

## **Mediation as a Method of Dispute Resolution**

Kerry Newcomer  
P. Mars Scott Law Offices  
2920 Garfield, Suite 200  
P.O. Box 5988  
Missoula, Montana 59806  
(406) 327-0600  
kerry.newcomer@pmarsscott.com

1. Mediation is defined by Webster's Unabridged Dictionary as, "Friendly intervention, usually by consent or invitation, for settling differences between persons." Another way to think about mediation is as an assisted negotiation.
2. Mediation has many advantages over litigation:
  - A. The participants retain control of the outcome;
  - B. Mediation is less expensive than litigation;
  - C. Mediation is faster than litigation;
  - D. Mediation scheduling is more flexible than litigation;
  - E. The participants decide what is important;
  - F. Mediation offers options for settlement that may not be available from litigation;
  - G. It is said that the participants are more likely to comply with agreements reached in mediation than with litigated outcomes;
  - H. Relationships between the participants can be preserved, and even improved. This may be important where the dispute is between family members, co-workers or business associates; and,
  - I. Participation is voluntary and if a resolution is not reached other resolution options, such as litigation, remain available to the participants.
3. The mediation process is described by statute at § 26-1-813(1), MCA. The characteristics of the mediation process described by the statute are:
  - A. Private;
  - B. Confidential;
  - C. Informal;
  - D. Voluntary;
  - E. Decision making authority remains with the participants;

- F. The mediator is an impartial and neutral third person;
  - G. The mediator does not have authority to compel a resolution or decide any issue;
  - H. The mediator encourages and assists the participants to reach their own mutually acceptable settlement by:
    - i. Facilitating the exchange of information between the participants;
    - ii. Helping to clarify issues and interests; and,
    - iii. Ensuring that relevant information is brought forth.
4. The term “mediation” is used in the legal system to refer to what may be fundamentally different dispute resolution processes. Look at the process as it is described to understand what to expect.
5. Alternative dispute resolution encompasses a spectrum of processes. They can look the same, or very different, depending upon the mediator’s or the participants’ preference and local custom. However, the processes may be distinguished by looking at two components: 1) the role of the mediator as facilitative or evaluative; and, 2) whether or not the outcome is voluntary for the participant.

**A. Mediation.** The mediator works to encourage disclosure of the interests behind the dispute, so that the participants can use their knowledge of each other’s interests to fashion a resolution that can work for both. This process often looks like the mediator and the participants to the dispute having a conversation. Most of the time, the participants are in the same room. For some kinds of disputes it is common to have several meetings over time.

The mediator’s role is to **facilitate** discussion between the participants. The mediator does not evaluate the participant’s proposals. Participation in the outcome is **voluntary**.

**B. Settlement Conference.** A settlement conference usually takes place after litigation has started or is anticipated. Typically, the lawyers and their clients meet with a third lawyer called the *settlement master*. The settlement master uses his or her experience to evaluate the positions taken by the participants to encourage a settlement. Often, the settlement conference occurs in two rooms, one for each side of the dispute, with the settlement master shuttling between rooms. Settlement conferences are usually conducted for as long as necessary during one day.

The settlement master’s role can be facilitative but often shifts to the settlement master’s **evaluation** of legal positions or an expression of likely outcome if the dispute proceeds to trial. The settlement master is often selected for his expertise in the subject matter of the dispute. The participants may be compelled to attend the settlement conference, but they retain the choice to reach an agreed outcome. Participation in the outcome is **voluntary**.

- C. **Arbitration.** This is the informal version of a hearing before a tribunal. The *arbitrator* decides the dispute after hearing the participants' presentations about the dispute. The participants control the setting and rules but leave resolution of the dispute to the arbitrator.

The arbitrator **decides** the outcome of the dispute after **evaluating** the participants' presentation of the matter at issue. The arbitrator is often selected for his expertise in the subject matter of the dispute. Once arbitration is selected as the dispute resolution method, participation in the outcome is **not voluntary**.

- D. **Combined processes.** Often mediation and arbitration are combined. A facilitated mediation is attempted and if resolution of the dispute is not successful, then mediator decides or recommends the outcome.

Look very carefully at combined dispute resolution process proposals in order to determine what to expect. Where the role of the mediator shifts from facilitative to evaluative, participation in the outcome may no longer be voluntary.

6. The goals for the mediation process can vary.
- A. For example, in a facilitative mediation process, the goal may be to improve the relationships between the participants. This is often referred to as the **transformative model** of mediation. This model is often used for conflicts between employees in a workplace.
  - B. Another example, again in a facilitative mediation process, the goal may be to reach an agreement by encouraging the participants to abandon positional bargaining and disclose their specific interests in the outcome to each other. This is often referred to as **interest based model** of mediation.
  - C. There are other mediation models. In practice, the nature of the dispute, the participants to the dispute, and the mediator's background and skill set determine the goals for the mediation and model used.
7. Mediation is subject to a statutory privilege from disclosure under state law.
- A. Section 26-1-813, MCA not only allows the participants, but also the mediator, to assert the privilege against disclosure of mediation communications.
  - B. The statutes authorizing mediation in criminal proceedings modify the mediation communication disclosure privilege of § 26-1-813, MCA:
    - i. The mediator is not included as a person in the decision to waive confidentiality;
    - ii. The reporting requirements about future and ongoing crimes, and threat of harm to others, are expanded. (Confidentiality is weakened); and,

- iii. The exceptions to disclosure of mediation communications are expanded to show the existence of an agreement or to interpret an agreement.
8. Mediator functions:
- A. Provides a safe environment where each participant can be heard by the other.
  - B. Enforces rules of conduct, communication and respect.
  - C. May suggest options to consider or different ways of looking at the problem and potential outcomes.
  - D. Manages the mediation process. For interest-based mediation the process is to:
    - i. Identify and clarify the **problem**;
    - ii. Determine each participant's **interests** to be satisfied in a potential outcome;
    - iii. Generate as many **options** for resolution as is possible;
    - iv. **Compare** how the participants' interests will be satisfied by the various options; and,
    - v. **Select** or create an option that maximizes each participant's interests in the outcome.
  - E. The mediator's tools include:
    - i. Reframing or restating participant statements to defuse inflammatory language and objectify the dispute as a problem for mutual resolution;
    - ii. To allow story telling by the participants to explain the dispute and the impact of the dispute from each participant's perspective. This can be emotional and cathartic for the participants. It is probably the most powerful tool used in mediation when the story is heard and understood by the other participant. It is sometimes necessary for a participant to tell his story before he can move to resolution of the dispute.
  - F. Common expectations of mediators:
    - i. Knowledge of the process to be used;
    - ii. Impartial and neutral;
    - iii. Experience; with the process, the subject matter of the dispute, or both;
    - iv. Able to maintain confidentiality; and,
    - v. Adherence to ethical guidelines.

9. Mediator qualifications, training and ethics.

- A. Qualification to be a mediator. Anyone can hold himself out as a “mediator” in Montana. Mediation and mediators appear in the Montana Code Annotated in several areas: domestic relations (Family Law Mediation at § 40-4-301, MCA and following); water rights adjudication; workers compensation; labor relations; taxation; district courts and the Montana Supreme Court; utility regulation; environmental protection; and agricultural marketing as examples.

The only place where mediator qualifications are listed in the MCA (that I’ve found) is for family law mediation. (There are administrative rules that also discuss mediator qualifications, not discussed here.) Section 40-4-307, MCA lists those qualifications as:

- i. knowledge of the court system and the procedures used in family law matters;
- ii. Knowledge of other resources in the community to which the parties may be referred for assistance;
- iii. If applicable, knowledge of child development, clinical issues relating to children, the effects of marriage dissolution on children, and parenting research; and
- iv. Knowledge of the mediation process.

B. Mediator training.

- i. Basic mediation training is typically a 40 hour course covering the mediation process, techniques and the ethical guidelines of the group sanctioning the training. Training is offered by for-profit and non-profit groups.
- ii. Many universities offer degrees or courses in conflict resolution.
- iii. The mediator’s personal experience and background are probably the most important predictors of mediator effectiveness. Most practicing mediators come from a professional background that led them to view mediation as a preferred alternative for resolving disputes. Many mediators have practiced in other professions, such as:
  - Law;
  - Counseling;
  - Social services;
  - Employment – human resources; and
  - Specific industries.

- C. Qualification and training requirements are imposed for membership or participation in mediator rosters of state and national mediation

organizations. These sanctioning organizations can be non-profit or for-profit. Some of the organizations make distinctions in membership status based on advanced membership criteria. As examples:

- i. The Montana Mediation Association qualifications for Full Membership include:
  - a. Effective communication skills.
  - b. Forty hours/5 working days of mediation training, or the equivalent, to include:
    - Two hours of ethics;
    - Principles and philosophy of mediation;
    - Mediation fundamentals;
    - Skills;
    - Role play;
    - Conflict theory; and
    - Assessment - external evaluation,or  
Twenty-four hours/3 working days of mediation training, or the equivalent, and participation in a community mediation program which includes the following supervised experience:
    - Observation of a minimum of at least 3 mediations and post-mediation briefings;
    - Co-mediation or supervised mediation; and,
    - A minimum of at least 5 mediations and post-mediation briefings.
  - c. After training, 8 hours of mediation time including observation of at least two mediations and post-mediation briefings conducted by two Full Members and 5 hours mentoring/consultation with a Full Member. The post training experience is to be completed within one year of the basic mediator training.
  - d. Adherence to the Association's Ethical Guidelines.
- ii. The Association for Conflict Resolution qualifications for Practitioner membership are:
  - a. Active mediation practice;
  - b. Forty hour basic mediation training course;
  - c. Three years or 200 hours of mediation experience; and

- d. Adherence to the Association's ethical guidelines.
- iii. The Montana Mediation Association qualifications for Family Designation (an advanced qualification) include:
  - a. Qualification as a Full Member;
  - b. An undergraduate degree from a four-year college or university;
  - c. Five years experience in a human services field;
  - d. Eight hours of co-mediation experience in 4 family cases, 5 hours consultation or debriefing with a Full Member, or 5 hours of supervised family mediations;
  - e. Sixteen hours of mediation training geared to family mediation, to include:
    - Interpersonal conflict, gender issues, communication processes, and ethics relevant to conflict involving a child;
    - Child development, family dynamics, and psychopathology; and,
    - Family law, including financial, property, and custody/parenting issues;
  - f. Sixteen hours per year of continuing education in family mediation-related issues, of which 4 hours must address child development, family dynamics, psychopathology, drug and alcohol abuse, and/or sexual abuse and domestic violence issues;
  - g. Adherence to the Association's ethical guidelines for family mediators.
- iv. The qualifications for Advanced Practitioner status in the Family Mediation Section of the Association for Conflict Resolution are:
  - a. The qualifications for Practitioner status;
  - b. Twenty hours continuing education in mediation every two years;
  - c. Two years family mediation experience, 250 hours of mediation time and 25 family mediation cases;
  - d. Thirty hours of family / divorce specific mediation training; and,
  - e. Adherence to the Association's ethical guidelines for family mediators.

- v. The American Arbitration Association's requirements for placement on its mediator roster are:
  - a. Ten years senior level experience in business, industry or profession;
  - b. Education and licensing appropriate to business, industry or profession;
  - c. Twenty-four hours of mediation training;
  - d. Five mediated cases in primary field within 3 years within the scope of an ADR program,  
or  
Four mediated cases outside the scope of an ADR program (i.e. privately engaged);
  - e. Membership in a trade or professional association; and,
  - f. Adherence to the Association's ethical guidelines for mediators.
  
- D. Ethical guidelines. Most of the sanctioning/membership organizations publish ethical guidelines for mediators. However, reporting and enforcement of ethical violations is problematic where licensing or regulation does not exist. Common elements of ethical guidelines require the mediator to:
  - a. Be impartial;
  - b. Assure the participant understands of the dispute resolution process;
  - c. Maintain confidentiality;
  - d. Disclose conflicts of interest;
  - e. Maintain participant self determination of the outcome, but to test the participant's understanding of the consequences of an agreement;
  - f. Consider unrepresented interests;
  - g. Advise the participants of any mandatory reporting requirements (for example, that the mediator is a mandatory reporter of suspected child abuse);
  - h. Be competent to mediate the problem presented; and,
  - i. Disclose fees and costs in advance.

10. Mediator qualification, rosters, and training are provided by many organizations. Examples and contact information for a few are:

**Montana Mediation Association**

Judy Wendt, Administrator  
238 6th Avenue S.E.  
Cut Bank, MT 59427  
406-750-8813  
[www.mtmediation.org](http://www.mtmediation.org)

**Association for Conflict Resolution**

5151 Wisconsin Avenue, NW, Suite 500  
Washington, DC 20016  
202-464-9700  
[www.acrnet.org](http://www.acrnet.org)

**American Arbitration Association**

1633 Broadway, 10th Floor  
New York, New York 10019  
212-716-5800  
[www.adr.org](http://www.adr.org)

**JAMS**

(formerly Judicial Arbitration and Mediation Services)  
1920 Main Street, Suite 300  
Irvine, CA 92614  
949-224-1810  
[www.jamsadr.com](http://www.jamsadr.com)