

# Mediation: Through The Eyes Of The Mediator

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What is mediation?

It is a process: The core value in mediation is that the process provides the parties with an opportunity to negotiate, converse and explore options aided by a neutral third party, the mediator, to exhaustively determine if a settlement is possible. It is a process of empowerment of the parties to control their destiny in their dispute.

Mediation involves a determination of interests – the interests of the parties. A concept frequently not found in the litigator’s lexicon, interests are the needs, wants, and desires that are of importance to the parties – the answer to the question “what is this dispute really all about for you?” To get there, mediation provides a forum for principled negotiations. These negotiations may at times become frustrating and troubling, but with the mediator’s help the parties keep moving forward. Principled negotiations stimulate exploration of settlement alternatives and an opportunity to evaluate those alternatives, weighing them against the likely outcome of going to trial and viewing proposals through the lenses of reality. Mediation - compared to litigation, trial and appeal – is a veritable bullet train to certainty and finality. If the dispute settles at the mediation, it settles on a basis acceptable to the parties; the specter of trial is removed; and, the threat of being tied up on appeal is eliminated.

The mediation does not fail if a settlement is not reached. Rather, the process fails when parties are not given every possible opportunity to be heard and explore settlement alternatives.

What we as Mediators do:

1. We are a Guide: a microcosm of life, mediation is a journey and your mediator is your guide. Your mediator helps get the parties from the odious accumulation that is litigation, out of the quagmires of the dispute, across the potholes and to a place where they can move on with their life.
2. We Provide a Place to be Heard: a significant advantage to mediation lies in its confidentiality. In caucus, we give the parties a place to tell us how they see it, to vent their emotions, to explain their needs, wants, desires – a secure place to be heard. Rules of evidence and strategy control what can be said at trial; sometimes even after the verdict the parties haven’t a clue if they were truly heard.
3. We Employ a Process Where Parties Control Their Own Destiny: unlike the adversarial litigation model, mediation is a dispute resolution process where the parties decide the outcome. The jury trial context is frequently described as the proverbial “crap shoot”, and even if not that random, you put your fate into the hands of 12 strangers. Not every case settles in mediation but

at least the process and the decisions on whether to accept settlement terms are both placed into the hands of the parties. This is a process of empowerment.

4. We Provide Reality Checks: we ask you the hard questions; the ones you avoid asking because they are painful; the ones the answers to which the parties try not to recall.

5. We Promote Focus: what are the parties truly looking for in a settlement? We encourage the parties to be clear about their expectations so that we can help them achieve their goals and help them test those goals against the Reality Checks.

6. We Seek to Expand View: look at the bigger picture and beyond legal and factual issues. More often than not, they simply get in the way of the party's ability to see key issues, to identify what she wants/needs, and to achieve her settlement goals identified by her as we Focused.

7. We Shift Focus: here we help the parties acknowledge that concentrating on arguing the facts does not move them closer to their settlement goal. Someone famous somewhere once said you cannot change history. We need to focus on where we are and where we want to be – with a settlement of the dispute.

8. Remind of the Costly Alternative: at the risk of stating the obvious and recognizing that your client has suffered through it, at times we must remind her of what she faces by continuing on with the dispute on the litigation battlefield. That process is fraught with expense: monetary, emotional and time. It is stressful. It is uncertain. And, it does not necessarily end with a jury verdict, judgment, or arbitrator's award.

9. Protect Strategic or Tactical Interests: Through private, confidential caucus, the mediator can take steps to assure that the mediation is conducted in a manner that does not prejudice a party's strategic or tactical trial interests, nor undermine or intrude upon the attorney-client privilege.

10. Guardian of Principle: By facilitating principled negotiation, the mediator keeps the process on track, guarding the underlying assumption that justice is not an empty word; "matters of principle" are not only important in mediation, they are paramount.

11. Protector of the Parties: The mediator's neutrality affords her the ability to insure that the disputants are treated with dignity, respect, and together with counsel, fairness.

12. Gatekeeper of the Process: Helping the parties, encouraging them in their efforts to achieve reconciliation and compromise, moving them beyond positions to explore their interests underlying the dispute, your mediator conducts the process so as to give every possible opportunity to reach a mutually acceptable settlement.

Depending upon to whom you listen, upwards of 98% of civil cases settle before trial, often in the closing days before trial. By waiting until then, however, you pay on multiple levels: the costs and attorney's fees dramatically rise in the final 90 days before trial; the settlement reached is likely to leave the parties with a feeling of having been forced or pressured into a "courthouse

steps” settlement; and then there is the emotional roller coaster ride that continues yet only to delay the inevitable.

Taking into consideration all of the factors, as a lawyer sworn to counsel and aid your clients, why would you not want to encourage them to disembark from the litigation train and join you on the mediation journey to a satisfactory resolution of their dispute?