Overview of the Use of Mediation

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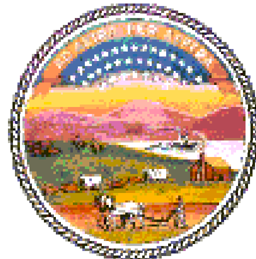

What is Mediation?

- Slides 1 through 9 provide a quick background on mediation.
- If you have been ordered to mediation, you might review slides 1 through 29.
- If you are interested in becoming a mediator or want a comprehensive review, examine the full 50 slides.

Keep In Mind

- The following information is a general view of some of the more common mediation practices. These practices may differ between courts, governmental agencies and private providers.

Introduction

…"mediation" means the intervention into a dispute by a third party who has no decision making authority, is impartial to the issues being discussed, assists the parties in defining the issues in dispute, facilitates communication between the parties and assists the parties in reaching resolution.

KSA 5-502 (F)

Why Learn About Mediation?

Mediation is used in state and federal courts, in state and local governments, by the business community, by individuals and by non-profit community organizations as an alternative to litigation. It is important for participants in those processes to know what it is and the variations in which it can be used.

Advantages of Mediation

- Agreement is voluntary
- Process is confidential
- Can be quicker than litigation
- Can be less expensive if done early
- Non-adversarial
- Allows for creative solutions
- Informal
- Opportunity to maintain relationships

Why Use Mediation?

Key findings that mediation (and other forms of dispute resolution):

- produces high user satisfaction;
- improves pace of litigation (especially in domestic litigation);
- produces high settlement rates;
- produces more stable agreements over time;
- may reduce court workload; and
- may reduce litigant costs.

➓ Report to the Legislature on the Impact of Alternative Dispute Resolution on the Massachusetts Trial Court. Prepared by the Supreme Judicial Court/Trial Court Standing Committee on Dispute Resolution for the Chief Justice for Administration and Management of the Trial Court -- February 2, 1998.

Role of the Mediator

The role of the mediator is to aid the parties in:

- identifying the issues,
- reducing misunderstandings,
- clarifying priorities,
- exploring areas of compromise, and
- finding points of agreement.

An agreement reached by the parties is to be based on the decisions of the parties and not the decisions of the mediator.

Interest-based - Position Based

A goal in mediation is to get the parties to focus on their needs (interests) rather than their wants (positions).

It is important to explore the interests that both parties have in common and move the parties to a common goal.

Essential Mediator Skills

- Effective listening
- Patience
- Skillful and varied questioning styles
- Problem solving ability
- Creativity
- Ability to reframe issues
- Ability to gather information
- Setting and maintaining the right tone
- Bring closure to the sessions.

Mediator's Deskbook, CPR Institute for Dispute Resolution

Active Listening

A critical component of communication is active listening, also known as reflective listening. It is more than hearing. The listener is very active. An active listener makes the speaker feel understood and fully attended to.

Reframing

Reframing is often used in mediations when it appears that one or more parties are not hearing or understanding what other parties are saying. It is a process of changing how a disputant defines the conflict, interest, or issue.

Steps of Reframing

Listen – demonstrate that you understand feeling and substance.

Take out what is unproductive – what's in the way of problem solving: position, threat, demand.

Look for Interests over Positions

Restate: Translate into positive, future oriented, non-judgmental statements of interest.

Creating Options

Some people will change their position easily and others dig in their heels. The mediator has to focus on the interests and not the positions. They need to invent options for the mutual gain of the parties. This means developing multiple options to choose from. They have to insist on using objective criteria.

Principled Negotiation

"The principled negotiation method focuses on basic interest, mutually satisfying options, and fair standards and typically results in an agreement. Separating the people from the problem allows you to deal directly and empathetically with the other negotiator as a human being, this making possible an amicable agreement."

("Getting to Yes", Roger Fisher and William Ury, the Harvard Negotiation Project, 1981)

Stages of the Mediation Process

- Mediator's Opening Statement.
- Disputants' Opening Statements.
- Joint Discussion.
- Joint Negotiation.
- Closure.

Mediator's Opening Statement

The opening statement is when the mediator will lay out the ground rules. A mediator will indicate that the process is confidential and nothing can be used in court.

The first stage is to encourage parties to meet together. Getting the parties to the first stage is to explore whether there is any opportunity to settle part or all of the dispute.

Written Procedures

"Before the dispute resolution process begins, the neutral person conducting the process shall provide the parties with a written statement setting forth the procedures to be followed."

K.S.A. 5-509 (c)

Sample Mediation Ground Rules

We will take turns speaking and not interrupt each other.

We will not blame, attack, or engage in put-downs and will ask questions of each other only for the purposes of gaining clarity and understanding.

Sample Mediation Ground Rules

We will stay away from establishing hard positions and express ourselves in terms of our personal needs and interests and the outcomes we wish to realize.

We will listen respectfully and sincerely try to understand the other person's needs and interests.

We recognize that even if we do not agree with it, each of us is entitled to our own perspective.

Sample Mediation Ground Rules

We will not dwell on things that did not work in the past, but instead will focus on the future we would like to create.

We will make a conscious, sincere effort to refrain from unproductive arguing, venting, or narration, and agree at all times to use our time in mediation to work toward what we perceive to be our fairest and most constructive agreement possible.

We will speak up if something is not working for us in mediation.

We will request a break when we need to.

We will point out if we feel the mediator is not being impartial.

Consortium for Appropriate Dispute Resolution (CADRE),from a grant from the U.S. Department of Education, Office of Special Education and Rehabilitative Services

Disputants' Opening Statements

The mediator then allows the parties an opportunity to explain their positions both in front of each other and/or in private meetings with the mediator. Some mediators will meet individually with each party and then meet all together. At this stage the mediator asks questions to better define the dispute and to see what the positions and the interests are of the parties.

Joint Discussion

The third stage is to begin to encourage or propose options and have each party respond to each option. Each party needs to be continually encouraged to be open to discuss any suggestion and to offer their own suggestions in a positive response.

Caucusing vs. Face to Face

Some mediators use caucus (separate meetings) to conduct the negotiations and seldom get the parties together. Other mediators feel that it is essential to have the parties negotiate face to face and to only use a caucus when there is a clear break down in the process. There can be strategic reasons for using either system or for mixing them.

Closure

If an agreement has been reached, the mediator may put its main provisions in writing as the parties listen. The mediator may ask each side to sign the written summary of agreement and suggest they take it to lawyers for review.

If the parties want to, they can write up and sign a legally binding contract. If no agreement was reached, the mediator will review whatever progress has been made and advise everyone of their options, such as meeting again later, going to arbitration or going to court.

Information to Court

"If a court refers a case, information shall be provided to the court as to whether an agreement was reached and, if available, a copy of the signed agreement shall be provided to the court."

K.S.A. 5-509 (b)

Mediation Agreement

"If the parties involved in the dispute reach an agreement, the agreement may be reduced to writing and signed by the parties. The agreement shall set forth the settlement of the issues and the future responsibilities of each party. If a court referred the case, the agreement as signed and approved by the parties may be presented to the court as a stipulation and, if approved by the court, such agreement shall be enforceable as an order of the court." K.S.A. 5-514

Co-Mediation

Some mediators work in pairs or co-mediate. This sometimes occurs in complex disputes where their skills and knowledge may complement each other.

TYPES OF MEDIATION

- Facilitative Mediation
- Evaluative Mediation
- Transformative Mediation

Facilitative Mediation

The mediator will assist the parties in reaching a mutually agreeable resolution. The mediator asks questions; searches for interests underneath the positions taken by parties; and assists the parties in finding and analyzing options for resolution.

The facilitative mediator does not make recommendations to the parties, give his or her own advice or opinion as to the outcome of the case, or predict what a court would do in the case.

The mediator is in charge of the process, while the parties are in charge of the outcome.

Evaluative Mediation

Evaluative mediation is a process modeled on settlement conferences held by judges.

An evaluative mediator assists the parties in reaching resolution by pointing out the weaknesses of their cases, and predicting what a judge or jury would be likely to do.

Evaluative Mediation

An evaluative mediator might make formal or informal recommendations to the parties as to the outcome of the issues.

Evaluative mediators are generally concerned with the legal rights of the parties rather than needs and interests, and evaluate based on legal concepts of fairness. Evaluative mediators are more likely to meet in separate meetings with the parties (caucus).

Transformative Mediation

The transformative approach to mediation does not seek resolution of the immediate problem, but rather, seeks the empowerment and mutual recognition of the parties involved. Empowerment means enabling the parties to define their own issues and to seek solutions on their own.

“Recognition means enabling the parties to see and understand the other person's point of view--to understand how they define the problem and why they seek the solution that they do.”

Guy Burgess or Heidi Burgess, Conflict Research Consortium, University of Colorado, Transformative Mediation, What Is It. www.colorado.edu/conflict/transform/tmall.htm

Good Mediator Characteristics

"The parties indicated that some of the mediators' characteristics that had the largest effect on favorable assessments were more hours of formal mediation training, more hours of continuing mediation education, and spending 11% to 50% of one's work time as a mediator."

"An Assessment of Domestic Relations Mediation in Maine and Ohio Courts", State Justice Institute grant 95-03C-A-152, July 1999.

What creates a successful mediation?

"Our study of the mediation programs in these courts indicates that it is the quality of the mediation session and the individuals involved, not the characteristics of the case referred to mediation, which have the greatest effect upon a case's propensity to be settled." An Evaluation of Court-Connected Mediation Programs In Northern Illinois, American Judicature Society 1999.

Kansas Supreme Court Rules

The Kansas Supreme Court has issued Supreme Court Rules 901-904 which govern approved mediators in Kansas.

Rule 901 - governs attorney mediators.

Rule 902 - defines mediators and mediator trainer qualifications.

Rule 903 - defines the ethical standards for mediators

Rule 904 - lists the continuing mediation education requirements

Supreme Court Rule 903

Several key ethical issues in Rule 903 are:

(a) **Self-Determination:** A Mediator Shall Recognize Mediation Is Based on the Principle of Self-Determination by the Parties.

– Self-determination is the fundamental principle of mediation. It requires the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement.

(b) **Impartiality:** A Mediator Shall Conduct Mediation in an Impartial Manner.

The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which she or he can remain impartial and evenhanded. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.

(c) **Conflicts of Interest:** A Mediator Shall Disclose All Actual and Potential Conflicts of Interest Reasonably Known to the Mediator. After Disclosure, the Mediator Shall Decline to Mediate Unless All Parties Choose to Retain the Mediator. The Need to Protect Against Conflicts of Interest Also Governs Conduct that Occurs During and After the Mediation.

(d) **Competence:** A Mediator Shall Mediate Only When the Mediator Has the Necessary Qualifications to Satisfy the Reasonable Expectations of the Parties.

(e) **Confidentiality:** A Mediator Shall Maintain the Reasonable Expectations of the Parties with Regard to Confidentiality.

K.S.A. 23-605. Confidentiality

A mediator shall treat all verbal or written information transmitted between any party to a dispute and a mediator conducting the proceeding, or the staff of an approved program as confidential communications.

No admission, representation or statement made in the proceeding shall be admissible as evidence or subject to discovery.

K.S.A. 23-605. Confidentiality

A mediator shall not be subject to process requiring the disclosure of any matter discussed during the proceedings unless all the parties consent to a waiver.

K.S.A. 23-605. Confidentiality

Any party and the neutral person participating in the proceeding has a privilege in any action to refuse to disclose, and to prevent a witness from disclosing, any communication made in the course of the proceeding.

A neutral conducting the proceeding shall not be subject to process requiring the disclosure of any matter discussed within the proceedings unless all parties consent to a waiver.

Alternatives to Litigation

- Dispute Resolution Act–K.S.A. 5-509(a) provides the following:

  "Upon finding that alternatives to litigation may provide a more appropriate means to resolve the issues in a case and that the costs of the dispute resolution process are justified relative to the parties' ability to pay such costs, a judge may order the parties to the case to participate in a settlement conference or a non-binding dispute resolution process …."

Dispute Resolution Methods

There are a variety of dispute resolution methods other than mediation. Mediation techniques are used in many of these methods. Courts and other referral organizations screen cases to determine which method will work best. The following chart lists some methods and when they may be most appropriate to be used.

A CONTINUUM OF ADR APPROACHES

Cooperative Decision-Making	**Third Party Assistance with Decision Making**			**Third Party Decision Making**	
Parties are Unassisted	Relationship Building Assistance	Procedure Assistance	Substantive Assistance	Advisory Non-Binding Assistance	Binding Assistance
Conciliation	Counseling/ Therapy	Coaching/ Process Conciliation	Early Neutral Evaluation	Non-Binding Arbitration	Binding Arbitration
Information Exchange	Conciliation		Mini-Trial	Summary Jury Trials	Med-Arb
	Team Building	Training			
Cooperative Problem Solving	Informal Social Activities	Chairperson	Technical Advisory Boards		Mediation then Arbitration
		Ombudsperson			Dispute Panels (binding)
Negotiations		Facilitation	Advisory Mediation		
		Mediation	Fact-Finding		Private Court Judging
			Settlement Conference		**Voting**
					Grievance
					Formal Courts
					Violence

Caution

Dispute resolution is not appropriate in all cases. In many cases it is a litigant's constitutional right to go to trial to get their dispute resolved. There may be previous acts of violence, mental illness or simply a proven inability to negotiate which would make direct negotiations difficult.

Information

Please contact the Dispute Resolution Coordinator if you would like additional information:

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