

Introduction to mediation

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Mediation is a process through which participants seek to resolve disputes, with the help of an independent mediator or mediators.

It involves the participants and the neutral person working through the issues being disputed one-by-one, so that they can develop options, consider alternatives and reach a mutually-agreeable settlement.

Mediation emphasises the responsibilities of the participants to make decisions that affect their lives, and it is therefore a self-empowering process (Folberg & Taylor, 1984). It can be used in conflicts or disputes where those involved are unable to resolve matters or come to an agreement by themselves, and this can be related to a range of circumstances.

For example, family dispute resolution, which is a form of mediation, may be used by a couple who have separated and are unable to agree on the living arrangements for their children.

Mediation can also be useful in workplaces, such as when two staff members are in dispute in relation to a project or work-related matter, and are unable to reach an agreement on how to proceed.

Mediation process

The National Mediator Assessment Standards (NMAS) defines mediation as a process that “promotes the self-determination of participants and in which participants, with the support of a mediator:

- communicate with each other, exchange information and seek understanding
- identify, clarify and explore interests, issues and underlying needs
- consider their alternatives
- generate and evaluate options
- negotiate with each other; and
- reach and make their own decisions.

A mediator does not evaluate or advise on the merits of, or determine the outcome of, disputes.”

These steps form a specific process that a mediator works through. It is this structured negotiation process that allows the participants to share their point of view and generate a range of options for discussion. By clarifying the interests and areas of disagreement, participants can brainstorm options that extend past what they were initially considering.

Therefore, mediation can “expand the pie” by opening up more opportunities for resolution, with the aim of reaching an agreement that both participants can live with.

Key principles of mediation

Future-focused

- Mediation is not about going over past events but making arrangements for the future

Impartial

- The mediator is an independent person and does not have any vested interest in the outcome

Neutral

- The mediator is not aligned with either participant and uses language and skills to ensure that all participants have an opportunity to speak and put their ideas forward

Voluntary

- Participants need to agree to attend mediation and participate in the process

Transparent

- Participants are informed about the process at the start of the mediation session and are encouraged to be open and honest about their interests and concerns.

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Using these principles, mediators create a supportive environment where participants can feel safe, comfortable and respected and therefore are able to contribute meaningfully in the process. It is important to note, that if participants do not have the capacity to participate effectively, for example if they feel uncomfortable or unsafe in a room with the other participant, mediation may not be appropriate.

As discussed earlier, one of the key aspects of mediation is the independence of the mediator. The mediator is not involved in making the decisions or determining the outcome, but rather they facilitate structured conversations to help the parties involved in the conflict to develop ideas and potential agreements that meet their interests.

The mediator's role is as a neutral third party who helps to manage the process and provide a safe environment for mediation to occur. The participants can raise their concerns and choose to make decisions, or choose not to make decisions. In this way, the participants have control over the outcome of the mediation process. This differs from the process of going to court, for example, where a judge makes the decisions and both participants must then follow this decision, whether it is suitable for them or not.

Types of Alternate Dispute Resolution

Mediation is one of the many processes that come under the banner of Alternative Dispute Resolution (ADR) processes. There are a number of other ADR processes, which are detailed below.

Negotiation

Negotiation involves the people involved in the conflict discussing the conflict directly and trying to come to an agreement.

Mediation

Mediation involves an independent person (the mediator) facilitating a discussion for the people involved in the conflict, and supporting them come to a suitable agreement. The mediator is not involved in the decision-making. Those involved in the conflict have control over the outcome.

Conciliation

Conciliation is similar to mediation, however the independent person (the conciliator) may be able to provide some legal information or advice. Like mediators, conciliators do not take sides or make decisions.

Solicitor Negotiation

A solicitor acting for each party negotiates an agreement on their behalf. Those involved in the conflict may or may not be present. Solicitors provide advice to their client, but the client makes the decisions about accepting any agreements.

Arbitration

Arbitration is usually a much more formal process than other forms of ADR. In arbitration, all those involved in the conflict present their point of view to an independent person (the arbitrator). The arbitrator then makes a decision on the dispute.

Litigation

The litigation process involves all participants presenting their case in a court or tribunal, usually through their legal representation (the lawyer). A judge or tribunal member then makes a decision on the dispute, with the participants then required by law to follow the decision, unless it is successfully appealed.

The processes listed above become progressively more formal, structured and public, with the participants having less control over the outcome. For this reason, mediation can be a useful process to resolve disputes where participants wish to have input into the outcome but are unable to reach or negotiate an agreement independently. Mediation can also help to provide an opportunity for conversations and a dialogue between those involved in the dispute.

Summarising mediation

Mediation can:

- help participants to make workable agreements
- assist participants to identify shared views and where the differences lie
- help participants to make decisions about how to manage the areas on which they don't agree
- provide a forum for discussion
- provide a supportive environment
- be an entry point to, or be part of, the legal system.

References

- National Mediator Accreditation System (NMAS). (2015, July). Retrieved from <http://www.msb.org.au/mediator-standards/standards>.
- Folberg, J., & Taylor, A. (1984). *Mediation - A comprehensive guide to resolving conflicts without litigation*. San Francisco: Jossey-Bas.

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