



PDHonline Course P101M (4 PDH)

Alternate Dispute Resolution

Instructor: William J. Scott, P.E.

2020

PDH Online | PDH Center

5272 Meadow Estates Drive
Fairfax, VA 22030-6658
Phone: 703-988-0088
www.PDHonline.com

An Approved Continuing Education Provider

MODULE #2 **Mediation**

How it Works

Mediation is just another, but somewhat more formal form of negotiation. The parties either have a mediation clause in their contract or they agree to mediate prior to more aggressive forms of settlement. The parties then submit their paperwork to the ADR organization they have selected. At some point in the near future, a mediator is selected. In the event the parties cannot agree on a Mediator, then their ADR institution selects one for them. Mediation usually lasts one day. However, it might turn out to be a “48-hour” one day. Mediation is usually held at some neutral site (Mediator’s office or other neutral location).

SOME OF THE MORE IMPORTANT **MEDIATION RULES** **[American Arbitration Associations (AAA)]** **(Most other ADRs are similar)**

1. Agreement of the Parties

Mediation or conciliation of existing or future disputes under the auspices of the American Arbitration Association (AAA) rules, they do so based on the rules in effect as of the date of the submission of the dispute. AAA rules change periodically, but generally not significantly.

2. Initiation of Mediation

Any party or parties to a dispute may request mediation by submission of a written request for mediation pursuant to the AAA rules. Where there is no submission to mediation or contract clause providing for mediation, a party may still request the AAA to invite the other party to join in submission to mediation. Upon receipt of such a request, the AAA will contact the other parties involved in the dispute and attempt to obtain an agreement for mediation. Sometimes this works and sometimes it does not. The best way to ensure mediation is to have it written into the contract.

3. Request for Mediation

A request for mediation should contain a brief statement of the nature of the dispute and the names, mailing addresses, email addresses and telephone numbers of all parties to the dispute and those who will represent them, if any, in the mediation. The initiating party shall simultaneously file copies of the request with every other party to the dispute and the AAA.

4. Appointment of Mediator

Upon receipt of a request for mediation, the AAA will appoint a qualified mediator to serve. Normally, a single mediator will be appointed unless the parties agree otherwise. If the agreement of the parties names a mediator or specifies a method of appointing a mediator, that designation or method would be followed.

5. Qualifications of Mediators

No person shall serve as a mediator in any dispute in which that person has any financial or personal interest in the result of the mediation, except by the written consent of all parties. Prior to accepting an appointment, the prospective mediator shall disclose **any** circumstance likely to create a **presumption** of bias or prevent a prompt meeting with the parties. In the event that the parties disagree as to whether the mediator shall serve, the AAA will appoint another mediator.

6. Vacancies

If any mediator shall become unwilling or unable to serve, the AAA will appoint another mediator, unless the parties agree otherwise.

7. Representation

Any party may be represented by persons of the party's choice.

8. Date, Time, and Place of Mediation

The mediator shall fix the date, time, and location of each mediation session. The mediation shall be held at the appropriate regional office of the AAA or at any other convenient location agreeable to the mediator and the parties, as the mediator shall determine. Normally, mediation is in person, but by agreement of all parties, mediation may be conducted by telephone, video, or other means of electronic communication.

9. Identification of Matters in Dispute

At least ten (10) calendar days prior to the first scheduled mediation session, each party shall provide the mediator with a brief memorandum setting forth its position about the issues that need to be resolved. At the discretion of the mediator, such memoranda may be mutually exchanged by the parties. At the first session, the parties will be expected to produce all information reasonably required for the mediator to fully understand the issues presented. The mediator may require any party to supplement such information.

10. Authority of Mediator

The mediator **does not** have the authority to impose a settlement on the parties but will help them reach a satisfactory resolution of their dispute if possible. The mediator is authorized to conduct joint and separate meetings with the parties and to make oral and written recommendations for settlement. Whenever necessary, the mediator may also obtain expert advice concerning technical aspects of the dispute, provided that the parties agree and assume the expenses of obtaining such advice. Arrangements for obtaining such advice shall be made by the mediator or the parties, as the mediator shall determine.

11. Privacy

Mediation sessions are private. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the mediator.

12. Confidentiality

Confidential information disclosed to a mediator by the parties or by witnesses in the course of the mediation will not be divulged by the mediator. All records, reports, or other documents received by a mediator while serving in that capacity shall be confidential. The mediator shall not be compelled to divulge such records or to testify regarding the mediation in any adversary proceeding or judicial forum. The courts, both state and federal have adjudicated this issue over and over. The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceedings, such as:

- (a) views expressed or suggestions made by another party (expert or not) with respect to a possible settlement of the dispute.
- (b) admissions made by another party in the course of the mediation proceedings.
- (c) proposals made or views expressed by the mediator; or

- (d) the fact that another party had or had not indicated a willingness to accept a proposal for settlement made by the mediator.

13.No Stenographic Record

There shall be no stenographic record of the mediation process.

14.Termination of Mediation

- (a) by the execution of a settlement agreement by the parties.

- (b) by a written declaration of the mediator to the effect that further efforts at mediation are no longer worthwhile.

or

- (c) by a written declaration of a party or parties to the effect that the mediation proceedings are terminated.

The Rules Aside - How Does Mediation Really Work

Usually, the parties furnish the mediators and the other parties with a written brief of the dispute along with their supporting legal theories and demands prior to the actual day of mediation.

The mediation process starts with a meeting of all the parties present (Claimants, Respondents, Representatives, and the Mediator). The mediator normally starts the meeting by introducing himself and giving the parties some education and experience background on himself, how he expects to conduct the mediation, and so on. Many Mediators are retired judges or lawyers, but not all. It is not necessary or even necessarily desirable to select a “lawyer” as the Mediator. Depending on the nature of the case and type of dispute other types of Mediators might be more appropriate or suitable. For example, engineers, accountants, or businessmen. Choose your mediator wisely.

Each side is given a short period of time verbally to state their side of the dispute. It is not necessary that the parties bring their lawyers or witnesses to the mediation. But most lawyers would feel uncomfortable with their clients mediating without their advice and/or presence. You must decide if the additional cost is worth it. Remember, the Mediator cannot force a settlement. Mediation is also not intended to be a court case. Witnesses are not necessary.

The parties then break up into separate rooms. The Mediator then “visits” with the Claimant first. The Mediator uses this time to better understand the nature of the Claimant’s claim, the supporting legal theories behind it, and the remedy which the Claimant demands. He may point out weaknesses in their claim, legal theories, or remedies. He may give an opinion of his view of the Claimant’s case. If the Claimant wants to modify their position/claim or demand at this point they may do so through the Mediator.

The Mediator next visits with the Respondent. The Mediator uses this time to better understand the nature of the Respondents’ case (defenses and counterclaims), and the legal theories behind them. He may point out weaknesses in their defense. He may give an opinion of his view of their defense. If the Respondent wants to modify his position/counterclaim or demand at this point, they may do so through the Mediator. At some point during the Mediator’s visit, the Mediator will relay the other party’s modified offer (if there is one). The Mediator continues the process of probing, picking, pushing, suggesting, etc. in order to weaken the parties’ resolve to continue the case, wear them down mentally and physically to bring the parties closer together. Ultimately, the parties will agree (mediation works about 80% of the time) or **NOT**. Usually, it is late in the day, most of the time well after 6 pm. The settlement, if one is reached, **MUST** be put in writing, and signed by the parties before anyone leaves to go home. This is extremely important.

Mediation works best when:

1. The parties absolutely understand the nature of the dispute and have a realistic view of their case.
2. The parties are not entrenched too deeply in their positions.

3. The Mediator forces the issue!