

Mediation is a collaborative activity in which the parties and their counsel work together to resolve disagreements. My task as mediator is to encourage a collaborative attitude, help the parties understand their needs and interests, and show how they can be served by settlement.

My approach to mediation is a blend of facilitative and evaluative techniques. I employ facilitative techniques throughout the mediation but am prepared to provide an evaluative opinion when needed to break an impasse or move the parties closer to settlement.

The mediation process starts with a joint telephone conference with counsel. During this conference, we will select dates and address administrative issues such as the location of the mediation and the facilities that will be available to the parties.

Shortly before the mediation session, I engage in separate, ex parte discussions with counsel. We address key issues affecting the mediation, including the following:

- a. the strengths and weakness of their client's case and that of the other side;
- b. the status of pending litigation;
- c. their client's needs and interests;
- d. what their client wishes to accomplish through mediation;
- e. their client's priorities for the negotiations;
- f. how their client's objectives can be translated into specific proposals;
- g. areas of flexibility and possible fallback positions;
- h. counsel's understanding of the needs and interests of the other side;
- i. how counsel expects the other side to react to their client's proposals;
- j. how counsel expects the other side will approach their settlement proposals;
- k. existing and potential roadblocks to resolution;
- l. the personalities of the parties and counsel;
- m. negotiating authority;
- n. in cases involving organizations, the level of support of key constituents; and
- o. the procedures that will be followed during the mediation session.

Statements made by counsel during these discussions are confidential, and I will not disclose them unless given permission to do so.

Based on what I learn during these discussions, I develop a plan for the mediation and strategies for bringing the parties to resolution.

The procedure followed during the mediation session will vary from case to case. Normally, I make brief opening comments in which I explain the mediation process and encourage a collaborative attitude. From there, the procedure followed depends on what I learn during the discussions with counsel and the status of any pre-mediation settlement negotiations.

If the parties misunderstand each other's positions, I invite non-confrontational opening statements intended to clarify the misunderstanding. While I encourage clear communication, I also encourage counsel to adopt a positive tone that fosters a collaborative attitude, not one that is confrontational.

I encourage direct, face-to-face negotiations when the parties are close to a resolution and I believe they can bridge their differences through direct discussions. I also encourage direct negotiations if it is important for the parties to reestablish or maintain a positive working relationship.

If there are significant gaps between the positions of the parties, generally I suggest they break out into separate rooms. Then, using facilitative techniques, I explore the issues addressed in the pre-mediation discussions, and work with the parties to develop settlement proposals consistent with their needs and interests.

Sometimes counsel ask the mediator to provide an evaluative opinion. This poses a potential problem because a mediator can be effective only when he or she has the trust of the parties and their counsel. Providing an evaluative opinion places that trust at risk, particularly if it is unfavorable. For this reason, I avoid giving evaluative opinions unless one is needed to break an impasse or move the parties substantially closer to resolution. Even then, I will not share an opinion unless counsel invites or gives me permission to do so.

There may come a time when the parties appear to be at impasse. This is when persistence comes into play. I continue to engage with the parties and work to break the impasse using a variety of techniques, including reality testing, discussing the consequences of an unsuccessful negotiation, discussing the best, worst, and most likely alternatives to a negotiated agreement, brainstorming, bracketing and conditional offers, partial deals, direct negotiations between the parties only (if counsel consent), and mediator proposals.

If the parties settle subject to agreement on other terms "to be negotiated by counsel," I ask the parties to address and agree upon key settlement terms that could derail a settlement. I also ask counsel to document the terms on which the parties agree before concluding the mediation.

When parties are at impasse, they sometimes request a mediator's proposal. I provide one if needed to break impasse, but I will not provide the proposal during the mediation session. Instead, I adjourn the mediation, prepare a proposal, and share it with the parties. I also provide each party with an ex

parte explanation of how the proposal is consistent with their needs and interests. I ask the parties to let me know if my proposal is acceptable. I then report to both counsel whether my proposal has been accepted. If the proposal is not accepted, that will normally conclude my involvement in the mediation.

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The logo for Bennett ADR features the word "Bennett" in a sans-serif font above the word "ADR" in a larger, bold sans-serif font. A horizontal red line is positioned below "ADR", with a small red triangle pointing upwards from the center of the line.