

The Mediation Process



U.S. Army ADR Program
Office of the General Counsel

Mediation

Definition

“Private, informal dispute resolution process in which a neutral third person, the mediator, helps disputing parties to reach an agreement. The mediator has no power to impose a decision on the parties.”

- Black's Law Dictionary (6th Ed. 1990)

Mediation

An Alternative Definition...

“Mediation is an imperfect process, that employs an imperfect third person, to help imperfect people, come to an imperfect agreement, in an imperfect world.”

- Leonard Marlow

Mediation

History

- Dates back to ancient Greece
- Emerged as a popular alternative to litigation in mid-20th century
- Now the most widely-used ADR process
- Mediation ***IS NOT*** Arbitration
 - ✓ A mediator is not a decision-maker
 - ✓ Results of mediation can't be appealed
 - ✓ Mediation is less formal, less structured
 - ✓ Arbitration is adversarial, mediation is not

Mediation

Features

- Generally voluntary
- Non-adversarial
- Highly adaptable
- Confidential
- Neutral 3rd party
 - ✓ Impartial
 - ✓ Special training
 - ✓ May or may not be a subject matter expert
 - ✓ Not a judge or decision-maker
- Parties exercise total control over outcome
- Preserves relationship between disputants



Mediation Approaches

➤ **Facilitative:** the mediator...

- ✓ **Facilitates** positive discussion between the parties
- ✓ **Helps** the parties identify their interests and goals for resolution
- ✓ **Assists** the parties develop and evaluate options and proposals
- ✓ **Asks** probing questions to test parties' assumptions about the strength of their cases or likely outcome if case goes to litigation

➤ **Evaluative:** the mediator...

- ✓ **Assesses** the strengths and weaknesses for the claim or probes the parties' interest
- ✓ **Predicts** courts outcomes or the impact of not settling
- ✓ **Develops and proposes** settlement terms for consideration
- ✓ **Urges/pushes** parties to accept settlement terms

➤ Regardless of approach, parties **ALWAYS** control the outcome of mediation

The Agreement to Mediate

- What it is: a written agreement to engage in mediation to resolve issues in controversy
- What it does: provides a “road map” for convening and conducting the mediation
- Memorializes the intent of the parties to engage in mediation in good faith
- A MUST in every case!



Elements of the Agreement

- Mediation approach
- Selection of mediator
- Mediator's compensation
- Mediator's role
- Timing and duration
- Procedures/logistics
- Information exchange
- Confidentiality
- Preservation of rights
- Payment of costs
- Withdrawal from process



Notional Pre-Mediation Actions

- Initial agency actions:
 - ✓ Determine whether mediation is appropriate
 - ✓ Identify the players
 - ✓ Identify settlement authority (should be release authority)
 - ✓ Explore options for negotiation and settlement

- Next steps:
 - ✓ Offer/request for mediation
 - ✓ Decision to engage/not engage in mediation
 - Engage: negotiate and execute agreement to mediate
 - Not engage: revert to existing processes

Notional Pre-Mediation Actions

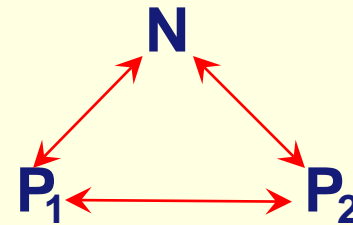
- Choosing the mediator:
 - ✓ Government employee or private sector mediator
 - ✓ Level of subject-matter expertise required
 - ✓ Mediator's fee (if applicable) and expenses
 - ✓ Contract or other documentation requirements

- Convening the mediation:
 - ✓ Parties work directly with mediator
 - ✓ Schedule and procedure per mediation agreement
 - ✓ Position papers, other information given to the mediator in advance of mediation

Mediation Process

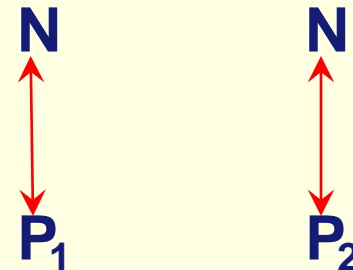
Process Dynamics:

Third-party assisted negotiations



Unique Feature:

Confidential caucuses

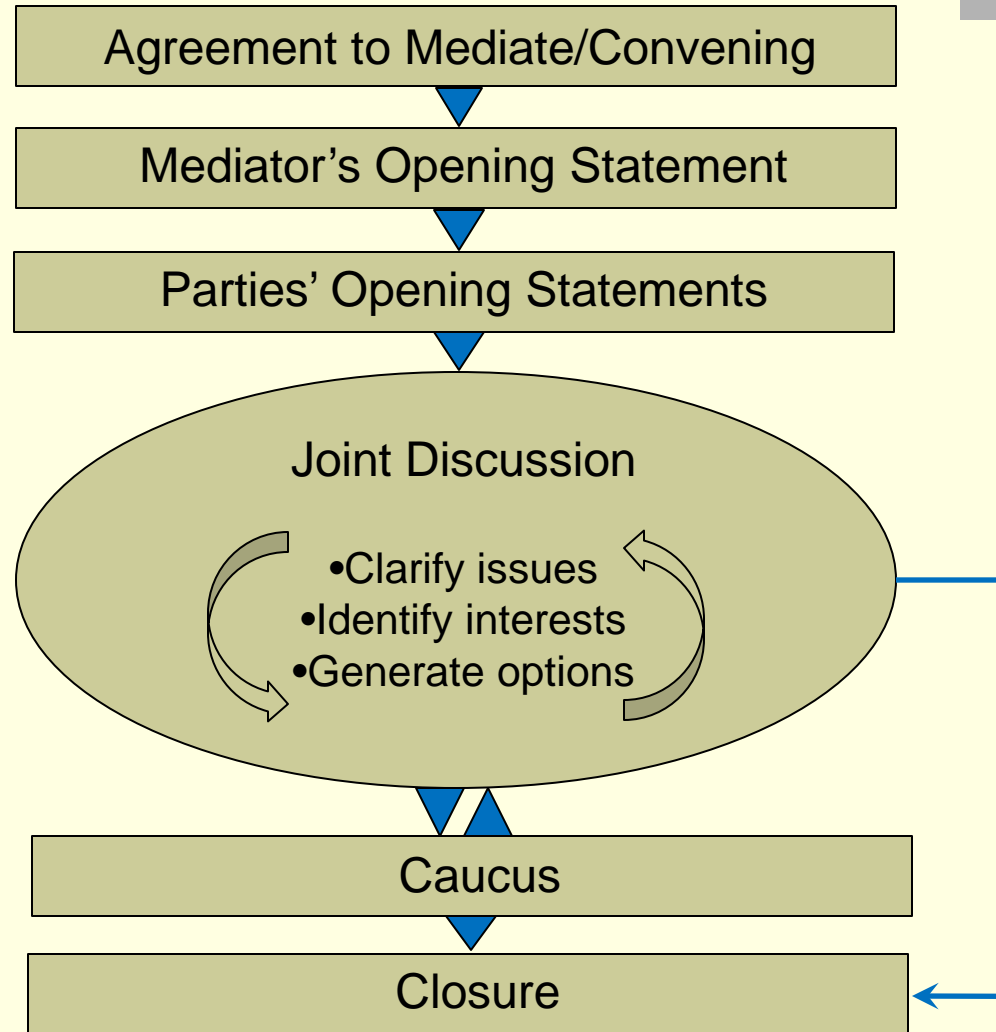


Decisionmakers:

The parties



Typical Mediation Procedure



Mediator's Opening Statement

- Opens the formal mediation session
- Describes mediator's role and purpose
- Establishes expectations of the parties
- Explains the ground rules
 - ✓ Confidentiality of proceedings
 - ✓ Notes and written materials
 - ✓ Procedural and logistical matters
- Sets the "tone" of the mediation

Parties' Opening Statements

- Party initiating the action goes first
- Uninterrupted from each side
- Each party's demands or positions
- Each party's view of the facts and law
- Preview of bargaining style or posture
- Reveal attitudes of parties and their reps
- Help define the gap between the parties
- May or may not reveal the real issues

Joint Discussion

- Mediator summarizes and clarifies parties' respective positions
- Guided discussion between parties
 - ✓ Narrow the issues
 - ✓ Identify the interests
 - ✓ Brainstorm possible options
 - ✓ Allow for venting, if necessary
- Continues as long as progress is being made

Caucus or Separate Session

- Private meeting between the mediator and a party
 - ✓ Need for additional information to move discussion forward
 - ✓ Discuss “private” information that party doesn’t want disclosed to the other side
 - ✓ Float possible settlement terms or subjects of further negotiation in a no-threat environment
 - ✓ Engage in reality checking or case evaluation
 - ✓ Outcome prediction (evaluative only)
- Decision to caucus is the mediator’s call
- Mediator generally is bound not to disclose caucus discussions with other side unless the party OKs it

Closure

- Agreement reached
 - ✓ In writing, signed by parties
 - ✓ Terms accurately reflect parties' understanding and intent
 - ✓ Settlement agreement is not confidential

- No agreement reached
 - ✓ Declaration of impasse
 - ✓ Advisement of available options
 - ✓ Mediator thanks parties for the effort

- Announcement of outcome typically limited to whether mediation was successful or not (i.e., terms of settlement not disclosed)