



Technical

The Mediation Process and Roles of the Parties

Date: 12 Sep 2018

Introduction

1. To give a further understanding of mediation, this Article will cover the various stages of the process and the roles of the parties.

Stages of Mediation?

2. In general, there are three main stages to mediation:
 - Pre-Mediation (1).
 - Mediation (2).
 - Post-Mediation (3).
3. This basic framework can be sub-divided¹ and is summarised in the following table:

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(Table from Gould, N. King, C. Britton, P (2010), Page 8)

BASIC FRAMEWORK	GOLDBERG	BROWN and MARRIOTT
Pre-Mediation	A) Pre-Mediation - Getting to the table	1) The Initial Inquiry - Engaging the Parties 2) Contract to Mediate 3) Preliminary Communications and Preparations
Mediation	B) Opening of the Mediation C) Parties' Opening Presentations D) Mediated Negotiations E) Agreement	4) Meeting the Parties 5) The Parties' Presentations 6) Information Gathering 7) Facilitating Negotiations 8) Impasse Strategies 9) Terminating Mediation and Recording Agreement
Post-Mediation		10) Post-Termination Phase

1 Goldberg et al (2007) suggest a five-stage process, while Brown and Marriott (1999) propose 10.

Pre-Mediation (1)

4. Parties to a dispute can agree to appoint anyone to act as the Mediator, although there are bodies that will assist in appointing one.
5. The parties may choose their own Mediator directly, from a panel of mediators, may ask a panel to nominate one or recommend names from whom they can choose to act as the Mediator for a dispute in accordance with the wishes of the parties or under contractual agreement or the provisions of any relevant Court Order.
6. The Mediator makes the necessary arrangements for the mediation as required or agreed by the parties or under the terms of any scheme, including:
 - Drafting the agreement for mediation, submitting it for approval by the parties and preparing the final form for signature (incorporating any agreed amendments) if requested.
 - Compiling names and roles of attendees for circulation of a participant's form before the mediation takes place.
 - Facilitating an agreement as to the date, start time and providing venue arrangements for the mediation when necessary.
 - Organising the exchange of case summaries and document bundles between the parties and the Mediator when requested.
 - Setting up any pre-mediation meetings agreed by the parties and the Mediator if requested.

The Mediation (2)

7. Usually, the parties will have a private room for confidential consultations on their own and with the Mediator during the mediation. There is also a further room large enough for all parties to meet with the Mediator jointly. The Mediator chairs and takes responsibility for determining the procedure at the mediation in consultation with the parties.
8. The likely procedure will comprise:
 - Preliminary meetings with each of the parties when they arrive at the venue.
 - A joint meeting of all attending the mediation, at which each of the parties will normally be invited to make an oral presentation.

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- Further private meetings and joint meetings (which may involve all or some of each party's team).

9. The mediation can end in a number of different ways:

- Settlement of the dispute, in whole or in part, and a signed Settlement Agreement.
- An “*in principle settlement*” of the dispute with an agreement drafted after the mediation day.
- A settlement, for the time being at least, cannot be reached.
- One or more of the parties leave the mediation before settlement is achieved.
- An agreed adjournment, for such time and on such terms, as the parties and the Mediator agree.

Post-Mediation (3)

10. Post-mediation will either involve execution of the Settlement Agreement, suspension of the mediation or a continuation towards a trial or arbitration.
11. If the parties do not settle, it does not mean the mediation was unsuccessful. The parties may have gained a greater understanding of their dispute and may have narrowed the issues.

Roles of the Parties

Role of the Mediator

12. The role of the Mediator is to facilitate the parties to reach their own agreement. *Boulle and Nesic (2001) Mediation²* identifies many functions of a Mediator as follows:
 - Developing trust and confidence.
 - Establishing a framework for co-operative decision making.
 - Analysing the conflict and designing appropriate interventions.
 - Promoting constructive communication.
 - Facilitating negotiation and problem solving.
 - Educating the parties.
 - Empowering the parties.

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13. Mediators encourage the parties to explore behind each other's stated positions and consider each other's interests and needs.
14. The Mediator will restrict pressure, aggression and intimidation. The Mediator should also demonstrate to the inexperienced parties how to communicate through employing good speaking and listening skills and paying attention to non-verbal messages. The mediator should direct the parties to focus on the issues and stay away from personal attacks.

2 Boule, L. Nestic, M (2001) Mediation - Principles Process Practice page 158 to 174

Roles of the Representatives

15. The parties' representatives, such as lawyers, do not adopt advocacy roles but those of supporter and trusted advisor. They should assist the parties to present their cases where required. The representatives have roles even before the parties attend the mediation. The first question the representatives should discuss with the parties is whether or not the dispute should be mediated and, secondly, when the mediation should be held. The representatives should have made a proper assessment of the case before deciding.

Roles of the Parties

16. The roles of the parties will vary according to their motivations and skills, the roles of their legal advisers, the model of mediation, the style of Mediator and the culture in which the mediation takes place.
17. In the mediation, the parties should send someone who has authority to settle. They should be willing to listen to each other's positions and be willing to negotiate a settlement. This would be useful in any future dispute. Each party should consider the needs of the other. There is little point in pursuing something that the other parties are unable to provide.
18. A lot of what the parties should do is done before the mediation. The parties should have carried out an assessment of their case and know their boundaries for settlement. Depending on the nature of the dispute, this can involve asking and deciding the following questions:
 - What are the key issues in the case?

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- What are the strengths and weaknesses?
 - What evidence will be needed if the case goes to trial, arbitration or adjudication?
 - Is that evidence available?
 - What are the cost implications of winning or losing the case?
 - What is the best alternative to doing a deal?
 - How will the other party be approaching these questions?
19. Other qualitative factors that should be taken into account, when deciding whether to settle at mediation or carry on to arbitration or litigation, include:
- Stress.
 - Uncertainty.
 - Lost management time.
 - Lost business opportunities.
 - Adverse effect on reputation.

Summary

20. In order for mediation to work, the parties need to know their positions and have a band in which they would be willing to settle. Therefore, work done at the pre-mediation stage is just as important (if not more) than the actual mediation.

Note: This article is based on the author's own research.

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