




The Basics of Commercial Mediation

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TWVLF

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Mediation: What Is It?

“A process in which a neutral, third-party (the mediator) works with the parties to reach a mutually agreeable settlement of their dispute. The mediator may assist the parties and their counsel in formulating the terms of their settlement. The mediator’s role is to aid in facilitating a settlement agreeable to the parties. The mediator does not have authority to impose a resolution on the parties.”

Source: Nassau County Bar Association, *Mediation & Arbitration: Alternative Dispute Resolution Through the Nassau County Bar Association* (Brochure) (updated as of Jan. 13, 2017 and available at http://www.nassaubar.org/UserFiles/Mediation_Arbitration_Brochure_2_3_2017.pdf)

Mediation vs. Arbitration

- ❖ No Final Decision
- ❖ Lowest Cost vs. Litigation
- ❖ No Set Procedure
(More Informal)
- ❖ Usually One Neutral
- ❖ No Motion Practice
- ❖ Little to No Discovery
- ❖ No Court Enforcement Role
- ❖ Parties More in Control
- ❖ Lawyers Optional
- ❖ Final Decision
- ❖ Lower Cost vs. Litigation
- ❖ Set Procedure
(More Formal)
- ❖ One or More Neutrals
- ❖ Motion Practice
- ❖ More Discovery
- ❖ Court Can Enforce Decision
- ❖ Arbitrator(s) More in Control
- ❖ Lawyers Usually Required

Litigation vs. Mediation

Litigation = Legal Fees + Damages + 18 (min.) Months of Depositions, Discovery, Trial Prep + Trial

Mediation = 2 to 30 Days of Mediation Sessions/Caucus – Fees – PR Risk + Confidentiality

Source: Ricardo Granderson (<http://www.thegrandersongroup.com/group-bios>), E-mail dated Aug. 18, 2017 to NYC-DR Listserv (John Jay College)

The Position Prison

“When negotiators bargain over positions, they tend to lock themselves into those positions. The more you clarify your position and defend it against attack, the more committed you become to it. The more you try to convince the other side of the impossibility of changing your opening position, the more difficult it becomes to do so. Your ego becomes identified with your position. You now have a new interest in “saving face”—in reconciling future action with past positions—making it less and less likely that any agreement will wisely reconcile the parties’ original interests.”

Source: Fisher et al., *Getting to Yes: Negotiating Agreement Without Giving In* (Penguin Books 3d ed. 2011) (Kindle Location 363 of 3669)

Needs and Interests

Keys to the Position Prison

- ❖ **Needs and Interests - Broader Than Positions**

- **The “Orange” Dilemma**
(with \$ being just a green orange)

- ❖ **Creative Option Generation**

- ❖ **Preservation of Relationships**

- ❖ **Strategic Future Relationships**

- **Avoids “Bridge Burning” – Today’s Competitor Can Become Tomorrow’s Business Partner**

B.A.D.G.E.R.

A Mediation Process Summary

- ❖ **B – Begin the Mediation (Introductions, Rules)**
- ❖ **A – Accumulate Information (Case Statements)**
- ❖ **D – Develop Agenda (Needs & Interests)**
- ❖ **G – Generate Movement / Options (Party-Driven)**
- ❖ **E – ESCAPE* to Caucus (if necessary)**
 - * E – Explore settlement options; S – Signal warning signs; C – Confirm movement; A – Attack recalcitrant party’s BATNA (“Agent of Reality”); P – Pause; E – Evaluate
- ❖ **R – Resolve the Dispute**

Source: Prof. Joseph B. Stulberg, *Taking Charge Managing Conflict* 58 (1987) (and Prof. Lela P. Love (informally))

Recent Research – 47 Studies

“Overall Conclusions. Looking at the relative potential for positive versus negative effects, while bearing in mind the substantial likelihood of no effects, the following mediator actions appear to have a greater potential for positive effects than negative effects on both settlement and related outcomes and disputants’ relationships and perceptions of mediation: (1) eliciting disputants’ suggestions or solutions; (2) giving more attention to disputants’ emotions, relationship, and sources of conflict; (3) working to build trust and rapport, expressing empathy or praising the disputants, and structuring the agenda; and (4) using pre-mediation caucuses focused on establishing trust. Some of these actions, however, have been examined in a relatively small number of studies and in only a subset of dispute types, primarily divorce, limited jurisdiction, community, and labor disputes.

The potential effects of other mediator actions appear more mixed. Recommending a particular settlement, suggesting settlement options, and offering evaluations or opinions have the potential for positive effects on settlement and on attorneys’ perceptions of mediation, but have the potential for negative as well as positive effects on disputants’ relationships and perceptions of mediation. Both caucusing during mediation and pressing or directive actions have the potential to increase settlement and related outcomes, especially in labor-management disputes; but pressing actions also have the potential for negative effects on settlement, and both sets of actions have the potential for negative effects on disputants’ perceptions and relationships.”

Source: ABA Section of Dispute Resolution, *Report of the Task Force on Research on Mediator Techniques*, at 4 (June 12, 2017) (available at https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/med_techniques_tf_report.authcheckdam.pdf)

The Bottom Line: Mediation Works

“Mediation is highly successful,
with more than 85% of mediated
business cases resulting in
settlement agreements.”

Source: David J. Abeshouse, Esq., *Business ADR (Arbitration and Mediation) vs. Court Litigation for Commercial Cases* (June 18, 2013) (emphasis added) (available at <http://www.avvo.com/legal-guides/ugc/business-adr-arbitration-and-mediation-vs-court-litigation-for-commercial-cases>)

Questions or Comments?



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