

THE MEDIATION PROCESS

THE CONCEPT

Mediation is a voluntary process in which the parties make decisions together based on their understanding of their own views, each other's, and the reality they face. The mediator works as a non-coercive neutral to help the parties negotiate an agreement that serves them better than their alternatives. Understanding is the key to the process.

THE BENEFITS

The benefits of using mediation are that disputes can be resolved quickly, thus lessening the strain on relationships. As the process of mediation is much faster, the cost is much lower than the costs of litigation. The process is entirely confidential. Thus the conflict is not exposed to public view and information is kept private. Mediation is conducted in an informal setting. The parties can be more relaxed. Since the emphasis is on problem solving, mediation is non-confrontational. The parties find their own solutions through the facilitation of the mediator and therefore, the solutions are usually more workable and permanent.

THE DISADVANTAGES

The disadvantages are that mediation is voluntary and requires more commitment by the parties to making it work. If one party refuses to come at all or does not actively try to find solutions, mediation will not work. Secondly, mediated settlements are not enforceable, however, the parties can then enter into a formal agreement or consent court order in order to carry out the settlement. This is the role of counsel after the conclusion of the mediation.

THE MEDIATION PROCESS

Generally speaking, there are four steps to the mediation process:

1. In step one, the Mediator sets the tone of the meeting by explaining the process, describing the roles and responsibilities of those present, setting down some ground rules for behaviour, and obtaining a commitment to the process which involves actively seeking win/win solutions.
2. In the second step, each party defines the disputes as he or she sees them. Generally speaking, each party's position on each dispute emerges during this step. The Mediator can begin to define an agenda of issues that need solution and confirm that the parties are all working on the same set of facts. The Mediator will ensure that each party will have heard the other side and will have understood the opposing position.

The law plays an important part in this step. A mediator does not give legal or tax advice, but a mediator is an advocate for clarity. The mediator's role is to ensure the parties understand the law and facts. Therefore lawyers play an important role in the mediation, by explaining the law to all the parties and how they view its impact on the case. The mediator is neutral, but is not neutral about getting the law, the issues and the facts on the table. The mediator encourages the lawyers to talk about the law with each other in the presence of the parties and works to ensure that all the parties understand how the law impacts both sides of the issue.

3. In step three, the Mediator moves to flesh out the underlying interests and identifying what information is agreed upon by all parties and tests any assumptions upon which the parties are relying. The Mediator can determine items of general agreement (if any) and begin to focus the parties on identifying the interests that lie behind their stated positions, both for themselves and for the others.
4. In the final step, the purpose is to generate as many options for solutions that the parties can think of. The ground rules are that the parties do not evaluate or criticize the ideas as they are posted and we do not attribute the ideas to any party. The options are then distilled down to those that will satisfy the parties' interests and needs. The parties will then work towards the details of an agreed settlement. The Mediator prepares a Mediation Report which can be used as the basis for preparing binding agreements.

THE ROLE OF THE MEDIATOR

The Mediator is a neutral facilitator who ensures that the mediation process is kept going. The Mediator cannot impose a solution on the parties. The parties must understand that the object of mediation is for them to find a solution through their active participation in the process. The Mediator simply helps the parties achieve this.

The Mediator sets the tone of the mediation conference. The Mediator will establish a set of ground rules for all to follow. These rules include such matters as listening quietly while other parties speak, not interrupting, remaining seated and calm, and generally treating everyone at the conference with respect.

The Mediator will help the parties narrow the issues and seek ways of dealing with them to everyone's mutual satisfaction.

THE ROLE OF LEGAL COUNSEL

Parties are generally, but not always, represented by legal counsel. Where the mediated settlement needs to be reduced to a legal agreement or consent Court order, counsel must be involved.

Counsel may have a role in mediation at three stages: preparing their clients for mediation, attending at any meetings in preparation for the mediation, and attending the mediation conference itself.

Lawyers play an important role in the mediation itself, by explaining the law to all the parties and how they view its impact on the case. This is not an adversarial process. The mediator encourages the lawyers to talk candidly about the law with each other in the presence of the parties and works to ensure that all the parties understand how the law impacts both sides of the issue.

Counsel may describe the process of mediation to their clients and discuss this as a possible alternative to other methods of solving disputes, such as arbitration or litigation. It is important to discuss the mediation process and to emphasize the role of the mediator since this is probably something their clients have not experienced before.

Counsel may also discuss their client's best and worst alternatives to reaching a settlement through mediation. This involves not only a consideration of the possible legal outcomes but also a discussion of the cost in time, money, and emotion to alternative methods of solving the issues. To do this, counsel must have a thorough knowledge of the applicable law and the facts of the individual case. In such a way, counsel will understand the strengths and weaknesses of their clients' case and what their clients' and the opposing disputants' interests are.

If a case management discussion is held, counsel may help to narrow down the issues, provide the mediator with an agreed statement of facts and any relevant documents. This preliminary meeting may also be used to focus attention on the mediation process and the part that all the players have in it.

The parties will have to decide whether their legal counsel will attend at the mediation conference. Counsel should always be available to their clients for consultation at any time during the conference. If lawyers attend the conference, their role is very different from that of the advocate in court.

It is very important in the mediation conference that the parties take ownership of the issues and actively participate in their solutions. They are the primary participants in the mediation process with the mediator providing the means to move the conference along towards its goals. Counsel's role at the mediation conference is extremely flexible. The nature of the client and the dispute will often determine the extent of counsel's involvement. Counsel may participate by providing information, asking questions, suggesting solutions, and encouraging the client to actively participate. Most of the substantive discussion should be carried on by the client.

The emphasis in mediation is on counsel's collaborative and communication skills rather than advocacy skills. The tone is one of conciliation and cooperation, not cross examination. Everyone is looking for the best win/win solution and this requires an understanding of all the parties' interests not just the interest of one side. To this end, counsel may also help their clients to manage their emotions and focus on the goal of solving the issues. Where there is an actual or perceived imbalance in power among the parties, counsel's presence can even this out.

Once the mediation has reached the stage of seeking solutions, counsel's legal knowledge may help find solutions that will satisfy everyone and that will be legally effective.

Counsel's presence at the mediation conference will be counterproductive if their clients do not understand the mediation process and believe that their counsel are attending to advocate for them or, worse, to browbeat the other side into submission. There is a trained tendency for counsel to take over their client's case and argue strongly in their favour. There is a natural tendency for their clients to let them. This is inappropriate in a mediation setting. Rather, counsel must bring skills to the mediation process that brings parties together, not ones that force them apart.

Our thanks to Anne de Villars of de Villars Jones in Edmonton for sharing her description of the mediation process, which we have used and modified in this article.