

# Resolving Your Business Disputes Through Mediation

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# Types of Business Mediation

Businesses can benefit from mediation when they have a conflict with neighboring businesses, employees, customers, vendors, or with their own business partners. Specific examples of business mediation include:

- Business “Divorces”
- Contract Disputes
- Disputes over “arrangements” where there is no written agreement
- Workplace disputes

# Examples of Business Disputes in Mediation

- Example #1: Business Divorce
  - One business partner is buying out the other business partner's ownership in the company, and divorcing partners can't agree on the terms of the buy-out, such as price, non-compete requirements or timing of payout.
  - In the mediation, the Mediator assists the divorcing partners in determining the terms of the buy-out.
- Example #2: Contract Dispute
  - A service provider and his/her client have a contract for certain deliverables. The client claims that the service provider did not deliver as promised, and the service provider claims he or she is not at fault.
  - In mediation, the Mediator assists the parties in determining a proper remedy, and whether/how to move forward with the business relationship.
- Example #3: Workplace Dispute
  - An employee's supervisor terminates her employment for insubordination. The employee claims sexually hostile work environment.
  - In mediation, the Mediator assists the parties in determining the issues at the core of the dispute and whether a continued employment relationship is possible or desirable, and assists the parties in developing a remedy to avoid litigation.

# Why mediate a business dispute?

- Early intervention and quick resolution
- Parties craft the resolution themselves with the assistance of the Mediator and thus are more likely to comply with it
- Prevents escalation of the dispute and encourages reparation of the relationship
- Helps define real issues involved in the conflict
- Alternative to costly and time-consuming litigation
- “Last ditch effort” before filing a lawsuit
- After filing a lawsuit, to assist in the settlement of the litigation
- Mediation is confidential and not subject to future discovery in the case of a lawsuit

# Why Does Mediation Work?

- Mediation requires parties and attorneys to seriously focus on settlement.
- A Mediator's goal is to settle the conflict, whereas the party's attorney's primary goal is to advocate for the client.
- The mediation process is structured to result in an agreement.
- The parties are all in the room.
- Mediation is confidential
- Mediation avoids publicity.
- Mediation is not subject to discovery, giving parties the freedom to explore settlement options.
- The parties may be able to obtain remedies that would not be available in court.
- The Mediator has a unique and neutral role, allowing the Mediator to challenge parties' assumptions.
- Mediation gives the parties more control and thus may be more predictable.

# Basic principles of mediation

- A Mediator is a neutral third-party who facilitates the settlement discussions between the parties.
- Mediation is voluntary and requires the consent of all parties
- Mediation is confidential, private and not subject to discovery.
- Mediator does not advocate for either party or act as a judge, but rather uses specific mediation strategies to encourage settlement

# Types of Mediation

- **Mediation Styles:**
  - **Facilitative**
    - Structured process where the Mediator assists and guides the parties toward a mutually agreeable resolution
    - Does not provide predictions, recommendations or opinions
  - **Directive**
    - Mediator is proactive and helps to generate creative options
    - Keeps pressure on the parties to move towards resolution
  - **Neutral evaluation**
    - Points out the weaknesses of parties' cases
    - Makes predictions on judge or jury rulings
    - Might make formal or informal recommendations to the parties
  - **Transformative**
    - Focuses on recognition and empowerment of the parties
    - The parties structure both the process and the outcome of mediation, and the Mediator follows their lead

# What to look for in a mediator

- **Traits of Good Mediators:**
  - **Focus**
  - **Patience**
  - **Perseverance and endurance**
  - **Integrity and ability to maintain confidences**
  - **Neutrality and objectivity**
  - **Self-Control, tact and calm demeanor**
  - **Credibility**
  - **Adaptability**



# What happens prior to a mediation?

- **Agreement to Mediate:** Parties agree to mediation and agree on a Mediator.
- **Pre-Mediation Calls:** Often the Mediator will hold pre-mediation calls with the parties and/or their attorneys (together, individually or both) to familiarize themselves with the conflict and coach the parties and/or their attorneys regarding the mediation process.
- **Preliminary Statements:** The Mediator also may require the parties to submit pre-mediation statements on an *ex parte* basis. These statements are usually only seen by the Mediator (not the other party) and may summarize the party's position regarding the facts, law, damages, potential settlement ranges and potential settlement obstacles.
- **Scheduling:** Scheduling of the date and location of the mediation. Important scheduling considerations include:
  - If the case is already in litigation, whether the parties have conducted discovery and or status of any motions or other court deadlines
  - Ensuring sufficient time is set aside for the mediation
  - Ensuring all parties with settlement authority can attend
  - Choosing a location where all parties will feel comfortable and where there are sufficient conference rooms for break-out sessions

# What happens at a mediation?

## Opening Session

- The Mediator will introduce him or herself and general introductions will be made.
- The Mediator will provide an overview of the mediation process, review the confidentiality agreement and explain the role of the Mediator.
- Each party and/or his or her attorney will have the opportunity to give an opening statement regarding his or her side of the story.
- Following each party's preliminary statement, the Mediator will follow up with questions and or reflections.
- Mediation will continue in joint session or go into caucus.

# Joint Session

- Joint Session is when all parties (and their attorneys) stay in the same room and carry out fact finding and settlement negotiations with the facilitation of the Mediator. Joint Session gives the parties an opportunity to hear each other's position and be heard by the other party.
- Pros:
  - Joint Session gives the parties an opportunity to move forward with settlement discussions, but with the facilitation of the Mediator.
  - If the parties have not had the opportunity to hear the other party's perspective, Joint Session can be a "safe place" to share information that may lead to settlement.
- Cons:
  - If the parties are in litigation and have not conducted much discovery, they may be unwilling to participate in detailed Joint Session because it could lead to a "fishing expedition."
  - In the case of escalated disputes, long Joint Sessions can lead to inflammatory comments and accusations.

# Caucus

- A Caucus is where the Mediator meets with each party (and his or her attorney) separately without the other party or parties present.
- Anything said in Caucus is confidential, and the Mediator should not disclose what is said in Caucus to the other party or parties (or their attorneys) without permission.
- Initial Caucuses are often focused on fact-finding and establishing settlement ranges.
- Later Caucuses often operate more as “shuttle diplomacy”, with the Mediator utilizing various mediation techniques to assist the parties in reaching settlement.
- Caucus is often where the real work occurs in business mediations because it allows the parties to share additional facts, legal positions and interests with the Mediator.
- Caucuses give the Mediator the opportunity to work with the parties separately on their settlement ranges, expectations and brainstorm additional settlement options.

# Mediator's Strategies

- Strategies a Mediator may utilize during a business mediation to help the parties reach settlement and avoid impasse include:
  - Brainstorming new options
  - Questioning parties regarding the facts, law, interests, strengths and weaknesses of their case and the other party's case
  - Exploring non-monetary settlement options
  - Conditional demands and offers
  - Backwards bargaining
  - Decision tree analysis
  - Last best demand and offer
  - Best alternative to negotiated settlement
  - Mediator's Proposal
  - Attorney-only sessions
  - Triangulating the gap
  - Apologies
  - Timing of payments

# Ultimate Goal: Agreement

- The ultimate goal of a mediation is for the parties to come to agreement on a resolution.
- If the parties are in litigation, the goal is to settle the lawsuit.
- The settlement terms are agreed to in principal at the mediation. The parties and their attorneys then prepare the settlement agreement.

# Benefits of Mediation

- Cost Savings
- Efficiency
- Confidentiality
- Neutrality
- Flexibility
- Preservation of business relationships
- Parties have more control

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Deborah Buyer serves as a neutral Mediator in commercial, business, employment and workplace mediations.

- **MEDIATOR ROSTERS**
- SDNY Mediation Panel
- NYS Supreme Court Commercial Division (NY County) Mediation Roster
- Cornell ILR Scheinman Institute National Roster of Workplace Neutrals
- NY Peace Institute approved Mediator
  
- **MEDIATION TRAINING**
- NY Peace Institute Basic Mediation Training and 10-week Apprenticeship, Spring 2011
- NYC Bar Association Advanced Commercial Mediation Training, Summer 2011
- Cornell ILR Scheinman Institute Employment Law Mediator Training, Fall 2011
- SDNY Mediation Refresher course, Fall 2011