
AMERICAN COLLEGE OF REAL ESTATE LAWYERS

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THE MEDIATION OF REAL ESTATE DISPUTES

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What Is Mediation?

Mediation is a process for resolving or mitigating existing or potential disputes. It is not necessarily a single activity; it may be a group of activities that can differ substantially from one case or problem to another.

Mediation involves the intervention of someone “outside” the dispute who helps to produce a settlement, but only when the parties agree on all its terms.

Like *conciliation*, mediation brings disputants together and attempts to reduce conflict but, unlike conciliation, mediation remains a vital force all the way through to settlement.

There is no one “right” way to mediate. Different disputes and different parties demand different strategies and tactics from mediators. Mediators themselves differ in background, personality and skills.

Why Should Parties Mediate?

- Parties “own” the solution to their dispute.
- Procedures are informal; litigators may not be needed.
- There is a greater opportunity to be heard to “speak one’s piece” than when appearing before a judge. Each party will feel, at some level, that he or she has had his or her “day in court.”
- No outside force is pronouncing one side a “winner” and the other a “loser.”
- Satisfaction with the process has been shown to be high.
- Creative options for settlement are encouraged and given a more thorough exploration than is often possible in court.
- Better relations are preserved between the parties. This is especially important if there will be ongoing contact between them.

Personal Attributes of the Mediator

Each mediator has his or her own personal style, strengths and weaknesses. Each mediator's personal attributes may vary; however, listed below are skills basic to all mediators:

- *Acceptance* (of people's feelings, ideas and goals)
- *Awareness* (of the mediator's biases and predispositions)
- *Objectivity* (in spite of the mediator's biases)
- *Patience*
- *Candor*
- *Flexibility*
- *Creativity*
- *Sense of proportion*
- *Sense of humor*
- *Listening ability*

Roles of the Mediator

In the course of a mediation session, a mediator plays a number of roles, including:

The Facilitator. The mediator facilitates the mediation process by keeping the discussion moving, by handling conflict so that it becomes an impetus to movement rather than a contribution toward hardened positions, and by phrasing and rephrasing the parties' positions and areas of possible agreement.

The Opener of Channels of Communication. When the parties are not talking to each other for one reason or another, the mediator intervenes to re-establish communication. If communication exists, but in a form that exacerbates tensions or hardens bargaining positions, the mediator helps the parties alter their language, timing or behavior.

The Translator and Transmitter of Information. Sometimes the parties are talking but they are not understanding each other. They might not only be unaware of certain facts, but they might also have a different perception of the *meaning* of facts they know. Here the mediator can act to transmit new information and translate the meaning of information into new terms. Both functions are important.

The Distinguisher of Wants from Needs. The mediator knows that the bargaining positions of one person may be expressions of hurt, anger, fear, or a desire to punish, as well as realistic hopes for concessions from the other side. Usually parties cannot settle a dispute without modifying the content of their original demands. The mediator helps them distinguish their true underlying needs – those things that must take place for the dispute to be settled – from their original desires, and helps the parties modify their bargaining positions accordingly.

The Generator of Options. This is one of the most creative aspects of mediation. Although it is not the mediator's job to decide on a solution and sell it, he or she helps the parties articulate and evaluate as many realistic options for settlement as possible. If this is done artfully, the parties will retain "ownership" of their settlement and will not find later that better solutions to the dispute went unexplored.

The Organizer. At the beginning most parties will simply want to tell their story and make the best case for their positions. But when the engagement, or negotiation, stage of the process is underway, the parties want the mediator to organize and give direction to the discussion.

The Agent of Reality. This is one of the mediator's most critical roles. Parties' bargaining positions are often based on unrealistic ideas about practical matters (how far a dollar will go), external forces (what a court will or will not do to the other side) or the role of other important players (whether the insurance company will support the terms of a financial settlement).

In addition, a party may be unwilling to compute the costs of not reaching an agreement. Depending on whether the party is by nature an optimist or pessimist, the mediator helps him or her consider the best alternative to a negotiated agreement or the worst alternative to a negotiated agreement.

The mediator's job is to increase the awareness of each party of the true needs of both parties and to build a realistic framework within which the parties can assess the costs and benefits of a particular proposal or of continuing versus resolving the overall conflict.

The Bad Guy. Parties are angry at each other. They are angry at having to accept less than they hoped for or wanted. They may be unhappy with the pace of the mediation process (too fast or too slow). Better that some of this anger be directed at and absorbed by the mediator than that it all flow toward the other side, impeding an agreement. The mediator must have a thick hide, a sense of humor and a willingness to take the blame for some of the negative feelings of the participants.

The Old Hand. When the parties have developed a certain amount of trust in the mediator, he or she can offer mild opinions about options or negotiating strategies without giving offense. For example, if a party offers a proposal that patently will not fly with the other side, the mediator can say, "You know, in my experience that suggestion is likely to meet with the objection that . . .," and then steer the party in a more constructive direction.

The Worry Wart. A major responsibility of the mediator during the closure stage of the process is helping parties test the stability, completeness and adaptability of the proposed agreement. To do this, the mediator helps parties anticipate what might go wrong, and either prevent the problem or provide means of resolving later disputes.

STAGES OF MEDIATION: PROCESS AND SKILLS

	STAGE	SKILL
1.	Getting Started	confidentiality, commitment, confidence
2.	Gather Information	separating positions from needs and interests
3.	Identifying Issues	framing
4.	Developing Options	creativity, knowledge of the facts and law
5.	Caucusing	integrity, strength, conviction
6.	Reaching Agreement	care, thoroughness

STAGE 1: GETTING STARTED

INTRODUCTION

<u>Procedure</u>	<u>Purpose</u>
• Introductions/seating	Establish rapport
• Explain mediation process	Educate on process
• Role of Mediator	Decision making roles
• Invite involvement of parties	Engage in process
• Describe how session will proceed	Manage and structure

GROUND RULES

<u>Procedure</u>	<u>Purpose</u>
• Confidentiality	Create safe environment for settlement
• Sign Agreement	Gain written commitment to process
• Separate sessions (“caucus”) and rules relating to caucus	Normalize separate meetings
• Handling communications	
◆ No interruptions	Modeling fairness
◆ Note taking	Containment of conflict
◆ Agree to stop speaking if mediator requests	Contract to cooperate

PARTIES' EXPLANATION OF ISSUES

Procedure

- Invite each side to briefly describe his/her understanding of what the issues are
- First party speaks about problems/issues
- Mediator summarizes
- Second party speaks about problems/issues
- Mediator acknowledges areas of agreement and restates in neutral format the issues to be resolved
- Establish agenda – decide whether there are issues that are more suited for continued joint session

Purpose

- Opportunity to speak without interruptions
- Model neutral listening
- Constructive reframing of party's statement
- Model neutral listening
- Create framework for both parties' interests and concerns
- Prioritize and fractionalize issues

SUGGESTED MEDIATOR INTRODUCTORY COMMENTS

EXPLAIN

Purpose of meeting and voluntariness – Either party may terminate at anytime.

Process is confidential and without prejudice; agree not to summon or subpoena mediator. Treated as settlement proceedings if there is future litigation.

Mediator will not rule on case – parties reach own agreement; mediator has no power to decide; distinguish from litigation or arbitration (collaborative v. decisional process).

EXPLAIN PROCEDURE

In a joint session, one party presents comments and his/her/its position; the other parties then respond. Anything a party does not want to discuss openly should be reserved for the private caucus.

Avoid interruptions and cross examination. The mediator may ask questions to clarify the mediator's understanding of the parties' perspective. Parties should take notes so that they can comment or clarify at the appropriate time.

Mediator then will caucus privately with each side.

Final joint session: Will convene when parties have approached settlement and they will establish the terms of the settlement agreement.

DISCUSS NATURE OF PRIVATE CAUCUSES

They are confidential: Anything said will not be repeated to the other side unless a party authorizes disclosure. Discussion will cover strengths and weaknesses of the party's case and any factors a party may want to add.

DISCUSS ANY QUESTIONS OF THE PARTIES – Then begin initial joint session.

STAGE 2: GATHERING INFORMATION

Communication Skills:

- (1) Active Listening
- (2) Open-ended Questions
- (3) Paraphrasing
- (4) Restating
- (5) Reframing

Types of Information:

- (1) Facts
- (2) Positions
- (3) Interests

Separating Positions from Interests

STAGE 3: IDENTIFYING ISSUES

Skills

- (1) Framing Issues
- (2) Fragmenting Issues
- (3) Buy-In on Issues
- (4) Sequencing Issues
- (5) Setting an Agenda

STAGE 4: DEVELOPING OPTIONS

There are several ways a mediator can develop options to assist the parties through the mediation process. The first is a technique known as reframing.

Reframing is the process of using language to alter how a person or a party to a conflict conceptualizes his, her or another's attitudes, behaviors, issues, interests, or how a situation is defined. Reframing is used to put things in more neutral terms and helps to mitigate defensiveness, increase understanding and reduce tension. Reframing can soften demands, identify underlying interests, and remove both value-laden language and emotion from communications. It is essential, when engaging in reframing, to keep in mind that every framing has some kernel of truth and has relevance for the person who holds it. The purpose of reframing is to further open doors to communication, not to discount anyone's feelings or interests.

The second way to develop options is to separate and regroup the options in a manner that the parties may not have been aware of previously. The parties may be able to take "baby steps" to resolve their issues if they do not view the situation in its entirety and wholly from their perspective. This second skill is similar to a "divide and conquer" mentality.

Separating and regrouping can be done by:

- a. Changing the person who communicates the message
- b. Changing the syntax or wording of the message
- c. Changing the meaning of a statement, by broadening or narrowing the meaning and focusing away from positions and toward interests.
- d. Changing the context of the situation by identifying common ground and minimizing differences

STAGE 5: CAUCUSING

1. Allows mediator to understand the interests of each party to a dispute and promote positive negotiating strategies, outside of the hearing of the opposing party.
2. Uncovers latent issues/hidden agendas.
3. Promotes negotiating equality.
4. Addresses indecisiveness of one or both sides to a dispute.
5. Resolves impasses.
6. Allows mediator to try out hypothetical situations and “what ifs” with each side.
7. Dissipates the tension when reaching final accords.
8. Opens discussions with mediator feeling free to express himself or herself.

RULES FOR CAUCUSING

1. In each separate session, begin and close by asking the parties to let you know about information they provided to you in an individual session that they do not want repeated to the other party.
2. Golden Rule of Caucusing – do not say anything to a party in a separate session that you would not be able to say in front of the other party were he/she present.
3. Do not caucus with one party without having a separate caucus with the other.

STAGE 6: REACHING AGREEMENT

Once the parties have reached an agreement bring all of the parties back together, if possible. Congratulate the parties on achieving an agreement; recognize that each side made concessions in order to achieve settlement; and point out the advantages of reaching an agreement at mediation (e.g., lower costs, ability to maintain relationship and no clear “winner” or “loser”).

The agreement should be reduced to writing so that there is no further disagreement.

COMMUNICATION SKILLS

Early in the process, and at the beginning of the first separate session with each party, ask only general, open-ended questions.

Do not interrupt a constructive narrative to ask a question that can wait.

Avoid “why” questions – they often sound accusatory (e.g., “Why did you walk away from your lease responsibilities?”).

Don’t play cross-examiner: avoid questions that pump a party to give an answer you have already formulated (e.g., “Don’t you think it would be wise to ask the landlord for permission before doing that?”).

Gathering information should sound more like a conversation than an interrogation. Let your questions respond naturally to the flow of the party’s narrative. Use what the party has just said as a prompt for a natural follow-up question (e.g., “Because you mention moisture during rain storms, could you tell me a little about the slope and drainage of your property?”).

Be cautious in eliciting information that would be damaging to the negotiations (e.g., “Did you think she was trying to cheat you?”).

Ask one question at a time and wait for an answer (a quick series of questions will appear as an interrogation or cross-examination, eliciting negative responses).

There are four general types of questions. Appropriate use of questioning during mediation can make a tremendous difference in the amount of information revealed by a party. Develop skill in controlling the mediation process through the selection of questions.

- (1) **Open Questions** – These questions are broad and allow for a narrative answer. They are used to gain lots of information, to begin two-way communication, and to ask sensitive questions (e.g., “Tell me more about how you came to that decision.” “Tell me more about your view as to how the lease provision should work.”).
- (2) **Closed Questions** – These questions are specific and allow for only short answers. They can be used to try to stop a talker, to direct the hearing to a specific topic, to gain control of the process/parties. They typically only require a yes/no response (e.g., “Were you in the premises at the time?”).
- (3) **Focused Questions** – These are questions with a specific purpose, looking for a specific piece of information. An open or closed question also can be focused.
- (4) **Leading Questions** – These questions direct the individual toward a specific conclusion.