which the mediator disagrees. It may be less than an optimum solution from the mediator's point of view. The mediator must remember that it is the parties' agreement and not his success that is important. A mediator should help guide the discussions. He should resist the temptation to impose solutions. Mediation agreements are more likely to endure if the parties freely find their own way into agreeing with one another.

There are also the less obvious but important aspects of space and interior design that help to facilitate mediation. A pleasant place to meet with good interior design helps the parties relax. Comfortable chairs or sofas and good lightning, preferably natural light,

are all elements in providing an environment that maximizes the parties' sense of well being and comfort.

A mediator needs to address the emotions of the parties. People are human. They have feelings; they do not have merely problems to solve. Feelings matter. A mediator must keep in mind that people need an opportunity to allow their feelings to be expressed. They need an opportunity to be assured that they are being listened-to and that what they are saying is being heard by the other side and by the mediator. A mediator may, at times, be required to ask the parties to control their feelings or bracket their feelings for the sake of focusing upon the problem at hand. These are techniques the mediator may use but what is not arguable is that people come to mediation with 'baggage.' It may entail a history of broken promises or bad relationships. No matter what it is, the mediator needs to be sensitive to the context in which the parties come together. Are they a couple with marital problems? Is it a landlord/tenant dispute? Is it court ordered mediation prior to a trial? Is it representatives of the Peoples Republic of China and the U.S. negotiating over the return of a United States' surveillance plane?

The mediator also needs to consider, in his checklist, whether the parties in the room are all the parties that are involved in the mediation? There is the situation in which the parties may be engaged in representative mediation. The people in the room are participating as individuals but they are also, in fact, representing distinct special interest groups. These other constituencies may even object to their representatives having a conversation with the other side. Sometimes representatives cannot agree to participate in

mediation. In that instance, the only alternative viable alternative may be to participate in a “facilitated” conversation in which the parties meet to talk but not necessarily mediate.

If the parties are engaged in a representative mediation, for example a labor/management dispute, the mediator needs to find ways for the parties to periodically consult with and report to their constituencies about the progress of the mediation. There should be a mechanism for feedback from the constituencies so that the information can be constructively introduced into the mediation process. The mediator’s awareness of “others” who are effected by the mediation will make it more likely that any mediated agreement will be adopted and supported by those outside the room. If the constituencies see the process as transparent and fair it is more likely that the agreement will endure.

Trust is an issue. The mediator must always be mindful of it. Trust can be broken down into two parts: the trust that the parties have in the mediator, and the trust that the parties have in each other. The mediator needs to earn the trust of the parties. His actions of impartiality, fairness and open-mindedness are elements in establishing that trust. There is some disagreement on whether the parties need to trust one another. Can they come to a consensual agreement on a distinct topic without trusting one another? Is the likelihood of their reaching agreement predicated upon their trusting one another? Is this a chicken and egg type of argument? It may be that by the process of the parties meeting during the course of the mediation they “learn” to trust one another. To ask them to trust a priori, although laudatory, is unlikely. Actions speak louder than words. The mediator can only hope to create a climate in which the seeds of trust may be

sown. He cannot expect people to ignore their basic instincts that may be to distrust the other parties involved in the mediation.

MAXIMS

1. Mediation is a consensual process.
2. The mediator should insure that all the participants fully understand the process.
3. The mediator should try to establish the facts: inquire with curiosity.
4. The mediator is an impartial but active participant who uses guided intervention.
5. The mediator needs to be open-minded. He also needs to encourage open-mindedness by the participants.
6. Be aware of the human component; feelings matter.
7. The mediator should be rigorous in investigating the issues but sensitive toward the parties involved.
8. The mediator should be aware of his prejudices to avoid impeding the process.
9. The mediator should cultivate a climate of trust.
10. The mediator should avoid coercive tactics to insure durable solutions.
11. In representative mediation, the parties should regularly report back and consult with their constituencies.

There are also ethical issues to consider which have a practical reality. Is the mediator required to adopt an ethical stance? Are the parties required to be ethical in their

dealings once mediation commences? It seems that an effective mediator is an ethical mediator who tries to guide the participants into an ethical process. What is more problematical is what a mediator should do when confronted with an unethical situation. There seems to be no easy answer except to say that a mediator probably should not continue in a mediation in which he knows a party is actively engaging in unethical behavior. The problem arises in the uncertainty of the mediator's "knowing" a party's behavior is deceitful or unethical. Suspicion is not proof.

PERSONAL PERSPECTIVES

I am an attorney who practices in Boston, Massachusetts. The vast majority of civil (non-criminal) cases filed in a court of law are settled prior to trial. The statistical average is over 95%. It seems self-evident that a substantial part of an attorney's work is negotiating with different types of people. Some of these people are attorneys; some are clients, corporate managers, witnesses, insurance representatives, financial advisors, doctors, friends and relatives to name just a few. Mediation presents an opportunity for these disparate people to come together and find out what's on each other's mind. It also provides them an opportunity to see the case or the dispute from another point of view or from several points of view. Most of the people engaged in litigation related mediation, either as parties or as mediators, have never been trained in the art and science of mediation. Anyone can call himself a mediator and anyone can engage in mediation on behalf of a client. There are opportunities for mistakes, coercion and conflicts of interest.

The issues upon which I am still unclear and for which I seek clarification at this conference are the following:

- Is an ethical viewpoint a prerequisite to mediation?
- Is there a moral quality to all mediation?
- Are shared values among the mediator and the participants necessary?
- Does the mediator have an obligation to demand ethical conduct from the participants?
- Is there a limit to reasoned-based mediation?
- How do we account or take into account the emotions of the participants?
- How much should the mediator know about the participants?
- Is the best advice for mediation participants the oldest rule? “Do unto others as you would have them do unto you.”
- Is the respect for the dignity of all human beings a value imbedded into the mediation process?
- How do cultural pre-dispositions effect the mediation process?

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