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Mediation

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Mediation is a form of dispute resolution in which a third party with no interest in the outcome of a dispute and with no authority to dictate the result of a dispute facilitates a dialogue between the disputants. The dialogue is less formal than a contested hearing, and rules of evidence and procedure are substantially more relaxed than what one would expect to find in a court hearing.

Use

Mediation is used in virtually every type of dispute, from the smallest local tort case to the largest complex international affair. Mediation is used primarily to resolve disputes, but it has applications in dispute prevention, transactional bargaining, and planning. Mediation is most often used in discrete civil disputes such as divorce, problems between neighbors, employment problems, and commercial transactions gone awry, but it is also used in large-scale environmental cases, in disputes with governmental agencies (including, among others, the U.S. Internal Revenue Service), and in intellectual property and land use disputes. Many would say that if a dispute could be filed in a court, it could be mediated. However, mediation also may be used in cases in which a court would have no jurisdiction (such as peer-to-peer mediation between high school students having problems sharing a locker).

In the United States, mediation has been instituted in nearly every administrative agency and every court. At the federal level, the Administrative Dispute Resolution Act of 1996, 5 U.S.C. § 571 (2000), and the Civil Justice Reform Act of 1990, 28 U.S.C. § 473 (2000), require that agencies and courts explore alternatives to trials for the disposition of cases. Mediation has become the most widely used alternative method. The vast majority of states have passed similar laws, with similar effect.

Consensual Process

Mediation is consensual and voluntary, at least to the extent that the disputants retain the right to veto any proposed solution. However, in many legal disputes, the parties may be ordered to attend and participate in a mediation session. These orders may

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come because of a court rule, a judge's order, or a legislative enactment. In these mediations, attendance is mandatory but settlement is not.

In court-ordered mediation, the parties are typically subject to a requirement that they participate in good faith. In this context, judges have defined *good faith* as sending a person with settlement authority to the mediation for at least the opening session. That person need not ever make an offer or respond to an offer. Thus, good faith in mandatory mediation does not mean the same thing as good faith in negotiation.

The aspiration that mediation be consensual impels that mediation be noncoercive. In the early days of court-ordered mediation, it was common for a mediator to make a report about the parties' behavior in mediation and to pass that report along to the judge overseeing the litigated claim. In the event that mediation resulted in an impasse, the mediator might report that one party or the other caused the impasse, and the assumption was that the judge would retaliate against a recalcitrant party. The threat that a mediator might make an unfavorable report gave the mediator coercive power over the parties. More recently, this practice has changed, and now a mediator's post-mediation report to a judge presiding over a case is rare.

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Mediation as the Practice of Law

Some states have held that an attorney who acts as a mediator is engaged in the practice of law. Other states have held the contrary. A state's holding on this point has an impact on matters such as whether an attorney's malpractice insurance covers actions taken during the course of a mediation. It may also affect whether an attorney-mediator may draft an agreement reached by unrepresented parties at a mediation (for example, when a low-income divorcing couple seeks to amicably resolve their divorce through mediation and without lawyers), and whether attendance at a mediation education program qualifies for continuing legal education credits needed to retain active membership in a bar association.

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Mediators need not be trained in the law. However, as a practical matter, most mediators of legal disputes are either lawyers or laypeople who have become educated in the areas of law in which they mediate.

Confidentiality

In most instances and within certain limits, any information transmitted during the mediation must be kept confidential by the mediator. In a jurisdiction in which the practice of mediation is deemed the practice of law, lawyer-mediators may be held to the same standards of mandatory disclosure as those that would apply if they were representing a client. Thus, information about a future crime might be outside the limits of confidentiality.

The confidentiality requirement may derive from statute, legal privilege, or a contract. In the United States, it is possible to find instances in which judges have held the interests in confidentiality to be subordinate to other interests, such as the orderly administration of justice or the effective enforcement of a statute.

The parties to mediation are not responsible for maintaining any level of confidentiality about the matters discussed in a mediation unless they have reached a contractual agreement to maintain confidentiality. Otherwise, the only protection one party enjoys relative to the other is evidentiary rules that inhibit the later use in court of communications furthering settlement discussions.

Styles and Stages of Mediation

Mediators vary considerably in the approaches they take. The dominant distinction between mediators is whether they tend to be facilitative or evaluative. *Facilitative* mediators spend all or a majority of their time with all the parties in the same room. These mediators facilitate dialogue between the disputants and their lawyers and rarely offer their thoughts on anything other than on the mediation process. *Evaluative* mediators may conduct the entire mediation with the parties in separate rooms. These mediators are much more likely to offer opinions about the substance of the dispute.

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They may offer their own opinions about the merits of the dispute or about legal arguments supporting the parties' positions, and they may offer opinions as to the appropriate amount for which a given dispute should settle.

Most mediators consider themselves capable of working in either method, depending on what they deem necessary for the effective resolution of the dispute, but self-reports of style and approach are often at odds with party observation.

Mediation typically starts with an opening statement by the mediator, in which the mediator describes the process to be used and the ground rules (including confidentiality). After the parties manifest their assent to proceed, the mediator will elicit the parties' and the lawyers' rendition of the information they deem relevant to the dispute. In recent years, mediators have begun to do much of this information gathering in advance of the first joint session, and in a complex case, it is not uncommon for the parties to submit substantial mediation briefs and supporting documents to the mediator. Once all parties have had a chance fully to explain their side of the story, the mediator will often create a list of topics that must be agreed on before the dispute can be resolved. The next step is the creation of tentative solutions to the problem—which may take the form of offers and counteroffers or of a more elaborate brainstorming process, in which a wide variety of potential solutions are raised, discussed, and modified. If the effort yields a feasible solution, there is typically a discussion in which the parties compare the proposed solution to the value of continuing with litigation, and if all parties agree that the proposed **[p. 1009 ↓]** solution meets their interests better than additional litigation, a settlement occurs.

Advantages and Disadvantages

Proponents of mediation have long touted a trio of benefits associated with the use of mediation. These are cost savings, time savings, and heightened party satisfaction. However, the RAND Corporation has undertaken several comprehensive studies of the field of alternative dispute resolution and has been unable to document savings in time or money. Its conclusions are that while there is a great deal of anecdotal evidence supporting claims of cost savings and time savings, disputes are each too different to provide such support. If claim A settled in mediation, it may be that claim A would have

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settled as easily in less expensive direct negotiations. If claim B went through a trial and resulted in a verdict, it may be that claim B would have resulted in a failed mediation that would have cost the parties both extra time and money.

The RAND studies do point out that sufficient data exist to show that mediation does increase party satisfaction compared with their satisfaction associated with litigation—even the satisfaction of the victorious litigator. The increased levels of satisfaction relate to both the process used to resolve the dispute and the ultimate outcome.

However, mediation may not result in settlement or a narrowing of issues and may thereby increase the duration and expense of a given claim. In addition, some litigators express concern that a pretrial mediation may reveal weaknesses in one's case, may create an opportunity for revelation of information that would be outside the scope of formal discovery, and may provide opportunities for an opponent to uncover one's trial strategy.

Critiques of mediation run the gamut. Some commentators argue that mediation presents particular dangers to women or the poor because it tricks them into believing that they are bargaining on a level playing field when they are (in the opinion of these commentators) at a sharp social disadvantage. These commentators suggest that trial is a superior avenue for the vindication of the rights of the oppressed. Other commentators levy criticism against settlement generally, arguing that settlement produces peace instead of justice and that settlement deprives the public of the judicial interpretations that help give social order. To the extent that mediation is a tool that helps produce settlement, these commentators rail against it as a social ill.

Despite the failure to prove its advantages and in the face of unanswered critiques, mediation continues to flourish, and the field has grown consistently for more than forty years, with no signs of abatement.

Professionalization of the Field

There are no formal requirements to become a mediator, nor is there an accepted course of study that qualifies one to mediate. Most legislation requires that would-be

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mediators take a forty-hour, simulationbased workshop before they are eligible to be on the rosters of courts that mandate mediation. However, a great many mediators make substantial sums of money mediating cases brought to them by parties who are not ordered by a court to attend. These wealthy mediators may never have taken an hour of training, and yet their status in the field makes clear that they are professional mediators. Conversely, many would-be mediators have taken hundreds of hours of training and hold master's degrees in conflict resolution, and they lack clients and work.

In addition, there are no licensing requirements to become a mediator. The absence of these requirements is no accident but is the result of hundreds of failed attempts to create mandatory uniform standards of practice. In the place of mandatory standards are a great many organizational manifestos—rules that a mediator voluntarily adopts as a condition of membership in the organization. Thus, a mediator may be a member of the Association of Conflict Resolution or the Northern California Mediation Association or any of hundreds of similar groups, and each of these groups is almost certain to have a code of professional ethics and training expectations. However, many sought-after mediators belong to no such organization, and many members of these organizations hold out their credentials and still fail to attract clients.

The largest effort to create uniformity in the field in the United States was headed by the National Conference of Commissioners for Uniform State Laws. It spearheaded the creation in the early part of the **[p. 1010 ↓]** twenty-first century of a Uniform Mediation Act (UMA), containing provisions regarding confidentiality, professionalism, and the other standards. The UMA was created in the context of more than three hundred overlapping and different state laws regarding confidentiality in mediation. However, in the years since the creation of the UMA, few states have adopted it, and even in states that have adopted it, the dictates of the UMA extend only to those who voluntarily submit.

The practice of mediation is regulated, therefore, not by the government, but by the marketplace.

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Conclusion

Mediation appears poised to continue its unfettered growth. In the domestic context, courts remain crowded and slow. Populations increase faster than court budgets, and disputing parties have already demonstrated that they would prefer to seek alternatives than to raise taxes and increase the number of courts and judges.

On the international front, as globalization continues, more disputes will arise between parties from disparate backgrounds and with differing cultural expectations of the dispute resolution process. In the absence of a cheap and effective court system, these disputants will be left to alternative methods of disputing.

Many of these disputes, both domestic and international, will be resolved through the use of negotiation, and others will be resolved by binding arbitration. However, in that large swath of cases in which the parties have failed in their attempts to negotiate directly and in which they do not wish to turn the outcome of their dispute over to the authority of an arbitrator, mediation will continue to prevail as the alternative dispute resolution method of choice.

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See also

- Arbitration, International
- Arbitration, National
- Conciliation
- Conflict
- Dispute Resolution, Alternative
- Dispute Resolution, Psychology of
- Evidence and Proof, Doctrinal Issues in
- Mediation in China
- Negotiation
- Restorative Justice

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Further Readings

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