MEDIATION IN LABOR NEGOTIATIONS
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In this paper I have limited my discussion of mediation to its application in labor negotiations. I have not addressed its application to grievance processing or any of the other areas in which mediation is gaining more widespread use (real estate, juvenile court proceedings, voluntary mediation in lieu of court or court ordered mediation).

Mediation generally is defined as, “... intervention between conflicting parties to promote reconciliation, settlement or compromise...”\(^1\) It has a more specific meaning in the labor relations setting. Elkouri and Elkouri describe it as, “... a stage in the relationship between labor and management. Collective bargaining is the first stage and arbitration is the last. Conciliation or mediation, and fact finding, occupy intermediate stages.”\(^2\) Using this description, there are certain assumptions inherent in it that should be identified. They are:

1. The parties are desirous of reaching an agreement.
2. The parties have tried, through the meet-and-confer process to reach agreement and have been unable to do so.
3. There can be a number of reasons why they have not been able to reach agreement.

Some of the reasons that can prevent parties from reaching agreement include:

- The parties have contradictory information
- The parties may be dealing with misinformation, inaccurate or outdated information
- The parties are dealing with information they are unfamiliar with
- Information may be regarded as non-credible due to differing values or value systems, reputation of information source, or experience with an information source.
- The parties are dealing with unpleasant or disturbing information
- The parties, or a party, lack resources
- There are personality clashes between those representing the parties
- There are past patterns and practices or habits to overcome
- The egos of the parties are preventing the reaching of agreement
- The parties are operating from certain assumptions which may or may not be accurate
- The parties are operating under different value or belief systems

With this many potential causes for conflict and disagreement, it is not surprising that parties fail to reach agreement despite their intentions and the efforts of skilled negotiators. It was apparent

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enough that the drafters of California’s Meyers-Milias-Brown Act, which governs public sector labor negotiations, foresaw the potentiality and included a provision for mediation in the Act. Interestingly, it is also the only impasse resolution procedure specifically addressed in the Meyers-Milias-Brown Act.

Mediation has certain common characteristics regardless of the content of the disagreement. The first is the person who is called in to assist the parties, the mediator. The mediator is always important to the process and can be absolutely vital. The mediator can be virtually anyone to which the parties agree, but in practice mediators are people who are neutral and have no interest in the actual outcome of the agreement. They are generally people who have had training and experience in labor relations and specific training in mediation techniques though this is not required.

The State Department of Industrial Relations maintains a group of trained mediators, the State Mediation and Conciliation Service, who are paid by the State to assist parties in the resolution of labor disputes. This service is free of charge. The State Mediation and Conciliation Service maintains offices in San Francisco, San Diego, Los Angeles and Fresno.

The federal government also provides mediator services through the Federal Mediation and Conciliation Service. They have approximately 200 full time mediators in 78 field offices across the country. There is a charge for their services on a contractual basis. They will provide a cost estimate prior to the mediation.

Parties are not required to use the State Mediation and Conciliation Service or the Federal Mediation and Conciliation Service. Many other trained mediators are available. A number of arbitrators will also serve as mediators. Many attorneys have started doing mediation as well, since there are several programs through the courts where the parties are referred to mediation before or as a result of going to court. While these individuals are trained in mediation, they are not necessarily conversant with the nuances of labor relations generally and public sector labor relations in particular. If disputants use someone other than the State Mediation and Conciliation Service, they should reach agreement on the payment of any charges or fees ahead of time.

Many mediators are members of one or more professional organizations in the Alternate Dispute Resolution field. These organizations often promulgate ethical standards by which their members conduct themselves. These are available through these organizations. I have included here one such document as an example. It is from a joint committee formed by the American Arbitration Association, the American Bar Association and SPIDR (Society of Professionals in Dispute Resolution) and is representative of the manner in which most mediators try to conduct business.

Each mediator is different and each mediation has unique aspects to it, but certain things are

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common to almost all mediations. Mediations can be broken down into typical and predictable stages. The first stage is, for lack of a better term, the introduction. During this stage the mediator will give a brief outline of the process and ask the disputants to agree to some basic ground rules. This serves the dual function of establishing a procedural framework and establishing a precedent of agreement before getting onto the substantive portion of the mediation. The second stage is problem definition. The mediator will ask the parties to make opening statements during which they will state the issues as they see them without interruption. This can be done individually in separate meetings or each side can be present while the other party makes their presentation. There may also be the venting of emotions during this stage if that is part of the situation. This is typical and the mediator will allow it to happen but ask the other disputant not to react until the first party is finished. The mediator will go through some clarification of issues and summarize the disputant’s points and repeat them back to the disputant and allow for any clarification necessary. The mediator does this to ensure clarity but also to focus on the issues. Then the mediator will permit the other disputant to do the same without interruption. In some instances, it will be the first time both parties have been able to tell their story, as they see it, uninterrupted. This will often be a very large first step toward resolution of the dispute.

The third stage is the clarification stage and is to help the disputants gain understanding of each other and the importance of their issues to them. It is also a time when common interests are identified. It is often the case that the mediator may meet with the disputants individually during this stage of the mediation and go through a re-analysis of their thinking in reference to the information derived during the first stage of the mediation. The mediator will ask many questions to determine what options have already been considered and identify those that have not. It is typical that as the mediator leaves one disputant to talk to the other, the mediator will ask that they do some work on some specific item or issue that came up or to contemplate some option that had not been enunciated by either party in the first stage. This serves to focus their thinking on the issues and to work outside the framework they had been in. This exchange of ideas may go on through several iterations and may be done with the disputants separated or together or a combination of both. The mediator may at some point ask the disputants to do a “reality check” as to their alternatives and the likely outcomes of those alternatives. The mediator can often provide anecdotal information of other approaches that have worked in other instances as an aid to this process.

In the fourth stage, the mediator will attempt to get the disputants to identify what new information they learned from the previous two stages and to have the disputants echo back to the other party what they heard as the issues as identified by the other party. In doing this, the mediator is trying to ensure that there is clear understanding of the issue(s) by both parties and clear understanding of one another’s interests. It is also an opportunity for the disputants to present any new ideas they had developed that could lead toward resolution. It is during this stage that new approaches can be set up as “straw designs” than can be evaluated in a non-confrontational manner by both parties since it occurs outside the formal labor negotiation setting.

The last stage is assisting the disputants in reaching an agreement. This stage can be quite
difficult even if the disputants are in essential agreement on all substantive issues. It is common for this to be a reconciliation phase in which damaged relations can be repaired and egos assuaged. This can also be a delicate process that can still prevent final agreement and resolution. If an agreement is reached, the mediator will try to make sure both disputants understand it thoroughly.  

This is usually accomplished by setting the agreement down in writing. This may or may not be a part of the actual Memorandum of Understanding. It may be a “side letter” showing how a section of the Memorandum of Understanding is to be interpreted or it may be totally separate from the Memorandum of Understanding. This is to ensure that there is no “hidden agenda” and that the agreement is one both disputants can accept and actively support.

There are a number of advantages to mediation for labor relations practitioners. Mediation is exempted from the public disclosure provisions of the Ralph M. Brown Act.  

This confidentiality allows and encourages the disputants to be honest and open and to “lay their cards on the table.” It provides an opportunity to try interim solutions, express emotions, utilize informality and permit the disputants to “save face.” Confidentiality is a very important aspect of the mediation process and is recognized as such by the legal system. Under the Evidence Code, Section 1152.5(a)

“(1) Evidence of anything said or of any admission made in the course of the mediation is not admissible in evidence, and disclosure of any such evidence shall not be compelled, in any civil action in which, pursuant to law, testimony can be compelled to be given.” and 

“(2) Unless the document otherwise provides, no document prepared for the purpose of, or in the course of, or pursuant to, the mediation, or a copy thereof, is admissible in evidence, and disclosure of any such document shall not be compelled, in any civil action in which, pursuant to law, testimony can be compelled to be given.”

This prevents the use of statements in litigation and therefore reduces the fear that what you say might be used in litigation which reduces the need for posturing and encourages the disputants to be more honest and open with one another and to explore their negotiation “bottom lines.” It is the responsibility of the mediator to make the disputants aware of this confidentiality and many mediators have the disputants sign a confidentiality agreement before the mediation process begins. A sample confidentiality agreement is attached.

In many ways, mediation is very much like Interest Based Negotiation using a facilitator. The process of mediation uses many of the same techniques, methods and underlying philosophy as


6The role of the State Conciliation Service in resolving a public sector impasse, Department of Industrial Relations, State Conciliation Service, 60531-501 4-78 500 OSP

7California Evidence Code, Section 1152.5, Mediation.
Interest Based Negotiation. It disaggregates issues into smaller parts that seem less complex; it is collaborative rather than confrontational; the focus is on the issues not on positions or personalities; it provides a forum which permits quiet people to speak and be heard and talkative people to be quiet and listen; it equalizes the power of the disputants to compel a result, regardless of the difference in their real power outside the mediation; it permits the mediator to model useful behavior and techniques for avoiding future conflicts; it permits both sides to say no and also to compromise and save face; it encourages the disputants to tell the whole truth including the subjective and emotional truths; it allows the emotional and subjective aspects of the issues to be addressed; it encourages creative resolutions and permits the disputants to fashion the outcome rather than have it externally imposed.\footnote{Mediation from A to Z, Kenneth Cloke, Center for Dispute Resolution, Santa Monica, CA}

Mediation also serves some indirect purposes for labor negotiators. By engaging in the mediation process, the parties can demonstrate their willingness to try and reach agreement. Even if no agreement is ultimately reached, the relationship and the willingness to communicate frankly and openly about interests, needs and issues can be preserved. This is an important factor in preserving or enhancing the relationship between the parties. Credibility is an exceedingly important factor between negotiators. The mediation process can demonstrate to the parties that they were both being forthright and honest in their dealings with one another and thus preserve their mutual respect for one another even if they cannot reach agreement. This, in turn, will provide for a solid footing for future negotiations. If an agreement is reached, there is greater likelihood that both sides will have a better understanding of the issues which should lead to an agreement with fewer variances in interpretation of the agreement.

Mediation may seem redundant to some practitioners, a second bite of the apple, so to speak. There may be some validity to the comment, but if a second bite will result in an agreement that both parties can actively support, then it is an avenue that should be explored. It is a technique that has been used for a number of years with good success and the cost is minimal relative to the alternatives.

**Bibliography**


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