HOW TO CONDUCT MEDIATION EFFECTIVELY

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Mediation has been used to resolve disputes as varied as child custody battles and the centuries old conflict in Northern Ireland. In such disparate cases the mediation procedures and techniques used are similar and equally as effective. This is due in part to the high degree of involvement by the stakeholders in the process, and the implied goal of mediation to reach a common good.

Mediation and the Role of the Mediator

Mediation is a process in which a neutral third party assists parties involved in a dispute to resolve their conflict in a manner which is agreeable to them. Mediation is a form of negotiation in that the final resolution is determined by the disputants. The neutral third party, known as the mediator, has no decision-making power. This sets mediation apart from other forms of dispute resolution, such as litigation or arbitration, in which the third party involved in the process hears all sides of the argument and makes a ruling that settles the dispute.

The benefits of mediation are many. Factors such as cost savings, time savings, confidentiality, efficiency, effectiveness, resource conservation, and preservation of relationships are all enhanced by the mediation process as opposed to litigation or arbitration[10]. The strength of mediation is that it does not focus solely on the differences that contribute to the dispute, but also builds upon the common ground inherent between the disputing parties. Mediation, when handled effectively, recognises the common interest of the parties to resolve the dispute. It fosters an understanding of the varying points of view to the dispute by all parties. And it builds upon the trust that all parties have in the mediator's guidance through the process. The result is a resolution to the conflict which is based on common good rather than winners and losers[4].

The role of the mediator is to create an environment conducive to reaching an agreement by the disputants. The most important characteristics of a good mediator are tenacity in keeping the parties talking and eternal optimism that settlement is possible[2]. The mediator is not an advocate for any particular form of settlement, only that a settlement is reached and agreed to by all parties. If the mediator has a bias, it is for the mediation process itself, and, as such, works to ensure that the integrity of the process is upheld. The good mediator remembers that negotiations belong to the disputants, and that the best settlements are those that come about without the aid of a third party[8].

The Mediation Process

The mediation process can be broken down into five steps: The mediator's opening statement, the disputant's opening statements, the discussion stage, the caucus, and reaching agreement. In all of these steps the mediator is utilising techniques and skills to move the parties towards resolution. In the following sections the stages of the mediation process and the mediator's role in them will be described in more detail.

Mediator's Opening Statement

The mediator's opening statement is used to build rapport with the disputants so that later discussions will be open and candid[2]. The opening statement begins with introductions of the parties involved in the mediation including the mediator himself. The mediator then commends the disputants for agreeing to meet to resolve their differences. This is not a patronising comment but a sincere acknowledgement that all of the parties have a common desire to work out their differences together. This is a foundational step in cultivating a mood or attitude of resolution, with the purpose of internalising the mediation principle of self-determination[7, p.38].

The mediator then states the goal of the mediation, which is for the parties to find a solution that will be fair and workable in the long run, and explains the very high success rate in reaching an agreement when the parties work together in good faith. The role of the mediator in achieving this goal is described. The mediator's neutrality, lack of authority to render a decision, and impartiality as to the final agreement is stressed[1]. Finally, the

mediator describes in simple terms the rules and procedures of mediation, and then answers any questions the parties may have to that point[9].

Disputant's Opening Statements

The disputant's opening statements can be a great relief for many. Oftentimes it is the first opportunity for the parties to state their view of the case. Research has shown that long-term satisfaction and compliance with the agreement are a function of satisfaction with the conduct of the hearing and a sense that important issues were aired [6, p.389]. Except for mediator questions that are intended to clarify the statement, the disputant is allowed to speak uninterrupted, and is not bound by legal procedure or rules of evidence in presenting this point of view. The mediator's job is to help disputants tell their story. Besides asking clarifying questions, the mediator should echo comments and summarise statements in order to fully understand what was said and to allow the parties to correct mis-statements.

These opening statements allow the parties to listen for "want vs. needs". "Wants" are the positions staked out by the disputants such as a demand for money or custody of a child. "Needs" are the underlying interests of the parties such as respect, emotional security, and maintaining relationships. Real needs may be harder to identify than stated wants, but discovering these needs can lead to creative alternative solutions and enhance the possibilities of reaching a successful agreement. Also, by focusing on these basic human needs, the disputants will discover points of agreement and overlap in positions. As a result, the theme of common purpose is developed further[9].

Discussion Stage

The discussion stage begins the direct exchange between the parties. Viewed positively, it is an opportunity for the disputants to have a full discussion of the facts in order to define the conflict more clearly. The factual information shared may be helpful in narrowing areas of conflict[5]. The mediator must be aware, however, that the challenge of maintaining a positive emotional climate is greatest during this face-to-face exchange. The mediator must intervene when the disputants engage in interruptions, threats, verbal attacks, and value-laden or judgmental language. The mediator must remind the parties about behavioural guidelines that had been established during the opening stages of the mediation. This is not to say, however, that the mediator works to eliminate emotional content from the discussions. On the contrary, the mediator should be empathetic to the expression of feelings that are being shared. This promotes the sharing of information, reveals hidden issues not previously expressed, and enhances the mediators position as facilitator. But the mediator must intervene to prevent conflict escalation and maintain a safe environment for open communication[11].

During the discussion phase the parties, including the mediator, are free to ask questions of each other to further clarify statements and positions. There is investigation into the facts behind the dispute and a search for issues underlying the conflict. The mediator begins the task of organising the issues, looking for points of agreement and possibly narrowing the number of issues in the dispute[9].

The mediator can also help the parties "reframe" the issues. Reframing refers to redefining an image of reality. In the classic "glass half empty, glass half full" situation, the parties have the same first-order reality, but, because of different interpretations or world images, they differ in their subjective, or second-order, realities. Each party comes to the conflict with his or her own picture of the issues and basis of the dispute. While the number of interpretations is normally very large, our world image usually allows us to see only one. This one interpretation appears to be the only possible, reasonable, and permitted view, and, consequently, suggests only one possible, reasonable, and permitted solution. The parties must discover a mutually acceptable definition of the issues that will allow them to co-operate[11].

The mediator should allow the parties to frame the issues on their own, but step in when the threat of deadlock or impasse is evident. The mediator may either frame the issues before the parties entrench themselves with a particular position, or he may reframe the issues by steering them away from an unproductive definition to one that will lead to productive problem solving[11]. Useful definitions can be made by questioning the unspoken assumptions that the parties are making with regard to a particular issue. The mediator can assist by making a conscious effort to inventory these assumptions. Each assumption can then be individually considered and challenged. By challenging these assumptions in this way the parties can produce successful new ideas for framing the issues[5].

The act of reframing raises important questions regarding mediator neutrality. The act of reframing can be construed as an attempt by the mediator to move the parties to some particular desired solution[11]. The issue of neutrality often promotes the image of mediator tactics as primarily non-directive, or designed to increase the likelihood that the disputants will reach a solution on their own. But many mediations are conducted by using directive tactics as well. These tactics are designed to discover and put forward possible solutions and encourage the parties to come to some resolution[6]. Mediators often redefine the context of disputes in ways that the disputants find extremely helpful in avoiding or overcoming impasse. By reframing how the dispute is seen by the parties to new terms that are subjectively acceptable to all disputants, the mediator can open the door to more collaborative and mutually satisfactory solutions[11].

If the mediator has been successful in building trust and a good rapport with the parties, he can begin to use some directive tactics to move them closer to settlement. The purpose of these tactics is to disengage parties from unacceptable positions and begin to develop options. Methods of reversing commitment to previous positions by intransigent parties come in three forms: psychological means, procedural means, and the use of leverage[11].

Psychological means to reduce commitment focuses on finding ways to satisfy needs rather than wants. The need may not be satisfied in the way demanded, but often when a disputant feels his need has been heard and will be considered in alternate solutions, he will agree to abandon an intransigent position. It is often up to the mediator to get the other parties to consider the needs of the recalcitrant party[11].

Procedural means to reduce commitment refers to developing a process or steps for developing new positions. Introducing such a logical, problem-solving approach may cause a party to abandon a position because he views the process as fair. One such procedure is positional bargaining. In positional bargaining, the parties exchange proposals and counterproposals with the hope of bringing the parties closer to a settlement. The act of developing such proposals has the benefit of causing the parties to think beyond the scope of their entrenched position. There are some limitations to this procedure. The two-sided view of proposal and counterproposal tends to be limiting in terms of the number of options explored. Also, two-sided negotiations tend to produce win-lose attitudes. Still, the potential for movement can be created in this manner[11].

The use of leverage to reduce commitment puts the mediator in the role of "agent of reality". In this role the mediator will point out to the intransigent party the likely consequences of holding firm to the present position. Often the mediator will present this test of reality in the form of a question. Questions can be raised as to the workability of the hard line position should the other party agree to it. Also the mediator can ask what the cost of not settling the dispute would be if the party chooses not to yield from an unacceptable position. When faced with such question, the disputant begins to wonder if he is on solid ground with his position, and the realisation starts to develop that movement from his current position may be in his best interest[9].

Another method of reality testing is the use of evaluations in mediation. In this case the mediator expresses an opinion as to the likely outcome of a legal claim should the parties take their case to trial. Often the parties feel they have a much better than even chance of prevailing in a litigation, which causes reluctance to move from a hard line position. Evaluation can cut through disputants misjudgments about the strength of their case and motivate them to rethink their position. Also, the mediators opinion can give the disputants a rationale for moving from an entrenched position and offering concessions. If it is not required to break an impasse, the mediator should not use evaluation. There are dangers in evaluation. The mediator risks losing credibility with the parties if it is perceived he has chosen sides. Also the evaluation can be treated as a "take it or leave it" offer. The result could be the end of negotiations as the mediator has, in effect, validated one position over another. As a last ditch effort to break an impasse, however, evaluation does have merit[3].

The discussion stage creates the foundation for seeing a vision for the future and for reaching agreement in principle[7]. While the mediator is attempting to reduce the number of dispute issues, at the same time an attempt is made to broaden these issues by probing for underlying areas of conflict[9]. There is no attempt to move to a resolution of the conflict until these issues have been fully explored to the satisfaction of all parties.

The Caucus

After some period of joint negotiations, the discussions often bog down. Parties begin to restate their positions repeatedly and all proposed solutions are rejected. At this point the mediator must gain a better understanding

of this impasse and provide the parties with an atmosphere that is conducive to exploring new ideas without the threat of their immediate rejection. The environment should be one in which possible solutions can be put forth without having to make an immediate decision about adopting them. The mediator calls for a caucus[12].

Caucusing is a common tactic used by the mediator. The caucus is a private meeting between the mediator and the parties. The purpose of the caucus is to obtain information and insights that the mediator believes cannot be acquired through joint negotiation[12]. In this private meeting the mediator will explore areas of compromise. The mediator is looking for position shifts and other options for solutions[2].

Four characteristics of caucusing have proven useful in mediating difficult conflicts. First, the absence of the other parties in the dispute reduces tension, anger, and defensiveness and the disputant becomes more creative and flexible. Second, the disputant often feels freer to provide information about underlying issues when the other party is not present. Third, the mediator can encourage increased rapport and sharing of information with the disputant without appearing partial in the eyes of the other party. Fourth, the other party is not available for passing on of responsibility. This increases the effectiveness of the mediator to challenge the disputant to take responsibility for reaching a solution[6].

Four principles guide the mediator in the way a caucus is conducted. First, all discussions are confidential unless the party authorises the mediator to share the information with other parties. Second, the goal of every caucus is to discuss matters that are relevant to reaching a settlement. Third, each time a caucus is called, the mediator meets with each of the parties to maintain an image of impartiality and neutrality. Fourth, impartiality notwithstanding, the mediator is not obligated to spend an equal amount of time with each party in a caucus. The length and nature of these meetings is determined by the purpose for which the caucuses were called. If, for example, the mediator called the caucus to confirm movement by one of the parties, he approaches the other disputants to ask if there is anything they wish to discuss before reconvening joint negotiations. The mediator should be aware that separate meetings arouse suspicions of private deals being made. Extending the courtesy to meet with all of the parties during a caucus, however brief, greatly dispels such doubts[12].

For the caucus to work effectively, the parties need to view the mediator as their advocate with the other side. In order to achieve this, a high level of trust must have been developed between the mediator and the disputants. Parties often rely on the mediator in planning the presentation of information which is vital to making a breakthrough in the negotiations. The more open and honest the parties are with the mediator, the greater the chance that such movement can occur[2]. Many of the techniques used during the discussion stage for urging the parties towards resolution are used in the caucus stage, often with greater effect. The caucus reduces tension, enhances the mediator's ability to get disputants to accept responsibility, and improves the climate for candid discussion and assessing options for settlement[6].

Reaching Agreement

If the mediator has done his job properly, the final rounds of joint negotiation will have a collaborative rather than a competitive tone. The parties will understand the issues, which have been reduced in scope and number during the mediation process. They will have worked in good faith to reach a resolution to the conflict that is acceptable and workable[9]. The mediator's job at this stage is to keep the parties focused on the real issues and to facilitate the changing of negotiating positions.

Barriers to changes in position or the making of concessions can be overcome by an effective mediator. Many of these barriers are psychological, such as the fear of being perceived as weak or losing face. In these cases the mediator can frame the concession as a sign of strength, or a courageous first step to reaching a settlement. The mediator can offer a solid rationalisation for the change in position, and urge the other party to work in a similar good faith manner. In this way the mediator has helped the parties abandon their untenable positions[11].

Other barriers to changes in position are tactical in nature. For example, a reluctance to overconcede can stifle negotiations due to the fear of giving up too much to reach an agreement. Tentative or probing offers made during a caucus or joint negotiations allows parties the flexibility of exploring a settlement range without committing to a position prematurely[11].

Deadline management can be used by the mediator to encourage movement to reach a solution. The imposition of a deadline is only effective if the disputants truly wish to reach agreement. The implication of a deadline is the possibility of a worse option than if settlement was achieved. Making parties aware of deadlines and of the negative consequences of passing the time limit is an important aspect of deadline management. But just as important is stressing the positive benefits of settlement relative to the negative consequences of missing the deadline[11].

When final agreement is reached, the mediator announces the agreement and reviews the terms with the parties. Often this agreement is put down in writing and the parties sign the document. The written agreement creates a permanent record which enhances the possibility of compliance, and allows a legal means for its enforcement[9]. The mediator should always commend the parties for their efforts, even when no substantive resolution is achieved. In this manner the mediator holds out the hope that the parties can still find a way at some point in the future to reach a settlement. The seed is planted that the negotiation does not have to end, and that the parties are still capable of resolving the conflict on their own[12].

Conclusion

The strength of the mediation process is in its focus on the agreements between parties rather than just their differences. It has as its foundation the willingness of the parties to reach a settlement. It promotes the search for common ground within the issues be revealing the basic human needs inherent in the dispute. And it builds upon the trust that the parties have developed with the mediator. Hammering out the final details of the agreement can be fairly easy or problematic, depending on the degree of differences that still exist. Not every mediation concludes with a settlement. The hope, however, is that the disputants are in a better position to resolve their differences after the mediation than they were before it.

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