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MEDIATION

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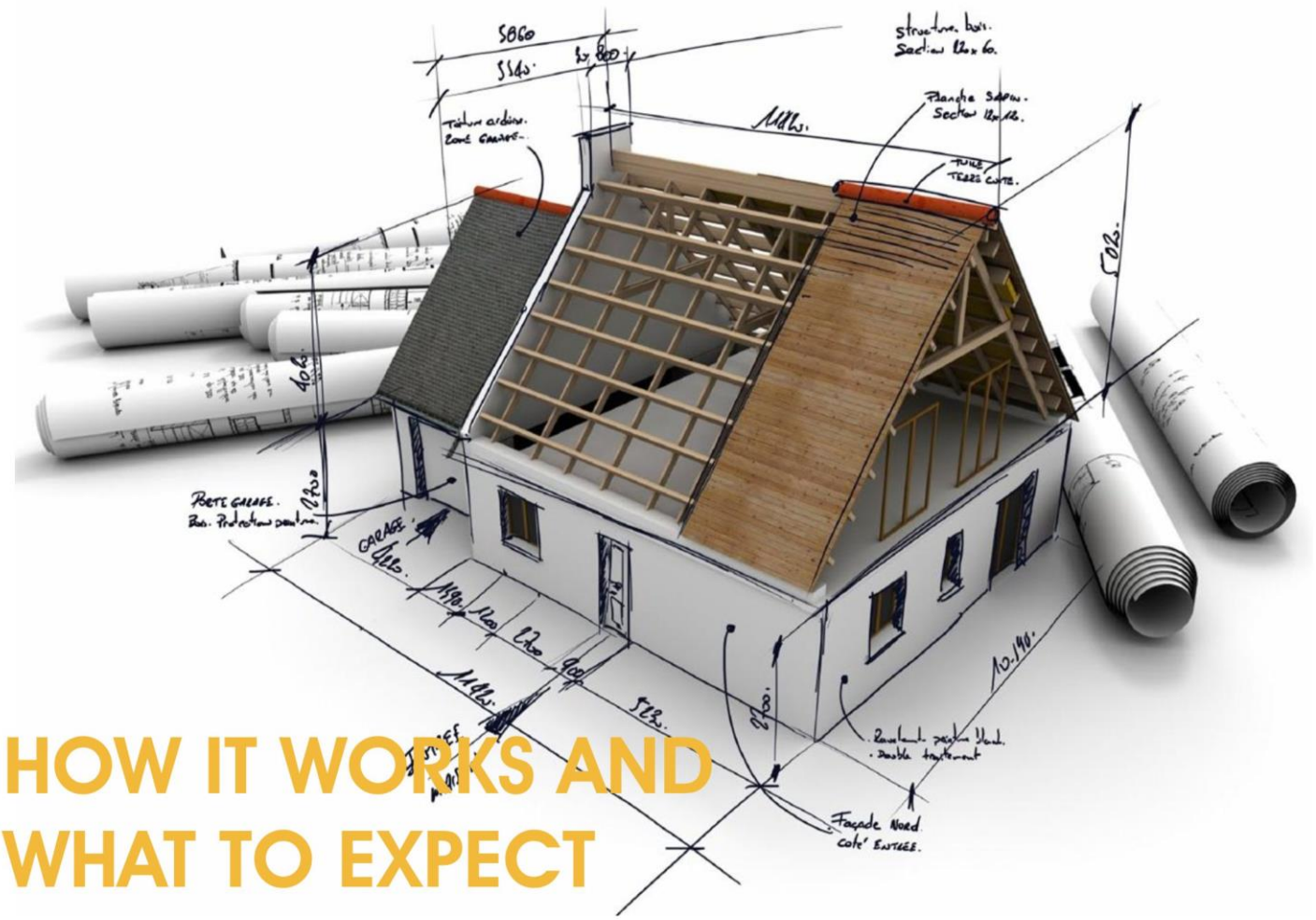

HOW IT WORKS AND WHAT TO EXPECT

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MEDIATION AT A GLANCE

Mediation is an **effective dispute resolution process** whereby the parties involved in a dispute are assisted by an independent and impartial third party to facilitate the process of reaching a settlement between the parties in dispute. Even though an independent and impartial third party (mediator) is involved, the outcome is not decided by the third party, he/she merely assists in reaching the outcome and the final settlement agreements lies with the parties in dispute. The third party may call upon expertise to assist in reaching a settlement.

Nowadays, mediation has become the preferred manner in which to resolve disputes and more in particular building disputes. Mediation is quite a flexible dispute resolution process in that it can be used before, during or after commencement of dispute procedures. It can even be used with other dispute resolution processes such as arbitration, simultaneously.

Dispute settlements, may with consent of the parties in dispute be made an order of court by the mediator.

WHAT IS MEDIATION?

In its simplest form it is a form of negation or round table discussion where parties involved agree to appoint a trained and impartial qualified third party (called a mediator) to assist them with whatever building dispute they are arguing at present – this could be anything from bad craftsmanship of your kitchen cabinets to a leaking roof.

The Mediator may not impose a decision on the parties and only acts as a facilitator whereby he/she facilitates the parties to reach an amicable decision.

> **In simple terms a mediator is the referee in a sports match, and it is his duties to ensure that all parties involved play fairly in achieving the end result or goal without injuries.**

Mediators do not judge or arbitrate a matter, they merely fulfil an advisory role where they offer certain educated recommendations as to a mutual settlement. The building mediator merely assists the parties involved to understand each other's arguments better and to reach an amicable solution to the advantage of all parties involved.

Seeing as this is a **voluntary process** the building dispute mediator is not allowed to judge or legally advise the parties involved in a dispute. The mediator may merely employ techniques in order to assist the parties in reaching an amicable solution with which all parties involved are satisfied. Having said this, each party involved will be given a fair chance to voice their concerns on an ongoing basis on the understanding that all parties must be given an opportunity to be heard.

The mediation process itself is confidential and exercised without prejudice which means that parties cannot rely on what is said during mediation outside of the mediation process. Once a settlement agreement is reached, the parties have a choice whether to enforce this agreement as a legally binding court order, but none of the parties may testify about what was said during the mediation.

BENEFITS OF MEDIATION

Mediation is a **fast, efficient, cheap and convenient** way of dispute resolution. Seeing as time is money, this is an extremely cost-effective way of dispute resolution. Nowadays, building dispute mediations is gaining popularity and is considered when a building dispute arises. With open and uninterrupted communication between the parties it also minimizes the risk of further disputes. This is a solid way of preserving important relationships for future value. Should court intervention be sought it will be to the benefit of both parties to advise the court that mediation has failed.

WHAT MEDIATION IS NOT

"Mediation is not debating. It does not require you to prove that you are right and the other person is wrong or convince her/him to give up what s/he thinks is important. Unlike debating, mediation is not intended to have a "win-lose" outcome. In fact, it is often the failure of "debating" that leads people to seek the help of mediators!

Mediation is not capable of changing anyone's personality or values.

Unlike the justice system, the mediation process is not intended to find fault, assign blame, or punish anyone.

Finally, mediation is not something people are likely to do successfully if they are mandated to participate in it against their will. It needs to be voluntary."

WHAT MEDIATORS DON'T DO . . .

"Mediator(s) do not:

- *make decisions for you and/or the other person about how your dispute will be resolved.*
- *talk with others without your permission about how the mediation went. This also includes your boss and/or other stakeholders. Even people who refer you to mediation do not hear from the mediator about how the mediation went, who said what in the mediation, etc.*
- *determine who is "right" or "wrong." There is no value in trying to persuade the mediator of the "merits of your case."*

PHASES OF THE MEDIATION PROCESS

From the onset it is important to note that the parties in dispute decide and agree on how the mediator must facilitate the building dispute mediation. Although the process might seem informal, one should not underestimate the great value that this form of dispute resolution has. As with every tried-and-tested process, mediation follows a certain pattern and rules to ensure that every party has his / her fair chance to raise their concerns and present their views etc.

Pre-Mediation

This phase entails the process of agreeing to mediate and the subsequent **preparations** (such as gathering all your evidence, photo's etc). After a dispute is identified and enquiry follows that involves an explanation of the process and an attempt to convince all parties involved to participate in the mediation process. Here the groundwork for the terms of the mediation must be clearly set out. The groundwork will consider factors such as **costs, confidentiality and timeframe in which a solution or aimed solution must be reached**. ***Parties exchange written statements of the issue in dispute together with any supporting documentation including written and agreed contracts they see fit.*** During this stage the mediator will also be officially appointed.

The Mediation

There is no fixed time period for the mediation process. It can last from hours, a single day to a good couple of days or even weeks. The mediation session must be conducted on neutral grounds, thus not in any place familiar with one of the conflicting parties. A neutral setting will put a limit on the chances of a power imbalance between the parties. During the very first mediation meeting the mediator will set out the ground rules for the mediation session to ensure that proceedings occur in an orderly fashion and invite the parties to start with their respective opening statements.

The mediator may at his/her discretion discuss the matter separately with the parties involved after they each delivered their opening statements. This is not compulsory, but entirely upon the mediator to call such action if he/she exercise the necessary discretion and sees such a call fit. It is important to note that the parties involved are not always on the exact same stage working towards reconciliation, therefore dealing with the parties separately has its merits in certain scenarios.

During the mediation the following factors needs to be dealt with:

- *Relationships needs to be built and established between the parties and mediator.*
- *The main issues need to be clarified and ascertained.*
- *The needs and interests of the parties must be clearly distinguished and separated.*
- *Possible hidden agendas must be addressed.*
- *Potential settlement agreements must be investigated.*

"The **6 stages of a typical mediation**:

> **Stage 1:** Mediator's Opening Statement. After the disputants are seated at a table, the mediator introduces everyone, explains the goals and rules of the mediation, and encourages each side to work cooperatively toward a settlement.
>
> **Stage 2:** Disputants' Opening Statements. Each party is invited to describe, in his or her own words, what the dispute is about and how he or she has been affected by it, and to present some general ideas about resolving it. While one person is speaking, the other is not allowed to interrupt.

Stage 3: Joint Discussion. The mediator may try to get the parties talking directly about what was said in the opening statements. This is the time to determine what issues need to be addressed.

Stage 4: Private Caucuses. The private caucus is a chance for each party to meet privately with the mediator (usually in a nearby room) to discuss the strengths and weaknesses of his or her position and new ideas for settlement. The mediator may caucus with each side just once, or several times, as needed. These private meetings are considered the guts of mediation.

Stage 5: Joint Negotiation. After caucuses, the mediator may bring the parties back together to negotiate directly.

Stage 6: Closure. This is the end of the mediation. 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 or 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."

Post-Mediation

Post-mediation is all about compliance with the outcome reached during the mediation process.

Here the aim is to execute the settlement agreement reached, if this is not possible for some reason, the matter can continue towards a full-on trial or arbitration hearing. The mediator may still be involved in a supervisory capacity, but usually withdraws from his/her duties and responsibilities at this stage.

It is important to note that even in scenarios where no settlements could be reached, the mediation was not necessarily unsuccessful. The parties may very well be closer to a solution to their dispute due to a better understanding of each other's problems which might lead to a settlement in the close future.

MEDIATOR'S ROLE

The mediator, being the manager of the proceedings, must fulfil his/her role in the following way:

- By being firm, but gentle and fair at the same time.
- By gathering as much information as possible to identify the pitfalls, opportunities and common goals.
- By steering the parties away from deadlock situations through the offering of suitable suggestions.
- By acting as a problem solver in constructing creative solutions to reach the most desired outcome according to the parties' needs.
- By ensuring that the settlement agreement reached is readily enforceable
- Reverting negative energy between the parties to positive outcomes

- By gaining the trust from the parties involved to ensure open communication channels
- By separating factual matters of dispute from other matters. Thus, only dealing with the matters in dispute.

While there is no fixed recipe for a mediator to follow in order to reach a settlement between parties, apart from the above guidelines there is five key principles a mediator must follow in the process of mediation:

1) Investigation – the mediator must obtain information and pinpoint any shortcomings in the arguments in front of him/her
2) Empathy
3) Persuasion
4) Invention – the creation of solutions and
5) Distraction – to eliminate the possibility of parties reverting back to a prior undesirable position.

A good mediator will differentiate between the issues pertaining to dispute and the underlying conflict between the parties involved. Little chance of success with regards to an outcome exists if a mediator is not taking the underlying conflicts/issues into account between the parties. To achieve this goal, it is of cardinal importance that the **mediator stays impartial and avoids any sympathy towards a party**. On the other hand, a degree of empathy is required to gain the trust of the parties involved. It is important to differentiate between sympathy and empathy while acting as a mediator.

UNDERSTANDING THE OTHER PERSON'S POINT OF VIEW . . .

"You probably know how you feel about the dispute and what problems you think need to be resolved. You could probably describe how the other person has acted and how her/his behavior has affected you. And, you could probably name the most important issues to you in the dispute. All of that is good because you will need to discuss these things in mediation. But, you may know a lot less about how the other person has been affected by the dispute and how s/he sees it. In fact, many people make the mistake of assuming that the other person wants her/him to be miserable, is not bothered by the conflict, or even enjoys it. This is almost never true! Most people engage in conflict because they have genuinely different interests, expectations, information, or values. How would you answer the following questions?

How does the other person feel about the dispute?

How would s/he define the problem(s) that need to be resolved?

How would s/he describe my behavior in this dispute?

How has my behavior in the dispute affected her/him ?

What are most the most important issues to her/him ?

If you cannot confidently answer the above questions, you have just discovered a potentially important clue for unlocking the dispute! You may believe that understanding and solving the other person's problem is "the other person's problem," but here's the problem with that belief: The concerns of the other person are why s/he is in conflict with you! If you don't really understand these concerns - from her/his point of view, you cannot do anything to address them. And if you can't address them, the conflict will remain unresolved. Try to understand the problems expressed by the other party exactly as s/he sees them. This does not mean you have to agree with what the other person says or abandon your own concerns. It only means you must understand her/his concerns. To accomplish this during the mediation, this means you will need to listen carefully to what the other person says. If/when the mediator asks you to do so, repeat what you heard the other person say as accurately as you can without dismissing, discounting, or interpreting it. If you see things differently, you will have an opportunity to explain that. But disagreeing before the other person knows you understand exactly what s/he has said tends to discourage her cooperation to work with you to resolve the problem. The mediator(s) will guide the discussion so you both will have the opportunity to hear the concerns of the other person. While it may be difficult to listen to a point of view with which you disagree, what is said may reveal important and helpful information for you."

LIABILITY OF THE MEDIATORS

The liability of the mediator is limited to any act or omission with regards to the services rendered by the mediator. This is merely for the sake of protection of the mediator in order to ensure that the parties involved in the dispute do not hold the mediator liable for any results as a direct or indirect result of the mediation where the parties involved did not stick to the outcome of the mediation. A good mediator will seldom encounter circumstances which may give rise to any liability, but it is common practise to include a liability clause in all mediation agreements.

QUALITIES OF THE MEDIATOR

While the expertise of a mediator in a particular area of the dispute is important, the ability of the mediator to aid the parties in their dispute is of greater importance in order to reach a settlement.

In aiding the parties, the mediator must manage the process, **gather information from the parties, evaluate the gathered information and then testing the information before the information can be exchanged with the other parties involved**.

WHY MEDIATION?

Past results had shown that mediation as a dispute resolution process results in the settlement of the majority of cases and even where no settlement is reached it provides the groundwork for a near future settlement.

ADVANTAGES OF MEDIATION

- Perfect opportunity for parties to **express their feelings** in a controlled environment.
- Parties can consider solutions a court might not be able to enforce.
- Mediation can be **scheduled at a date and time that is convenient** for all parties, rather than a date and time set by the court.
- Mediation is **private** and can take place in a comfortable and non-adversarial setting that is less formal than a courtroom. A courtroom is a public place and, unless the judge or magistrate rules otherwise, witnesses and other observers may be present in the courtroom during the trial.
- Parties may even agree on aspects where they were unable to in the heat of the moment on a building site.
- **Underlying issues** such as formal apologies can be dealt with.
- The continuance of working relationships between parties can be ensured.
- Outcomes / settlements can be kept **private**.
- By keeping the process out of court litigation **money and time can be saved**.

ABOUT ANGER . . .

"**People involved in disputes often get angry.** In order for the conversation to address real issues, if you are angry, this is a part of what may need to be discussed. However, the suggestion about making "I statements" and "asking open-ended questions" is very important to remember. For example, if someone were angry with you, to which of the following would you respond better?

> "I am angry that I have not received your response to my memo" or
>
> "You jerk. Who do you think you are ignoring me when I take the time to write you a memo?"

No doubt, you'd prefer not to be called offensive names or asked insulting questions. Your anger is real and it may very well need to be expressed. Again, to the best of your ability, do so tactfully. It will not help your mediation succeed if you express it in ways that leaves the other person feeling insulted, threatened, or angry.

If the other person expresses anger in the mediation, listen. Try to understand what the person's anger is about. A common reaction, especially when anger is expressed in inappropriate ways, is to respond defensively and "strike back" (e.g., "You're just too sensitive!"). Even if you believe this to be true, it will not encourage the other person to make agreements with you. If nothing else, sit and allow the other person to "vent." Above all, do not interrupt her/him while s/he is expressing anger. This usually prolongs the length of time an individual feels the need to "vent."

ABOUT FEAR . . .

When people engage in conflict **one or both may feel fear**. Some people feel fearful when others express anger toward them. Some people (and this often applies to men more often than it applies to women), have learned to mask their fear by expressing anger or making threats. If you feel fearful during your mediation, you may be tempted to engage in this type of behavior. Or, you may be tempted to admit to things you did not do or agree to things to which you do want to agree just to make the fear subside. Don't do either of these things! You have a number of other choices. One is to use an "I Statement" (e.g., "I feel afraid when you say X."). Another is to ask questions ("Why do you say that?"). If you can't think of anything else to do, ask for a "time out" or sit quietly until you feel composed enough to speak.

SOME OTHER THINGS TO AVOID:

- Try not to minimize the other person's feelings (e.g., “What are you whining about? That’s not so bad.”).
- Do not make negative judgments about what the other person has said, even if you believe what the person has said deserves a negative judgment (e.g., “These are just a bunch of lame excuses.”).
- Do not misrepresent or omit relevant facts. This can damage trust immeasurably if the other person catches - or even suspects - you are doing this.
- Do not speak in a condescending or sarcastic way to the other person (e.g., "Well, so nice that you could take time away from your busy schedule to meet with me today!").
- Do not demand that the other party apologize or admit to "wrong-doing." Most people won't apologize unless or until they believe what they did was wrong. Demands usually cause further resistance.
- Do not make offensive or hostile non-verbal expressions (e.g., rolling the eyes, loud sighs, laughing, groaning when the other party speaks, or obscene gestures toward the other person).
- Do not make threats to the other party. Even if you really intend to carry out a threat (e.g., filing a formal grievance or taking formal disciplinary action), making this threat against her/him in mediation is not likely to get her/his cooperation. It will likely set up a power struggle.
- Do not shout at the other party. This may be very natural for you when you are angry, but it is not very likely to encourage her/him to cooperate with you.”

CONCLUSION

While mediation might not be the preferred solution for everybody involved in a dispute, it is a sure way to reach a cost and time efficient solution and for this reason it is a favoured solution to keep matters out of the already burdened court system.

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https://www.nolo.com/legal-encyclopedia/mediation-six-stages-30252.html