Ask the Experts

Mediation can result in mutually beneficial agreements

*by Charles Goldman and Deanna Okrent**

If litigation is war, mediation is the negotiation that may put a stop to the fighting and limit the harm to both sides.

Although mediation can occur at any stage of a conflict, it is particularly effective early in a dispute before the battle lines are distinctly drawn and the parties entrenched on opposing sides. Another key to successful mediation is making sure the right people and issues are at the table.

Litigation versus mediation

Litigation is a means of conflict resolution in which a third party, usually a judge, resolves the dispute and a remedy based in the law, most commonly monetary damages and legal fees, is awarded.

By contrast, mediation is a process in which resolution is totally within the control of the parties. Because resolution is up to the parties, they are free to create novel solutions, bound by principles of general legality and public policy but not bound by strictures of a specific statute. Mediation of an employment dispute could result in an agreement for an employee receiving company equipment and a mutually agreed on letter of reference as a resolution in lieu of damages.

Suppose two people are fighting over a piece of iced chocolate cake. For readers with children this will ring all too true.

In a court, a judge might award the cake to one of the people or simply divide it in half. In mediation, through a facilitative dialogue, one of the participants may reveal an interest only in the icing — even though it is a much smaller piece of the proverbial pie — and the other person an interest just in the cake. The solution would not be to divide the cake in half with each getting half of the cake and half of the icing. Instead, one person could be given all the cake and the other all the icing.

Mediation and other forms of alternative dispute resolution have been around for many years, in various formats. But in recent years, there have been both legislative and programmatic changes to encourage the use of methods short of full-blown litigation to resolve disputes.

In the ADA, Congress expressly encouraged the use of alternative dispute resolution, including mediation, to resolve disputes arising under the ADA. Local laws such as the District of Columbia Human Rights may actually go a step further, mandating mediation of all disputes filed with the agency.

Who mediates

Critical to reaching a resolution agreement in a successful mediation is the presence of parties to the dispute who have the authority to resolve it. It is also crucial to have present the individuals most immediately involved to discuss the situation.

In an employment dispute, it is common practice to have a person from HR present. It also is very useful to have someone above the immediate manager who would have authority to resolve the dispute at the mediation. If a higher-level manager cannot attend, he or she might instead be available by phone. Similarly, when mediating a service delivery issue, someone with authority such as a facility administrator should be present.

Also present will be a mediator or two co-mediators. These are persons trained or certified in conflict resolution and are loyal to the process, not the contentions of any side. They should be neutral, whether paid by a government agency or one or both of the parties.

Mediators have minimal, if any, knowledge of the problem before the mediation begins. They listen and learn parties' interests and issues and facilitate resolution.

Lawyers and experts are not always present. In the garden-variety situation, they are not necessary. Mediation is a forum for a dialogue. It is not a courtroom. If the mediation arises after the filing of a charge of discrimination it is common practice for attorneys to be present, although their role is not the same as in a courtroom.

A court reporter or stenographer is not present. The parties and mediator may take notes but there is no transcript made. Commonly the mediator will collect and destroy the parties' notes at the end of the session.

The spouse of an employee also may come for moral support or to help the employee recall. If the problem is over service delivery such as a senior citizen violating nursing home rules by going to the dining room in his or her wheelchair, there may be many persons with an interest. There would be the resident who is in the home, his or her spouse, as well as any children and adult grandchildren. Typically, the children want the resident to be in the nursing home or assisted living facility because otherwise the parent will live with one of them.

The service provider might be represented by an employer such as the person running the dining room as well as a senior executive such as the home administrator or executive director.

What to discuss

Any problem or dispute can be mediated. That is another significant difference from litigation. If the parties are willing to meet and try to resolve a matter, anything can be the subject of mediation. Mediation is particularly effective in resolving a problem or a dispute if the parties have an interest in maintaining their relationship with each other.

Mediation is ideal to resolve a dispute over providing effective reasonable accommodation to someone who is still on the payroll and how to deliver services to a senior citizen. This is because all parties are interested in their relationship and seeing if the accommodation could be made or the service delivered. Mediation has worked well to resolve conflicts over treatment at

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medical clinics because the service recipients at the clinic planned to return there for added services in the future.

Even when there is no long-term mutuality of interest, as is usually the case when an employee is fired, mediation can be a most useful tool. Both sides have an interest in resolving a dispute without the significant time, energy and legal expense. Mediation usually ends a dispute without public rancor or disparagement of the other side.

Early mediation is preferable

Mediation is generally available at any stage of problem solving, even before a charge or complaint has been filed to formalize the dispute. In a simple case of reasonable accommodation mediation is most effective sooner, rather than later. Generally the longer a conflict festers unresolved, the more emotional and expensive it becomes.

Nevertheless, one of the recent trends is for mediation to be increasingly available and even ordered by judges after a lawsuit has been brought to trial. There are complicated situations when mediation has been effective to fashion a solution, after the judge decided liability, namely who was right and who was wrong.

Private entities are free to make mediation available at any time. When interacting with governmental entities, the process is usually more structured. For example, in the District of Columbia, under the local human rights act, mediation takes place before there is any investigation of a charge.

The good news is that this enables D.C. litigants to address the conflict face to face with a mediator usually within 90 days of charges being filed. The quick date for mediation can be invaluable to an employee who was allegedly discriminatorily terminated and lacks income and benefits such as health insurance. On the other hand, the early onset of the process means there has been no time to find out about the strength of the parties' cases.

In the federal government, the EEOC requires each agency to make alternative dispute resolution available. Agency practices vary, but as a general rule alternative dispute resolution usually is available relatively early in the complaint resolution process.

Three-part process

Mediation is a three-part process. In the first part, the mediator typically explains what mediation is and how it is conducted and addresses any questions the parties have. The mediator should explain that the process is generally confidential, that what is said in mediation is said for resolution purposes only and that the mediator will not testify in court for any party. The mediator notes that mediation is a process in which the parties show each other respect by not interrupting.

The mediator also should explain that there may be occasions when the mediator meets with one or each of the parties separately, a process called caucusing. The parties can take a break and caucus among themselves at any time too. After explaining the rules the mediator will give the parties an agreement to mediate for their review and immediate execution.

Before moving past the first part of mediation, it is important to note that the parties can make exceptions to the general rule of confidentiality of mediation in the mediation agreement. For federal government employees the rules are slightly different. Because of the Administrative Dispute Act of 1996, confidentiality for federal workers in mediation applies to caucuses, not sessions when all parties are present, although the parties can agree otherwise.

In the second phase of mediation, each party tells his or her story, what happened and why he or she is present that day. Even if a person's lawyer is present, the person shares his or her version, not the lawyer. Usually the mediator will ask the person initiating the mediation to speak first and explain the problem from his or her perspective. The mediator or the other side may then ask questions to obtain more information. This is not a cross-examination. After one side talks, the other side will make a similar presentation.

In the nursing home situation, the administrator could ask how much help the resident needed to get to the dining room or in carrying food. Or an employer could ask about an employee's particular frustration.

After the questions, the parties may tell more about their sides. When the storytelling is complete the next phase, resolution, comes into play.

In resolution, the parties interact and the dialogue is all about how to solve the problem. When receiving an offer or demand, parties often seek to caucus, usually alone or with the mediator. They then begin to go back and forth. If there is agreement on the terms, the mediator will memorialize the agreement in a written document the parties sign.

Mediated agreement

The agreement will call for specific acts to be taken by specific dates and may commonly include a provision to mediate any dispute about compliance with the agreement before filing suit. It will commonly be a confidential agreement with disclosure only to persons on a need-to-know basis.

Once reached, the agreement is a binding contract between the parties. It governs the issue, superseding the parties' prior dispute. In other words, what counts after the agreement is reached is only whether the parties meet their agreed to obligations, not whether there was discrimination.

If there is no agreement and the parties still want to mediate, it may be that they agree to come back to mediation at a later date. This often arises when an issue such as a pension or safety rule requires further checking in the spirit of reaching agreement. All is not lost when there is a need for a second or even further sessions.

Benefits of mediation

Litigation typically costs too much, often at least $25,000 per case.

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Tips for successful conflict resolution programs provided

There are no guarantees for success in mediation or in any other type of conflict resolution. But certain practical guidelines can increase the chances of success.

This list of tips is by no means exhaustive and is strictly advisory rather than mandatory. State or governmental agency rules should be reviewed to see when mediation may be mandatory. Mandated mediation is not always conducive to successful mediation. Persons and entities have to want the process to work or at least be open to it working.

1. Mediation should be encouraged in organizational literature, and the neutrality of the mediator noted. Mediation can be noted in an employee handbook, service deliverer's brochures and included in contracts between parties. Staff should be trained that information about mediation is in an organization's literature and encouraged to mediate disputes.

2. Mediation should be used to solve problems before they reach a crisis.

3. Mediators may be used from outside an organization. This may build trust. Mediators employed directly by one of the parties may be seen as partial to the party who hired them.

4. When mediating an issue that involves a person with a disability, accommodations should be in place for the mediation. The best way to find out if accommodations will be needed is to ask the participants. An accessible mediation room with a nearby accessible restroom should be used, and a sign language interpreter provided for a person with a hearing impairment. Materials in an accessible format should be available to a participant with a vision impairment.

5. The right people should be at the mediation or immediately accessible. Without persons with authority to solve a problem, there is a very limited opportunity to succeed. In fact, not having a vital person present could be viewed as an insult, hardening the will to litigate.

6. Participants should be prepared for mediation. Versions of the events should be written and notes made about what participants want to learn from the other side. A number of different possible solutions should be prepared in advance. An organization's participants should familiarize themselves with fair standards that apply to the situation. For example, if a merit increase for an employee is disputed, the employer's representatives should review in advance the objective company standards for merit increases during the relevant period.

7. Participants should be open-minded and flexible. At mediation, both sides invariably hear and learn things they did not know. Participants should be prepared to adapt their views, both as to the events and possible solutions.

8. Any agreement reached in mediation should be clear as to who will do what and when the specific action(s) will take place. The obligations of the parties should be crafted precisely. The mediation resolution agreement is a contract.

9. The confidentiality of the process should be maintained. The issues in mediation can be difficult for people to express. The resolution also is a very personal thing. There is no reason for either party to disclose anything to anyone who really does not need to know.

10. Alternatives to a negotiated agreement should be considered. In the landmark book, *Getting to Yes*, authors Roger Fisher and William Ury call this BATNA — Best Alternative to a Negotiated Agreement. Another term used is WATNA — Worst Alternative to a Negotiated Agreement. Most commonly the alternative, whether BATNA or WATNA, is expensive litigation and an unhappy employee, unhappy management or unhappy customer.

11. Mediation can work over more than one session. While many disputes can be resolved in a single session, all is not lost if more time is needed. Participants may need to gather information such as what technology is immediately available or what the tax consequences of certain payments are and then come back to the table.

12. Participants will have to meet the needs of the other side to get a resolution. ■