How to Resolve Disputes Through Mediation on 6 Oct, 2017

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Published 6 books on mediation and arbitration
Heading Summary

• Introduction to mediation in the resolution of disputes
• Different forms of mediation
• Different Stages and Skill set required in mediation
• The quality of the mediator
• Difference of mediation vs. arbitration
Conflict & Dispute
Conflict & Dispute

- **Conflict:** Disagreement/Incompatibility of interests over issues; capable of resolution, prolong, conceptual (social science)
- **Dispute:** Claim made by one party and disputed by other; **involve real actions** (more legalistic)
- Unresolved conflict leads to disputes
Dispute 爭議
What is Mediation

• Mediation is a **flexible** process, with the consent of the parties to find a natural **impartial third party** to arrive at a mutually agreeable **settlement**
• **Confidential** & non adversary
• **Parties’ determination**
• Option generation, realistic solution
• Maintain relationship
Types of Mediation

- Facilitative Mediation (Commercial, Work Place)
- Transformative Mediation (Empowerment, family disputes)
- Settlement Oriented Mediation (Construction)
- Evaluative Mediation (IP)
- Narrative Mediation (Victim/Offender)
- Peer Mediation (School)
Application of Mediation

- Commercial: trading, IP rights, Shareholders, Consumers, Agency, Distribution rights
- Construction
- Insurance (Travel, PI), financial products
- Labor & Employment
- Community: building management, rubbish, land boundary, family (divorce, estates)
- School, work place
- Health Care
- International border
Roles of a mediator

- Gate Keeper (fairness)
- Enabler (make the impossible comes true)
- Climate Assessor (Emotions)
- Communication Builder
- Ideas Generator (Options)
- Agent of Reality
- Enforcer
Functions of a mediator

1. Developing trust and confidence:
   - Reliable, impartial, neutral, even-handed
   - No personal views/values
   - Enforce guidelines and ground rules
   - **Observe confidentiality**
   - Show concern, respect and empathy
   - Good communication and interpersonal skills
Functions of a mediator

2. Establishing a framework for **co-operative decision-making**:
   - Physical
   - Emotional
   - Procedural

3. **Analyzing the conflict** & appropriate interventions:
   - Supervise gathering and **exchanging** of information
   - Facilitate disclosure and acknowledgement of **party needs**
   - **Clarify** and define the issues (Parties may not know what they want)
Functions of a mediator

4. Promoting constructive communication:
   - Encourage agreement on facts
   - Develop a shared perception of the problem

5. Facilitating negotiation and problem-solving:
   - Shift positional bargaining to interested-based bargaining
   - Identify and emphasize common ground
   - Use objective criteria
   - Future orientation
   - Separate people from problems
   - Invent options for mutual gain
Functions of a mediator

6. Educating the parties:
   - Observe ground rules
   - Use of reality tests

7. Empowering the parties

8. Imposing pressure to settle

9. Promoting reality
Qualities of a mediator

- Aware one’s own values
- Non-judgmental
- Flexible thinking
- **Be nice**
- **Be positive**
- Be confident
- Act unobtrusively in a dispute
- Be sensitive
- In **control of process and timing**
- Be sensitive to feelings
- Sense of humor
- Be concerned, **with heart**
- Understand the issues QUICKLY (**Prepare**)
Stage of Mediation

PROBLEM DEFINING STAGES (Chunk Down)
- Opening Statement
- Parties’ Statements
- Mediator’s Summaries
- Agenda Setting
- First Joint Session
- First Separate Sessions
- Subsequent Joint / Separate Sessions
- Agreement
- Closing

PROBLEM SOLVING STAGES (Chunk Up)

PAST

FUTURE
Mediator’s opening statement

- Appropriate meeting, greeting and modes of address
- Identifying prior association with parties or representatives (avoid conflict of interests)
- Nature of mediation and core principles: **Confidentiality**, **Parties are decision marker**, **Termination** and **Voluntary** and **Without Prejudice** [Privilege]
Mediator’s opening statement

- Process and procedure of mediation
- Grounds rules
- Documentation checking and confirming authority to settle
- Appropriate answering the parties’ queries
- Invite parties’ commitment to complete whole process and trying to settle
Notes-taking

Guidelines for note-taking:

- Ask for permission
- Explain
- Stress the principle of **CONFIDENTIALITY**
- In an abbreviated form
- Maintain eye contact
- Take notes in a consistent manner (for both parties)
- If necessary, read the notes back to the party for verification
Mediation Skills
共同點
Common Ground

A

B

共同意向
Mutual Interests
An interactive communication process
互動的溝通過程

當事人
Party A

和解員
Mediator

當事人
Party B
Effective communication
Six Elements of Communications (COMMA + E)
1. Communicator
2. Objective
3. Media
4. Message
5. Audience
6. Environment
Communication Skills

- Two Channels of Communication
  1. Verbal Component
  2. Non-Verbal Component
Mediator communication guidelines

Use simple and plain language

1. Speak in a neutral and impartial manner.
2. Show empathy and concern to gain trust and confidence.
3. Be specific.
4. Don’t use special jargons.
5. Don’t hesitate to ask for clarification.
6. Make the verbal and non-verbal messages congruent.
7. Pay attention to the other party when one party is talking. The nonverbal behavior indicates possible areas of disagreement.

8. Don’t talk too much (*Silence* is a good weapon).


10. Avoid indirect and non-specific communication.
Mediator’s Skill Set

1. Paraphrasing (Understanding)
2. Perception Check
3. Summarizing
4. Questioning
Active Listening
Body Language
1. Facial Expression
2. Eye Contact
3. Leaning Forward
4. Open Posture
5. Relaxed
Reframing

• Modifying party’s statement
  ➢ Words / phases
  ➢ Context

  Recast

  ➢ Positive / Right Direction

  ➢ Agreement / Settlement
Reframing a statement

Accusation / hostility → neutral language
Position → Interest
Person → Problem
Past → Present / Future
Negative perception → Positive

Reframing the Context
change Context → change Meaning
Purpose:

Negative → Reframe → Positive
Self Focus → Reframe → Problem Solving
Inconstructive → Reframe → Constructive
Conflict → Reframe → Resolution
Settlement ← Amenable to Negotiation
Facilitation skills

1. Acceptance Skill (nodding)
2. Reflection Skill (Mirroring)
3. Reassurance Skill (reduce anxiety/insecurity)
4. Leading Skill (Summary table)
Leading skill

- Can be direct or indirect
- Be careful of direct leading: just enough to keep the mediation process moving ahead
- Tool?
- Summarising table
How to identify interests?

- Position is likely to be concrete and explicit
- Underlying interests may be unexpressed, intangible, and inconsistent
- Ask “why?”
- Put yourself in their perspectives
- Ask “why not?”
- What interests of theirs stand in the way
- “點你先至會接受？” - what type of question?
- Probing question

- "探你先至會接受？" - what type of question?
- Probing question
Handling Impasses and Deadlocks (silence from both sides)
Handling Impasses and Deadlocks (silence from both sides)

- What are impasses and deadlocks?
  - Refuse to make further concessions
  - Threatened with termination
  - Deadlocks are destructive
  - Endanger the existing relationship

- Mediator has to
  - Diagnose
  - Hypothesis
  - Intervene (Time to think)
Crossing the Last Gap

Techniques

1. Split the difference
2. Toss a coin
3. Break the last issue into smaller issues
4. Make the last offer
5. Aim at procedural settlement
6. Adjourn and let the parties exchange their final offers
7. Adjourn and let the parties consider the final offers
8. Shaming the parties
Options generating questions

- If you could convince Y to extend the time for payment of what you owe her, is there something you would be willing to give Y in return?
- What if you agree to go along with their proposal for a trial period of certain weeks?
- What if you increase your offer by ....?
Arbitration:
Neutral, Impartial 3rd party, subject to procedural law, hearing similar to court, based upon law, facts, and precedent cases; adversarial manner; limited appeal; enforceable internationally; decision by arbitrator/arbitrators; can select specialist as arbitrator.
Mediation is an art and must be learnt through practice. Exposure through interaction with people, learn from others and sharing of information can all assist a person to become a better communicator/mediator. Mediator needs to have hearts throughout the process.
Question & Answers

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