

2018

## Is Mediation the Future for Settling Disputes?

Fabiola De Armas

Follow this and additional works at: <https://lawcommons.luc.edu/pilr>



Part of the [Civil Rights and Discrimination Commons](#), [Criminal Procedure Commons](#), [Environmental Law Commons](#), and the [Human Rights Law Commons](#)

---

### Recommended Citation

Fabiola De Armas, *Is Mediation the Future for Settling Disputes?*, 23 Pub. Interest L. Rptr. 106 (2018).  
Available at: <https://lawcommons.luc.edu/pilr/vol23/iss2/6>

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Public Interest Law Reporter by an authorized editor of LAW eCommons. For more information, please contact [law-library@luc.edu](mailto:law-library@luc.edu).

## Is Mediation the Future for Settling Disputes?

Fabiola De Armas

Mediation is one of the various methods of alternate dispute resolution to settle disputes. Common types of cases that can benefit from mediation include: where there is a history of cooperation between parties, there is moderate to low hostility between parties, there is a desire to maintain a relationship, and there is a desire to settle.<sup>1</sup> The mediation process involves a mediator, who is a neutral party with no stake in the case, facilitating a conversation with adverse parties and guiding them with the goal of reaching a mutually beneficial resolution.<sup>2</sup> The mediator does not have to be a lawyer but must be a person who has received the necessary training as determined by the state.<sup>3</sup> The process is voluntary, and the success of the mediation is not dependent on a final agreement.<sup>4</sup> All mediations are confidential to ensure the adverse parties feel comfortable sharing relevant information that might be helpful to reach an agreement.<sup>5</sup>

The process of dispute mediation moves away from positional bargaining to identifying the needs and interests of each of the parties.<sup>6</sup> With positional bargaining, parties may think there is only one option to solve the dispute, but arguing over positions can be ineffective.<sup>7</sup> Instead, mediation focuses on the needs and interests of the parties and delves into the underlying deeper issues behind the parties' positions.<sup>8</sup> Ways to shift from positional bargaining include having the parties invent options for mutual gain, focus on those underlying interests, separate the people from the problem, and use an objective

---

<sup>1</sup> Chelsea Olivia Ta, *An analysis of how mediation can be used as a dispute resolution tool in respect of bullying and harassment in the Australian Public Service*, 1, 8 [hereinafter Chelsea Olivia Ta].

<sup>2</sup> *Mediation*, ADR SYSTEMS (last visited Mar. 12, 2018), <https://www.adrsystems.com/mediation/> [hereinafter ADR SYSTEMS].

<sup>3</sup> Erin E. Lawler, *So You Want to be a Mediator*, 21 ALTERNATIVE RESOL. 13, 13 (2012).

<sup>4</sup> ADR SYSTEMS, *supra* note 2.

<sup>5</sup> *Section 1- Introduction*, CENTER FOR CONFLICT RESOLUTION, 1, 3 (2018).

<sup>6</sup> ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 6 (2011) [hereinafter *GETTING TO YES*].

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 12.

criteria.<sup>9</sup> These tactics involve the parties in the negotiation, help the parties realize what they value, and identify the negotiable parts.<sup>10</sup>

### THE MEDIATION PROCESS

Mediation is a structured process, and the process used by the Center for Conflict Resolution (CCR) will serve as the model. CCR uses a six-step model that is subject to adaptation depending on whether the parties are individuals, corporate entities, or the nature of the case.<sup>11</sup> First, the mediator must introduce herself or himself, explain his or her role as a mediator, explain the process, stress confidentiality, explain that the mediation is voluntary, and ask if the parties have the authority to settle.<sup>12</sup> Second, in the initial statement, the mediator asks each of the parties what brought them to the mediation and what they want and hope to get out of it.<sup>13</sup> These questions set the tone of the conversation and allow the mediator to assess the parties' initial positions.<sup>14</sup> Third, the mediator sets the agenda and decides what topics of conversation will be covered.<sup>15</sup> Examples of topics include: incident, court case, money, a tangible item, communication, or a relationship.<sup>16</sup>

Fourth, the mediator moves to Cross Talk.<sup>17</sup> Most of the mediation takes place at this stage, where the parties are encouraged to converse with each other.<sup>18</sup> The mediator ensures that the parties speak to each other, and also begins to identify the needs and interests of each of the parties.<sup>19</sup> By using tactics such as summarization, acknowledging emotions, and asking questions, the mediator can understand the parties and help guide them to meaningful conversations, which could potentially lead to an agreement.<sup>20</sup> Frequently, the parties are not aware of their needs and interests because they are too focused

---

<sup>9</sup> *Id.* at 12, 14, 86.

<sup>10</sup> *Id.* at 29.

<sup>11</sup> *Section 4-Mediation Process*, CENTER FOR CONFLICT RESOLUTION, 1, 1 (2018).

<sup>12</sup> *Id.* at 3-4.

<sup>13</sup> *Id.* at 4-5.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 5.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 5-6.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

on their respective positions.<sup>21</sup> The mediator helps the parties realize these needs and interests with guided questions.<sup>22</sup>

Fifth, some mediations may require caucuses, or individual meetings.<sup>23</sup> In these individual meetings, the mediator can dig deeper into certain issues and help the party generate agreement or compromise options.<sup>24</sup> If the mediator moves into caucus, then both parties will have the opportunity to meet with the mediator individually to ensure neutrality and confidentiality.<sup>25</sup>

In this stage, the mediator uses BATNA and WATNA, which are techniques geared toward helping the parties come to an agreement. BATNA is the best alternative to the negotiated agreement and WATNA is the worst alternative to the negotiated agreement.<sup>26</sup> The mediator walks the party through the best and worst alternative by asking the likelihood of that outcome, the costs associated with that outcome, and whether the outcome will meet both their needs and interests and those of the adverse party.<sup>27</sup> After examining those options, the mediator may help the party generate options to move the process forward.<sup>28</sup> Generating options includes making a list of concessions with the purpose of creating potential compromises, prioritizing the list, reality testing each option, and analyzing the impact of each of the options.<sup>29</sup> Then, the mediator could ask the party to explain how they might present these options to the adverse party.<sup>30</sup>

Sixth, the mediation moves into what is called Cross Talk 2, which is a continuation the first Cross Talk.<sup>31</sup> The difference is that at this stage the parties can present their options that they generated in their individual meetings and see if an agreement can be made.<sup>32</sup> Even if an agreement is not made, mediation is helpful because parties can realize their needs and interests, which could lead to a settlement in a courtroom.<sup>33</sup> A full agreement settling the entire dispute is not necessary to have a successful mediation, as the mediation

---

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 6-8.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Section 3- Reality Testing*, CENTER FOR CONFLICT RESOLUTION, 1, 4 (2018).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Section 4-Mediation Process*, CENTER FOR CONFLICT RESOLUTION, 1, 8 (2018).

<sup>32</sup> *Id.*

<sup>33</sup> GETTING TO YES, *supra* note 6, at 150.

might resolve some of the issues, and then only the non-resolved issues will go before a judge.<sup>34</sup> Regardless of whether all issues are resolved, by using mediation services, the parties take control of the outcome and speed up the judgment process in a cost-effective manner.<sup>35</sup> All parties benefit from this process and whether parties come to an agreement, parties at least get the opportunity to converse and with the guidance of the mediator try to come to a mutually beneficial solution.<sup>36</sup>

## BENEFITS OF MEDIATION

The benefits of mediation can outweigh the benefits of litigation. Morgan Rosenberg, a certified volunteer mediator for the CCR, lists the benefits of mediation over litigation by comparing them. First, mediation does not have to take place in court but litigation does.<sup>37</sup> Litigation is not confidential, while mediation can be.<sup>38</sup> A judge resolves the conflict with litigation, and a mediator facilitates the conversation between adverse parties in mediation.<sup>39</sup> Litigation is adversarial while mediation is collaborative.<sup>40</sup> Litigation uses a “look back” approach, while mediation uses a “look forward” approach because there is a focus on maintaining relationships and helping solve the underlying issue.<sup>41</sup> Litigation can be expensive, while mediation can be more affordable.<sup>42</sup> In litigation the remedies are limited, while with mediation, the agreements can be creative.<sup>43</sup>

Additionally, mediation is more cost-effective than litigation because the decisions are less expensive.<sup>44</sup> Generally, mediations lead to rapid settlements with mutually satisfactory outcomes because both parties are involved in that outcome.<sup>45</sup> Because the parties draft the terms of the agreement, there is a high

---

<sup>34</sup> Patricia L. Carson, *Mandatory Mediation: A Burden for Benefit*, 1 RESOLVED: J. ALTERNATIVE DISP. RESOL. 13, 13 (2010) [hereinafter Patricia L. Carson].

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Interview with Morgan Rosenberg, certified volunteer mediator, Center for Conflict Resolution, (Jan. 16, 2018).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Benefits of Mediation*, MEDIATE.COM EVERYTHING ABOUT MEDIATION (Aug. 1998), <https://www.mediate.com/articles/benefits.cfm>.

<sup>45</sup> *Id.*

rate of compliance, the terms are comprehensive and create customized agreements, and there is more control and predictability of outcome.<sup>46</sup> There is a sense of personal empowerment associated with decisions made through mediation because the parties control the outcome.<sup>47</sup> Mediation also allows parties to maintain relationships or terminate them in an amicable manner.<sup>48</sup> Generally, settlements from mediations hold up over time because the terms address the needs and interests of the parties.<sup>49</sup> Ultimately, mediation is simple, less expensive, and the parties decide their outcome.<sup>50</sup>

### DRAWBACKS OF MEDIATION

The main downfall to mediation is that the parties may not come to an agreement and still rely on litigation to resolve their dispute, which would waste time, money, and resources.<sup>51</sup> Mediation is not preferable for every party or every dispute, and there are some instances where parties do need litigation. Mediation may not be appropriate when there is a power imbalance, language barrier, issues with a repeat offender, financial superiority, and emotional intelligence.<sup>52</sup> One party may have more leverage with bargaining strength, education, or financial sophistication that might make the conversation difficult.<sup>53</sup> For instance, if the mediation is to be conducted in English and one of the parties speaks little to no English, then the mediation will not be fair and parties may not be able to communicate with another. Mediations rely heavily on communication between adverse parties and this problem would make mediation basically impossible. A solution to this problem is hiring an interpreter or bringing a relative or friend as an interpreter but that pose another problem.<sup>54</sup> These third-party individuals may summarize instead of translating what each party is saying.<sup>55</sup> Summarizing can change the meaning or intention

---

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Kourosh Akhbari, *When Mediation Fails*, LEGALMATCH, <https://www.legalmatch.com/law-library/article/when-mediation-fails.html> (last visited Apr. 1, 2018) [hereinafter Kourosh Akhbari].

<sup>52</sup> Chelsea Oliva Ta, *supra* note 1, at 9-10.

<sup>53</sup> Elizabeth A. Dalton, *Divorce Mediation*, 3 UTAH B.J. 12, 15 (Dec. 1990) [hereinafter Elizabeth A. Dalton].

<sup>54</sup> Chelsea Oliva Ta, *supra* note 1, at 10.

<sup>55</sup> Josefina Rendon & Edward Bujosa, *Mediating with Interpreters*, MEDIATE.COM, <https://mediate.com/articles/rendon1.cfm> (last visited Mar. 30, 2018).

of what is being said.<sup>56</sup> For mediation to be effective, both parties need to be able to understand the other.<sup>57</sup> Any time there is an imbalance between parties, conversations and negotiating powers suffer and decrease the likelihood of creating an agreement to resolve the dispute.<sup>58</sup>

Regardless, mediation can help the parties communicate, which is something that may have been lacking in the relationship.<sup>59</sup> However, even then, the parties by this stage would have discussed at length the problems, needs, interests, and examined potential options.

## THE FUTURE OF MEDIATION

Alternate dispute resolution methods favor the parties while more litigation-based methods favor justice.<sup>60</sup> Mediation gives parties options besides court and gives them the opportunity to participate in the outcome of the dispute.<sup>61</sup> Mediation helps parties resolve conflicts that stem from strained relationships, lack of information because of communication problems, varying interests, problems arising out of an incident, and perception or value issues.<sup>62</sup> Advocating for mediation is important because not all individuals are aware of alternative dispute resolution options. Mediation “empowers parties to resolve issues they are willing to compromise while allowing the unresolved conflicts to go before a judge.”<sup>63</sup>

Besides practical cost-benefit and court-related benefits, mediations can also yield emotional benefits.<sup>64</sup> During the process, negative emotions can come out during the conversation and acknowledging these emotions has a cathartic effect on the person.<sup>65</sup> Identifying these emotions and taking an optimistic approach will help “create an atmosphere in which the conflict can be transformed into something positive.”<sup>66</sup> Regardless the outcome, the benefits from mediation demonstrate that there is a need for awareness.

---

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Chelsea Oliva Ta, *supra* note 1, at 10.

<sup>59</sup> GETTING TO YES, *supra* note 6, at 24.

<sup>60</sup> Kourosh Akhbari, *supra* note 51.

<sup>61</sup> *Id.*

<sup>62</sup> *Types of Conflict*, MEDIATE.COM, <https://www.mediate.com/divorce/pg17.cfm> (last visited Mar. 30, 2018).

<sup>63</sup> Patricia L. Carson, *supra* note 34, at 15.

<sup>64</sup> Elizabeth A. Dalton, *supra* note 53, at 14.

<sup>65</sup> Fredrike P. Bannink, *Building Positive Emotions in Mediation*, MEDIATE.COM, <https://www.mediate.com/articles/banninkF4.cfm> (last visited Mar. 30, 2018).

<sup>66</sup> *Id.*

Organizations such as the Center for Conflict Resolution provide services free of charge without questioning financial means. The resources exist, and some courts use mediation services, but mediation needs advocates to spread the word. Awareness will inform parties that mediation is an option and encourage them to exercise this wonderful opportunity to settle disputes.