46th Annual Indiana Consortium
of
State and Local Human Rights Agencies Conference

Presented by:
MEDIATION & CONCILIATION
Systematic and interactive processes, which employ negotiation techniques to assist parties find the best possible solution to their problem.

Requires a facilitator who enables discussions resulting in an agreement between the parties which in turn settles the dispute.

Practical
- economical

Private
- unique
Mediation

ADR process

Mediator is neutral
- Facilitates dialogue
- Helps parties evaluate goals
- Helps parties review options
- Parties find mutually acceptable solution
- Does not focus on fault/liability

Attorneys may play active role to generate solutions

Mediator controls stages
- Does not make decisions/impose solutions/penalties
Mediation

Two or more persons

Mediator

Working together to find a solution to their problem
Mediation

Focus is on

Mediator Not trying to uncover the truth

Solution

Mediator Not trying to impose legal rules
Conciliation

- Not adversarial

- Not as structured as mediation

- Neutral, with authority to provide solution

- ADR process prevalent in civil law countries

- Impartial conciliator in the process

- Directs parties towards agreement

- Seeks out the right that has been violated

- Advises parties, makes settlement proposals
Conciliation

Focus is on

Conciliator seeks the violated right

Optimal Solution

Conciliator advises parties/responsible for settlement proposals

- Parties seek guidance from conciliator
- Attorneys offer advice about proposals made by conciliators
SIMILARITIES BETWEEN MEDIATION & CONCILIATION

• Practical solutions to disputes
• Establishes balance between parties
• Complements judicial process
• Non-adversarial
• Less formal / Informal
• Timely
• Confidential*
• Resolution may be accepted/rejected by parties
Benefits

- Expeditious resolution
- Cost effective
- Less formal
- Win–win outcome
- Complementary to judicial process
- Practical solutions
- Unique outcomes
- Furthers unique interests of parties
- Voluntary
- Confidential
PREPARATION IS KEY

• Block off several hours for mediation
• Choose participants strategically (witnesses)
  • Persons who have direct knowledge
  • Persons who have decision making authority
  • Persons who are genuine stakeholders
• Be aware of which party is likely to prevail if a solution is not reached
  • Research best and worst outcomes
• Inform parties that they are free to sue if they are not able to settle
PREPARATION IS KEY

- Discuss sensitive issues/concerns in advance
  - Identify priorities
  - Do not ignore interests that are not ideal
    - May expose clues that unlock keys to a deal
  - Be familiar with what parties are willing to give and receive
  - Have case law/precedents/ realistic predictions to guide parties
  - Compile strengths & weaknesses of case
  - Direct parties towards realistic expectations
  - Prepare templates for settlement
    - Share with counsel
DECISION MAKERS

• Ensure that parties to dispute are present
  • Witnesses are typically not necessary
  • Leave litigators at home

• Corporate decision makers MUST be present
  • Management/Directors who can accept offers for the entity

• Ensure that participants are aware that they will make decisions
**Agreement to Mediate**

- Consent of parties is crucial
  - Parties must sign notice of mediation and confidentiality agreement
    - Discuss nature of mediation and implications
    - Document whether all meetings will take place with both parties present
Method & Procedure

Hybrid

- Some parties present, some parties via phone

In person

Teleconference
PROCEDURE

• Structure is critical
  • Introductions
  • Opening statements
    • must be clear and thorough

• Joint sessions
  • Parties must be guided through the process
  • Ensure that salient points are covered

• Confidential caucuses
  • Encourage parties to be candid
  • Clarify whether information disclosed can be shared with other side
STAGES

1. Stage 1 Mediators Opening Statement
2. Stage 2 Complainants Submission
3. Stage 3 Respondents Submission
4. Stage 4 Confidential Caucuses
5. Stage 5 Settlement & Affirmation of Settlement
6. Stage 6 End of Mediation/Closure
Mediators Opening Statement

Introductions

Explanation of Mediation Process

Share Rules & Goals

Create a safe environment for the dialogue

Encourage parties to mediate in good faith
Complainant’s Submission

- Complainant describes dispute/incident in own words
- How complainant has been affected by incident
- Nature of harm & expectations

Maintain control over proceedings, No interruptions

Identify interests, priorities and concerns
Stage 3

Respondent’s Submission

- RP describes incident in own words
- Responds to allegations and demands

- Maintain control over proceedings, No interruptions
- Identify interests, priorities and concerns
### Confidential Caucuses

<table>
<thead>
<tr>
<th>Parties meet privately with mediator, discuss strengths &amp; weaknesses</th>
<th>Parties distill priorities towards settlement with mediator</th>
<th>Mediator moves parties away from focusing on facts</th>
</tr>
</thead>
</table>

**Stage 4**

- **Flexibility**: explore creative ways of cooperating as against clashing

- Identify main concerns: financial settlement, communications, apologies, visitation, reinstatement etc.
Stage 5

Generating Settlement

- Brainstorm about potential outcomes
- Evaluate possible solutions/options
- Manage parties’ critique

Focus on points of agreement; how realistic
Deliver bad news with pacing and patience

Probe and document potential areas of compromise
**Stage 6**

**Finalization of Settlement**

- Mediator confirms final outcome with each side
- Summarize agreement terms
- Confirm parties’ commitment

- Discuss agreement format and implications for non-compliance
  Circulate for review & amend accordingly

- Include timelines eg. Payment deadline, training dates etc.
**Ending & Paperwork**

Agreement must be signed by both parties to be binding

Make sure that all other cases/claims/related issues are discussed in detail

- Parties should be able to put the case behind them after settlement
- Most parties prefer one agreement covering Confirm true understanding of parties
- Attorneys may choose to draft agreement
IMPASSE – NO AGREEMENT

• When neither party is willing to compromise any further on an issue
• Parties regard it as the end of negotiations
• Mediators need skills to ride an impasse
**Impasse - No Agreement**

Review issues resolved and issues remaining

Discuss whether future mediation sessions would be useful

- Consider other dispute resolution processes
- Be clear that mediation is over and remind parties about confidentiality
IMPASSE BREAKING TECHNIQUES

- Bracketing
- Concessions
- Splitting the difference
- Breaks
- Asking for reciprocity
- Anchoring
- Framing & Reframing
- Set thorny issue aside
- Diagnostic Questions
- Telescoping
- Break issue into smaller parts
- Suggest a trial period
- Use reality checking e.g. Court
**Impasse Breaking Techniques**

- Bracketing - Establishing zone of potential agreement
  - Deliberate joint movement by parties towards resolution
  - Negotiating in explicitly stated range, narrower than last offer
  - Shows willingness to reciprocate, May require counter-bracketing
  - Fast forwards negotiation - once accepted process resumes in bracket
  - Narrows the gap between parties

If you move to X

If you move to X

<table>
<thead>
<tr>
<th>Lower Limit</th>
<th>Upper Limit</th>
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<tbody>
<tr>
<td>$10,000</td>
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I will move to Y

I will move to Y

If you move to X

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IMPASSE BREAKING TECHNIQUES

• Concessions
  • Tradeoffs - Conceding/yielding/compromising during mediation
  • Recognize that negotiation is a give and take process
  • Conceding requires balancing & prioritizing interests
  • Establish value of each concession
    • Ensures that expectations are not raised unreasonably
    • Guarantees that concessions will not be taken for granted.
    • Multiple small concessions outweigh one large concession
    • Stress importance of reciprocity
    • May be withdrawn
Splitting the difference

- This works best when parties are within settlement range
- The party that suggests this is often the primary beneficiary
- Parties may reject offer to split difference if not in their favor
Impasse Breaking Techniques

- **Breaks**
  - Ease the push and pull tension
  - Preferably structured
    - Assign homework to do
      - Written alternatives
      - Financial justification
      - Reasons for position

Generate new options

Explore alternatives

Reality check
**Impasse Breaking Techniques**

- Ask for Reciprocity
  - Stalling is often caused by perceived unbalanced movement
    - Encourage parties to make corresponding movements
      - Concessions/privileges should be returned in kind
      - Label concessions clearly to place value on same

**Feelings**

**Fear**

**Anxiety**
**IMPASSE BREAKING TECHNIQUES**

• **Anchoring/Focalism**
  - Association of a word, phrase or gesture with a particular concept, state of being or experience
    - Identify things that parties enjoy – hobbies, children etc
    - Re-stimulate/anchor positive state simply by repeating the word or gesture.
    - Detect when a participant is in resourceful state
      - Zoom in to move mediation forward

- Anchoring bias – giving weight to the first number put forth in a discussion
- Effective if you can predict the zone of possible agreement
- If countering against anchor, defuse it and move to counter proposal
IMPASSE BREAKING TECHNIQUES

• Reframing
  • Change the conceptual and or emotional setting/viewpoint in relation to which a situation is experienced
  • Place the situation in another frame which suits it equally well or better and change its entire meaning
    • Shift from substantive issues to procedural or psychological concerns
    • Reframe complex argument into simple propositions that involve solutions
    • Helps people view things from different perspective
      • May generate new energy to revisit substantive issues or put the issue into proper perspective
  • Test for emotional investment by asking what it would take to surrender
  • State what each party stands to lose
Impasse Breaking Techniques

• Setting Thorny Issues Aside
  • Change the focus of discussion
  • Move away from item on table to less complex issue
  • Return to complex issue after a positive outcome on less controversial issue
    • Parties get opportunity to re-evaluate their positions
    • Creative approach may be generated
IMPASSE BREAKING TECHNIQUES

• Ask Diagnostic questions
  • Seek their interests
  • Identify underlying motives
  • what they need
  • Their fear
  • Their preferred resolutions
• Formulate solutions that serve party
  Interests and address stakeholder concerns
**Impasse Breaking Techniques**

- **Telescoping**
  - Summarize both parties’ positions
    - Validate areas of agreement
    - Positive response to your integrity may result in positive outcome
    - Reveals points of contention
    - May reduce level of significance assigned to impasse issue. Make sure the parties realize that you are making reasonable efforts to understand their point of view

- Restate
- Stay flexible
- Clarify
Impasse breaking Techniques

- Break the issue down into smaller parts
  - Isolate difficult issues and reserve for later
  - Explore hidden agendas and willingness to compromise
  - Explore trade-offs
Impasse breaking Techniques

• Suggest a trial period
• Use reality checking e.g. court outcome


**Trust and Integrity**

- Protect your integrity during process
- Build trust
- Maintain confidences
- Be honest
COMPOSURE & CREATIVITY

• Remain calm during entire process
• Be creative and innovative, take advantage of unexpected opportunities
• Leverage information to influence offer/reception
• Manage party frustrations effectively
• Discuss all options thoroughly
• Be patient
  • Mediation involves change and change takes time
  • Address all issues carefully
Assertiveness & Persuasiveness

• Do not be a bully or allow yourself to be bullied
• Treat all parties with respect
  • A party who feels disrespected is unlikely to give consent
• Be persuasive
  • About the merits of the case in general
  • Mutual benefits of a deal
  • Use objective logic
  • Personal credibility is an asset
  • Share offers between parties to reach a compromise
COMMUNICATION

- Be clear and precise
- Repeat facts or options that are not well absorbed
- Focus on party interests – Getting to Yes
  - Provide solutions or paths to interests
  - Reconcile interests for the parties by providing options that are better than no deal

Empathy, active listening, seeking information are crucial elements of a successful mediation. During interactions with the parties your sole focus must be on the other person and what they have to say.
WHAT TO EXPECT

• Competitive negotiation
  • It is not a cooperative process
  • Parties are not ready to show their cards
  • Unreasonable expectations
    • Best case at trial is a good way to manage expectations
  • Attempts to argue about who/what is right
    • Focus on achieving a favorable settlement
    • Don’t focus on vindictive arguments
**Facilitative role**

- Gather information concerning the dispute,
- Identify the issues involved;
- Explore the respective interests of the parties
- Develop options that might satisfy the respective interests
- Evaluate the options that exist for settling the dispute
- Facilitate the conclusion of a settlement
- Facilitate the recording of the settlement in an agreement.
Facilitative Role

• The tone of your voice affects the success of the mediation
  
  • Be deliberate in your delivery
  
  • Use your positive voice even though the language must be direct
  
  • Build rapport
  
  • Calibrate questions carefully: open ended mostly
    • Avoid accusations or an audit-like approach
    • Tap into their emotions (it feels like, it seems like)
  
  • Control the agenda in a non-threatening way
  
  • Allow /encourage the parties to suggest solutions
  
  • Do not be discouraged when participants say no to suggestions or offers
## Resolution Options

<table>
<thead>
<tr>
<th>Reliefs</th>
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<tbody>
<tr>
<td><strong>Financial Settlement</strong></td>
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<tr>
<td><strong>Reinstatement</strong></td>
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<tr>
<td>Employer not to contest unemployment benefits</td>
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<tr>
<td><strong>Reference Letter</strong></td>
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<tr>
<td><strong>Training</strong></td>
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<tr>
<td>Reasonable accommodation</td>
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<tr>
<td><strong>Provide housing</strong></td>
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</table>
# Resolution Options

## Reliefs

<table>
<thead>
<tr>
<th>Option</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transfer</td>
<td>(position, location, schedule, supervisor)</td>
</tr>
<tr>
<td>Release</td>
<td>(non-compete clause, employment radius)</td>
</tr>
<tr>
<td>Placement support</td>
<td></td>
</tr>
<tr>
<td>Change of status</td>
<td>(termination to resignation)</td>
</tr>
<tr>
<td>Stock Options</td>
<td>(buy back, accelerated vesting)</td>
</tr>
<tr>
<td>Gift Cards</td>
<td></td>
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<tr>
<td>Public statement about inclusion &amp; anti-discrimination</td>
<td></td>
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</tbody>
</table>
Resolutions Options

Reliefs

- HR Record revision (counselling/discipline memo removed)
- Tuition Reimbursement
- Separation Package
- Recognition (retirement party, award)
- Payment of premiums (Cobra)
- Donations to charity
- Option to Rehire
The end

Questions