

Nova Law Review

Volume 14, Issue 3

1990

Article 9

Mediation: Part I: Background and Overview

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Abstract

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Background

Conflict and how we solve it is not new to individuals and countries. There are two basic approaches to conflict resolution: (1) problem *finalization* and (2) problem *solving*. Problem finalization occurs when the parties cannot resolve the dispute and seek external means to end the disagreement. War is an extreme version of problem finalization whereas adjudication has the same result but, hopefully, less harshly instigated. Neither solves the problem; each merely ends it. The second approach to conflict resolution is problem solving. Methods employed are negotiation, whether directly between the parties or through third parties, and mediation. In the first approach there is generally a winner and a loser. In the second approach there is, generally, no winner or loser. Rather, both parties "win" because both parties assisted each other to solve the problem—not end it. Mediation differs from negotiation in many ways. One of the threshold differences is that the parties are themselves involved in the negotiation, but an "outsider"—the mediator—assists them and acts as a "facilitator" so that the parties may communicate fairly and properly between themselves.

Mediation is not a new concept. For centuries the Chinese have utilized the mediation process to solve disputes.¹ The mediation method and tradition of solving problems first came to America with Chinese immigrants in the mid-1800's. The Chinese immigrants created an organization called the Chinese Benevolent Association.² One of its main purposes was to mediate disputes within the Chinese community.³ Mediation as a viable alternative to dispute resolution did not gain broad

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1. J. FOLBERG & A. TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 1 (1984); Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 Cal. L. Rev. 1284, 1286 (1967).

2. J. FOLBERG & A. TAYLOR, *supra* note 1, at 3; Folberg, *supra* note 1, at 5.

3. D. BROWN, *Divorce and Family Mediation: History, Review, Future Directions*, 20 CONCILIATION CTS. REV. 1 (1982); Folberg, *supra* note 1, at 5.

acceptance until almost one hundred years later. By the mid-1960's mediation began to be used in the commercial sector, particularly in the arena of labor relations as a problem solving tool.⁴ By the mid-1970's the concept of mediation expanded into the field of family disputes and, by the late 1970's, divorce mediation began to emerge as a specialty practice.⁵ There are many styles and methods of practice. Differences in training techniques and previous professions of individual mediators bring variety of style and substance to the mediation practice.⁶ Mediation varies from other dispute solving methods because it utilizes methods employed in the social sciences as well as a working knowledge of the law.

The Mediation Process⁷

Mediation is a four stage process: (1) setting the stage; (2) defining the issues; (3) processing the issues; and (4) resolving the issues.

Setting the Stage

The stage is set both inside and outside the mediator's office. The parties may have already talked to other professionals, family members and friends. They may then enter the mediator's office already prepared for the idea of problem solving. Others, however, may enter the mediator's office unaware that mediation involves problem-solving techniques but are there because they are frustrated with the legal system and are merely looking for an alternative method. The stage continues to be prepared by the mediator once the parties enter the office. In the first stage the mediator informs the parties about the process and gathers information from the parties. This is done while the mediator explores what the parties expect from the process itself and what they

4. See, e.g., Folberg, *supra* note 1, at 5.

5. Markowitz & Engram, *Mediation in Labor Disputes and Divorces: A Comparative Analysis*, 2 *Mediation Q.* 67, 68 (1983); Folberg, *supra* note 1, at 6.

6. A. Milne, *Family Self-Determination: An Alternative to the Adversarial System in Custody Disputes* in *DIVORCE MEDIATION: THEORY AND PRACTICE*, ASSOCIATION OF FAMILY AND CONCILIATION COURTS CONFERENCE PROCEEDINGS (1981) (conference held Dec. 1-19, 1981, in Ft. Lauderdale, Florida).

7. For a more comprehensive look at mediation, see Folberg, *supra* note 1; Milne, *Divorce Mediation—An Idea Whose Time Has Come?*, 2 *Wis. J. Fam. L.* 1 (1982); O.J. COOGLER, *STRUCTURED MEDIATION IN DIVORCE SETTLEMENT: A HANDBOOK FOR MARITAL MEDIATORS* (1978).

may expect from each other. In this first stage the parties assess the mediator while the mediator assesses whether the parties are comfortable with the process.

The single most important factor in establishing the first stage of the mediation process is the beginning of the relationship between the mediator and the parties. As the mediator builds trust and establishes a sense of interest, he builds credibility with the parties. The mediator accomplishes this by describing the process, how he works within the process, and the parties' ability to control their own outcome by using the process. The mediator's role is as a "facilitator" who will assist the parties' communication and will assist them in reaching a resolution rather than determining a resolution for them. Emphasis is placed on the parties' responsibility to solve the issues by themselves. Thus, sole responsibility for the final outcome of mediation rests with the parties rather than with the mediator or any other third party. Finally, the mediator prepares the stage by discussing the requirements within the mediation process: openness and full disclosure, willingness to negotiate and understand the concerns of the other party, and confidentiality. Finally, the mediator discusses the other methods available to the parties to resolve their dispute: negotiation, third party negotiation, arbitration, and litigation and adjudication. "When the parties agree to mediate they have already begun and made their first agreement—to resolve the issues in private and in a non-adversary fashion."⁸

Defining the Issues

The mediator has two tasks: (1) assisting the parties toward proper bargaining procedure (this incorporates understanding the nature of the conflict), and (2) categorizing the types of conflict.

Proper Bargaining Procedure. Both parties define what they want as if it were the solution to the problem. "I want the car because . . ." or "I want custody of the children because . . ." are phrases very often heard in the beginning stages of mediation. This method is called positional bargaining. The parties state what they want as the solution to the problem, but it almost never solves the actual problem.⁹ Each party attempts to convince the other party. It becomes a contest of wills.¹⁰

8. DIVORCE AND FAMILY MEDIATION (Grebe & Hanson ed. 1985).

9. R. FISHER & W. URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 3-7 (1981).

10. *Id.* at 6.

Clearly, therefore, movement away from positional bargaining is an essential prerequisite to successful mediation. This movement is one of the primary tasks of the mediator at the commencement of the process. The mediator moves the parties along by steering them away from the positional way of bargaining to a discussion by the parties of their basic needs and interests. This brings out any underlying concerns or conflicts that the parties may have that would otherwise prohibit the mediation process. As the process continues, the parties begin to deal with many issues, some of them longstanding. These issues are then identified by the mediator.

Categorizing the types of conflicts. There are three types of conflict issues: (1) concrete issues, (2) internal issues, and (3) inter-relational issues. Concrete issues may be defined as issues that are observable and physical. In divorce mediation, examples would be dividing the property, finances, child support, and visitation. Internal issues are those conflicts that the parties themselves bring to the mediation process. Power, anger, and lack of self esteem are common to this conflict, and oftentimes the individual's own family background is also involved. The third, inter-relational issue has to do with those unresolved conflicts within the marriage itself. Examples of this issue are broken or unfulfilled expectations, broken promises, hurt, and anger. While this issue is often at the core of the conflict dispute it is also the least likely to be resolved. While part of the mediator's task is to assist the parties in uncovering or identifying these issues as they become a roadblock, the mediator is also responsible for assisting the parties in steering around the barrier as they move toward solving the concrete issues.

Processing the Issues

The closer the parties begin to focus on the concrete issues the more the parties move away from inter-relational and internal issues. Concrete issues are then reframed with the assistance of the mediator as needs, concerns, or interests. At this juncture the parties begin to work together toward settlement. The mediator's task then is to maintain this momentum as the parties work together at mutual problem solving. Patterns of conflict are pointed out, commitment to the mediation process is constantly reestablished and issues are identified in order to keep the people targeted on resolution. At this stage the mediator assists the parties by developing long lists of options that meet the needs and concerns of both parties. No options are ever evaluated by the mediator. That is up to the parties themselves. The ability of the

mediator to assist the parties by working with them and creating options for them reinforces the problem-solving ability for the parties while helping them to recognize their ability to work together in order to solve a problem in a mutually satisfactory way.

Resolving the Issues

After all the alternatives have been presented, the parties may begin the process of accommodating each other in order to resolve each individual issue. Interests are matched to solutions.¹¹ The interests and their solutions are like pieces of a puzzle. Sometimes they appear to fit but then another piece of the puzzle is introduced and creates the need for change. The components come together one at a time. Finally, the parties' focus shifts away from the problem toward a method of solving the problem. This results in an agreement comfortable for both.

Conclusion

Mediation is neither the practice of law nor the practice of therapy. However, knowledge of both are important to the process itself. Understanding the underlying issues is the key to defining and resolving the conflict between the parties. The mediator's ability to reframe communication, maximize communication and understand the true issues between the parties is at the root of successful mediation. Mediation's ultimate objective is to resolve the concrete issues between the parties but if, along the way, internal and inter-relational issues are resolved also, so much the better.

11. See generally FISHER & URY, *supra* note 9.