Excerpt from Eric Sirotkin's *Labor and Employment in New Mexico.*

IV.

DISPUTE RESOLUTION AND MEDIATION[61]

A. Introduction

During the 1980s and increasingly into the 1990s employees, unions, and nonunionized workers have embraced mediation as a low-cost, low-risk method to resolve disputes in the workplace, primarily those between the employer and an individual worker. Mediation may be appropriate when an employee and supervisor have difficulty communicating or when disciplinary action has commenced against an employee. Some lawyers, prior to bringing suit against an employer, will write the company and offer mediation as an alternative to litigation. Employers facing either the opportunity to mediate a settlement to potential litigation

61 This section has been primarily prepared by Mark Bennett, Esq., of Bennett and Associates of Santa Fe, a mediation service. Mr. Bennett trains mediators around the state and has taught numerous workshops on the mediation of organizational disputes. He is often hired by companies to come into the workplace and mediate conflicts.

or a seemingly insurmountable workplace conflict should jump at the chance to resolve the disputes with this innovative process.

This section will answer some of the common questions employers, managers, human resources professionals, union representatives, individual workers, and attorneys practicing employment law may have about the mediation process.

B. What Is Mediation?

Private mediation is a voluntary process. A neutral, impartial person (or persons) assists individuals, groups, or organizations who are having conflicts and disagreements to discuss and negotiate a resolution. Neutrality means that the mediator will not personally benefit from the outcome of the dispute. Impartiality means the mediator does not favor any party.

All parties must agree on the final solution in order to resolve a dispute through mediation. Therefore, mediation is different from arbitration or a fair hearing in which a third party acts as a private judge to make a decision. It is also different from litigation (where lawyers for the parties argue in front of a judge or jury who makes a decision). However, the mediator is not without influence and power. He or she may make decisions about procedures used to negotiate and communicate and may suggest specific settlement options to assist the parties in reaching an agreement. Most mediators do not offer their opinions about the merits of the case.

Mediation is often confused with settlement facilitation or arbitration. Settlement facilitation is a process used in court-annexed programs to promote resolution of filed lawsuits. The facilitators are typically experienced attorneys. The process often involves moderate to strong pressure on the parties to settle, including frank opinions by the settlement facilitator about his or her view of the strengths and weaknesses of each party's case.

Arbitration is closer to a court proceeding, as the arbitrator serves as the judge and jury in a case and renders an opinion that is binding on both the employer and the employee. Agreements to use arbitration as a final and binding procedure are most often found in collective bargaining agreements.

❖ See Chapter 3 for a discussion of labor arbitration.

Although many mediation procedures rely on an individual to act as the third party, comediation is becoming increasingly popular. Using a two-person team has certain advantages. It can bring more expertise to

bear on the dispute. If gender, culture, or ethnic differences are a factor in the dispute, it may help if those differences are mirrored on the mediation team. The major disadvantage of comediation is the added expense of the second mediator.

A variation on mediation that is not uncommon in large employment systems is "peek-a-boo" or advisory arbitration. The mediator is someone recognized by the parties as having solid experience and credibility as an arbitrator of the type of dispute submitted to mediation. They expect, at some point during the mediation (typically, if an impasse is reached), that the mediator, like a settlement facilitator, will give each party a prediction of the result of his or her case in arbitration if they do not reach an agreement.

Another variation is med-arb. Prior to the beginning of the mediation, participants agree they will ask the mediator to switch hats if no agreement can be reached and, as an arbitrator, make a binding decision. Parties choose this procedure because it is seen as very efficient and it insures a resolution. However, everyone is aware that the mediator may become a decision maker later in the case. This awareness may lead to a reluctance to reveal the strengths and weaknesses of the case or limit the vigor with which the parties pursue the negotiations.

C. Why Consider Mediation?

To increase the chances of an agreement. The people (difficult personalities and strong feelings) or the problem (complexity or intractable positions) may make it difficult to reach a resolution. Many issues cause conflict in the workplace—discipline, performance, compensation, job security, poor teamwork, bias and discrimination, and sexual harassment. These issues can significantly affect the lives of those embroiled in the conflict, and strong emotional responses should be expected. Without assistance, the parties may be unable to communicate effectively. A mediator can improve the parties' communication to focus on the real issues in a productive, creative way. When there is disagreement and conflict, disputants often lock into positions and fight with one another in ways that can be destructive, time-consuming, and costly. Using a mediator increases the likelihood of a negotiated settlement by bringing the skills, creativity, and influence of a trained, impartial third party to bear on the problem.

To save time and money. When the parties in a conflict can't reach a negotiated settlement without assistance, those most aggrieved by the status quo may consider filing a lawsuit or other proceeding, with

arbitration to be the only alternative. The adversary process can be expensive and time-consuming. An employee bringing a case will spend from $6,000 to $10,000 in litigation costs, even when there is a contingency fee agreement. *An employer will likely spend over $100,000 in attorney's fees defending a case through trial in court.*

A lawsuit can take a year or more just to come to trial. Then either side can appeal. In addition, the parties must spend time meeting with their lawyers to discuss the status of the case, to prepare for depositions, and to answer written questions from the other side. Time spent handling the details of litigation is time that is unavailable to further personal or organizational goals.

Simple cases may mediate to conclusion in one session of two to three hours. More complex matters may require four to six sessions.

To keep options open. If mediation doesn't work, all parties reserve the right to pursue other available adversarial options including arbitration, litigation, or administrative hearing. Except in court-annexed programs, mediation is usually offered as a voluntary option. If it's not working, any party can end the process at any time and move promptly into a more formal legal process.

To reduce emotional costs. Not only is litigation expensive and time-consuming, but it can be very stressful. A disputant may feel that an important part of his or her life is on hold while he or she is waiting for a trial date, wondering and worrying about the outcome. When the dispute involves a current employee and his or her employer, the parties in conflict are likely to have future dealings. Using an adversary process like arbitration or litigation risks polarizing and embittering people and can complicate all the parties' future dealings.

Unresolved conflict in the workplace often carries significant risks. The productivity of the parties directly involved usually can suffer due to stress and mental preoccupation with the unresolved conflict. Often overlooked is the impact on their co-workers. They may rally around their respective friends creating rifts within teams and offices. They may also feel a threat to their own sense of security as the uncertainty about the status of their supervisor or colleague causes instability in the workplace environment. Questions can multiply rapidly in the minds of employees as the office "grapevine" works overtime. Will someone be terminated, demoted, or transferred? Will a supervisor's power and authority be strengthened or lessened by the outcome? Why should I "bust my butt" when Joe did and he got fired? How will these changes impact other employees?

To develop satisfying, lasting agreements. When the parties (who know their needs better than anyone else) work together, they can

customize a negotiated resolution for their unique situation. Judges, juries, arbitrators, and hearing officers don't have any special wisdom or insight that allows them to understand the parties' or the organization's practical and psychological needs. Also, they may be restricted by legal rules that prevent them from addressing all aspects of the conflict to develop a real solution. In mediation, there are no rules preventing anyone from taking the most pragmatic approach that deals with the whole picture. The agreement may address legal and nonlegal issues. For example, the employee may be most concerned with the type of job reference that they will receive or the impact on their record of having to tell prospective employers that they were "fired." Therefore, an agreement may address these emotional issues.

To keep control over the outcome. The goal of mediation is to reach an agreement that the parties can live with after having taken a direct role in negotiating its terms. When the parties participate in this way, there is a good chance they will have a sense not only of legal obligation but also of moral obligation to fulfill the terms of the agreement.

To protect one's privacy. Mediation is a private process. There is no lawsuit filed at the courthouse and listed in the newspaper for friends, coworkers, bankers, reporters, creditors, or others to notice and discuss. Most mediation procedures have written rules requiring that the mediator keep all discussions confidential.

D. The Evolution of Mediation in the Workplace

In the United States, much of the knowledge about mediation comes from labor-management experience in unionized workplaces. Beginning ten to fifteen years ago people in business, community services, and the mental health and legal professions began to use mediation in many different settings—divorce and child custody cases, contract issues, environmental and development disputes, car dealer-customer complaints, construction claims, employee, personnel and EEO complaints, special education-public schools problems, neighborhood controversies, and complex business litigation.

During this period of experimentation, many large and small organizations have implemented uses of mediation for employment conflicts that go beyond the scope of traditional union-management practices. Mediation may be offered as a specific step in a grievance procedure or as a free-standing option when disputes arise. Some large organizations opt for internal systems. These systems usually rely on a pool of employees

trained to provide mediation services. Other organizations hire outside mediators. This may be done by using a regular panel of independent mediators, using the services of one of the growing number of dispute resolution organizations such as the American Arbitration Association, or hiring an independent mediator on a case-by-case basis. Organizations have used mediators for intergroup conflicts between departments and teams.

One innovative program called "consulting pairs" has been adopted by a number of large U.S. corporations. A pool of managers and employees that mirror the diversity of the work force receive intensive training in communication and problem-solving techniques. If, for example, a conflict arises between a white male manager and an African-American female employee, the consulting pair includes a white male manager and an African-American female employee from the pool who work in different parts of the organization. The consulting pair then sits down with the parties in conflict to assist them in talking through the conflict.[62] Many mediation procedures offered in unionized workplaces limit the scope of the issues that may be mediated. The trend in nonunionized workplaces is to open up the mediation process to any work-related conflict.

E. When Can You Mediate?

Mediation does work, even in difficult and unlikely situations. Research that has tracked organizations with substantial experience with mediation ranging from office/clerical work to coal mining finds that about eighty percent of the cases submitted to mediation settle.[63] The most important determinant of the appropriateness of mediation is the participants' willingness to try the process and give it a chance to work.

When one or more of the parties is committed to causing physical, financial, or emotional harm to someone else, mediation is probably not appropriate. This is particularly true if there is recent history of physical violence and intimidation. If any of the parties has a serious, ongoing dysfunction such as alcoholism or drug addiction, that person may not have the level of responsibility required by the mediation process. However, mediation may be appropriate if a parallel process, such as counseling through an employee assistance program, can address the more deep-seated emotional problems that may be present.

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62 N.Y. Times, Sept. 1, 1991, at Sec. F p. 23.

63 Stephen B. Goldberg, *Grievance Mediation: A Successful Alternative to Labor Arbitration,* Negotiation Journal, No. 1, at 19 (Jan. 1989).

Evidence of bad faith, withholding information necessary for informed negotiation, and insistence on placing blame and having a day in court are also indicators that mediation is not appropriate. If a matter of legal principle is involved and one of the parties wants to establish a legal precedent for future situations, mediation is unlikely to result in agreement.

When one party has significantly more power than the other, it may be difficult to build a fair negotiating process. However, it is important not to overreact to an apparent imbalance of power. The sources of power for a manager are usually apparent: the formal authority of his or her position, the ability to reward, and the ability to punish. The employee who has no formal power may have other sources of power—the ability to persuade others of the morality of his or her position; the ability to cause the employer discomfort, delay, or cost; personal qualities such as perseverance, charisma, eloquence, and courage; and association with others who support and respect him or her.

The mediators's job is to act in ways that create a balanced forum where each party has a fair opportunity to speak, respond, and consider all of the options for a negotiated agreement.

F. The Role of Lawyers

In unionized workplaces, mediation procedures have usually been developed with input from the company's and the union's legal advisers. Most procedures do not require or encourage the parties in both unionized and nonunionized settings to have legal counsel in attendance during the mediation.

Although the use of mediation may limit the need to utilize legal counsel, it is important to recognize that important legal issues may come up in the negotiation that takes place during the mediation. It is wise to consider the need for a consultation before entering into mediation. This consultation is particularly critical before the parties sign any legally binding agreement resulting from the mediation.

The role of the lawyer as adviser and counselor during the mediation process can be useful and constructive. Rather than advocating on behalf of the client, the lawyer advises in the background to ensure that all aspects of the problem have been addressed, that the client understands the legal implications of the agreement, and that all of the client's legal rights and responsibilities are explained to him or her.

If the parties are planning to still work together in the future, it may be best to not have lawyers participate directly in the mediation. This may

reduce the adversarial nature of the session and allow both the employer and employee to speak more freely to each other.

The parties should remember that mediation is a process of assisted negotiation. Therefore, before declining mediation, they should carefully consider the alternative to negotiated settlement and ask the lawyer for an estimate of the odds of success in arbitration or litigation and the possibility of an appeal by the losing party.

G. Costs of Mediation

For most disputes there are five major options. For each option, parties should consider three types of costs: monetary cost, time, and stress.

First, negotiate a resolution one to one with the other side(s). This is the simplest, quickest and least expensive approach. It can be difficult and stressful if the relationship and the communication between the parties are poor. Many workplace grievance procedures provide for a first step in which the grievant must discuss the subject matter of the grievance with the immediate supervisor to attempt an informal resolution. When cases involve issues such as sexual harassment, it can be inappropriate to require that the person who believes he or she has been victimized sit down privately with the alleged victimizer.

Second, hire a mediator to help the parties directly negotiate a resolution. This is usually the next least expensive approach. The average cost of hiring an independent mediator for an employment mediation ranges from $300 to $500.[64] Procedures using internal staff reduce this cost to the value of the employee mediator's time away from his or her regular duties plus the costs of training.

Third, hire lawyers and ask them to negotiate with each other to attempt to resolve the issue. Similar to mediation, this process can move quickly. The stress level may be lessened because the parties don't have to directly deal with the other side. It may be increased because they give up some control over the situation to the lawyers. This option often costs more than mediation because two independent professionals are engaged instead of one. What should also be considered is the risk that bringing advocates for each party to the negotiating table may increase the level of tension and conflict. Some lawyers are excellent problem solvers who know how to defuse situations and negotiate skillfully for a constructive,

64 Peter Feuille, *Why Does Grievance Mediation Resolve Grievances?*, Negotiation Journal, No. 2, at 136–37 (April 1992).

workable, and fair agreement. Some tend to be aggressive. They look at most situations as opportunities to maneuver for their client's advantage and use posturing, bluffs, and threats that often elicit defensive or hostile responses from their counterparts. This may result in escalation of the conflict and increased time and expense as the dispute moves on to more formal adversarial processes that focus on the past and attempt to determine who is to blame, based on the legal rights and responsibilities involved. These fault-based processes do nothing to prepare the disputants to deal with each other in the future.

Fourth, begin (or continue) litigation or some other adversarial process. It is easy for the cost of this option to cost thousands of dollars per party. In disputes with any kind of complexity, the fees can become astronomical. There is also a real possibility that it can take one to two years to reach a resolution. The stress level can be very high as the issue drags on, the costs mount, and the parties sense how little control they have over the outcome.

Fifth, walk away from the situation with whatever can be salvaged. Although this takes little time, the monetary costs and the stress of this decision may be significant. For example, an employee may forgo opportunities for advancement and salary increases. He or she may also continue on the job with deep feelings of anger, depression, or fear. A manager may live with a reputation as a difficult person who creates problems with the people he or she supervises and consequently lose opportunities for promotion.

To take advantage of the mediation process while minimizing the cost, the case intake, selection of the appropriate mediator, and preparation by the parties for the initial session are all important. The case must be assessed by someone to determine (1) whether mediation is appropriate, (2) who needs to participate in the mediation, (3) whether the mediator should have some special background or skill, and (4) whether the case calls for a mediation team balanced by skill, gender, or ethnicity. At the beginning of the first session, the parties should have relevant facts and documents available. They should also have the authority to negotiate about the matters at issue in the dispute. If it is not appropriate for the person in authority to be present during the negotiation, arrangements should be made for that person to be available for consultation during breaks in the mediation session. Everyone should treat the resolution of the dispute as a priority. This means that participants must prepare carefully for each session, promptly gather any information reasonably required for the process to work, and keep their agreements to check with other people or produce documents.

H. The Mechanics of a Mediation

All mediations pass through seven basic stages.

1. *Intake*: At least two individuals or groups have a conflict. At least one of the parties in the dispute perceives that there is no basis for direct, unassisted negotiation to resolve the dispute. By individual initiative or joint action a proposal to bring in a third party moves forward.

In workplaces with a formal mediation procedure, someone makes contact with the person or office designated to receive requests for mediation. In many organizations this is in the human resources, employee relations, or personnel department. When there is an ombudsperson, his or her office may take the request and process it or refer the case to another department for intake. Occasionally, the office of legal counsel is the initial point of contact. When a union contract covers the parties and the issue in conflict, the contract language will determine where the case begins.

Some cases require a careful assessment of the participants necessary to reach a resolution. For example, assume that four employees in a twenty-person department have filed a grievance that raises issues of departmentwide policy, harassment by some of the other sixteen employees, and acts of favoritism and bias by their direct supervisor. The departmentwide policy issues cannot be negotiated by the direct supervisor because his or her authority is limited. To get the authority to negotiate on these issues, two additional management representatives must be involved.

This example raises several questions. Who should be involved? Do those involved need to participate in all aspects of the mediation? In what order should the issues be addressed? The answers to these questions should be obtained through consultation between the mediator and the initial parties. In complex cases, the intake stage may include some discussion of the participants and procedures, which must be confirmed during the next stage. All parties agree to proceed. A choice of a particular mediator is made and the initial session is scheduled.

2. *Contracting*: The mediator meets (usually jointly) with the parties to explain the mediation process. He or she answers any questions of the parties regarding the process and obtains their agreement to follow any guidelines deemed necessary by the mediator or the parties. These guidelines may include the following:

- who will be present during sessions;
- time frame and scheduling;
- a commitment to full disclosure of relevant information;

- the privacy or confidentiality of information developed during the process, including an agreement not to subpoena the mediator or his or her records in any subsequent hearing, arbitration, or trial;
- how necessary information will be gathered and exchanged;
- the role of lawyers and legal counsel in the process;
- entering the process with an open attitude;
- the scope of the issues to be addressed;
- behavioral ground rules necessary to ensure a constructive climate; the mediator's fee if any is confirmed. If the mediator is being paid by the organization, the employee participant must satisfy himself or herself that the monetary relationship between the mediator will not affect the mediator's impartiality.

Most mediation processes involving private mediators have some form of written agreement that must be completed before the parties begin to specifically discuss the issues. If the workplace has established an in-house procedure, the rules and guidelines may be set forth in a policy or personnel manual. Even so, it is good practice to obtain formal acknowledgment and acceptance of the rules and guidelines by participants.

3. *Information Gathering and Issue Identification*: Typically, each side makes an opening statement of its concerns and its view of the issues. The mediator often follows up with clarifying questions to ensure that everyone has the information necessary (1) to understand the dispute and (2) to negotiate on an informed basis. The problem to be resolved is framed by a list of the issues that must be discussed and addressed in order to resolve the dispute. For example, in a case of a disputed transfer to a different job assignment, issues might include (1) clarifying the details of the proposed job, (2) assessing current performance in the existing job, (3) reviewing employee qualifications and considering alternative job placements, (4) reviewing company policy and procedures, and (5) reviewing the handling of related situations in the past.

Generally, in sessions, the mediator will meet with all parties together, but it can sometimes be helpful to meet separately with each party. Mediators refer to a separate meeting as a "caucus." Some mediators rely heavily on caucuses. Others utilize them sparingly. It may be difficult for the mediator to get an open, honest assessment from one or more parties in front of others. For example, an employee may be exploring job

alternatives outside the organization and does not want to make a final offer until he or she knows if there is another job waiting. A manager may be unwilling to agree to the demands of an employee in mediation and is coming across as stubborn and unreasonable. In caucus he or she might reveal to the mediator that there are two similar cases pending and the company is afraid of setting a precedent which could be used against it in subsequent cases. When the mediator has a more complete picture, he or she is in a better position to assist the parties.

There are three distinct approaches to handling this private information. First, nothing shared privately with the mediator will be revealed to the other participants without the consent of the person who shared the information. Second, all information revealed to the mediator may be shared with the other party unless the mediator is specifically instructed to the contrary. Third, nothing revealed to the mediator will be kept from the other party under any circumstances. Also, where the feelings and communications of the parties are particularly difficult and bitter, separate meetings allow the mediator to act as a buffer and keep the parties from escalating the conflict by focusing the back-and-forth communication on the issues to be resolved. It isn't always easy to keep the parties talking productively about the real issues instead of personalities.

The information-gathering stage usually ends with a clear list of issues that fully define the conflict between the parties. It is not uncommon to spend a half hour to an hour in a typical employment case developing the background information before moving on to set an agenda.

4. *Setting the Agenda*: After the dispute has been clarified by gathering information and defined by identifying issues, the negotiation process begins. The mediator works with the parties to determine the best approach to the issues. In what order should they be discussed? Are there any fundamental principles that should guide the discussion? Are there any procedures to follow during the negotiation that will be helpful? Do any additional participants need to be present for particular issues? This stage takes very little time in most cases.

5. *Resolving Each Issue*: Taking each issue separately, the parties develop additional information, if necessary, generate options for addressing the issue, explore their respective needs and interests, evaluate the options, and negotiate the selection of an option. The mediator assists the parties to improve their communication, manage strong emotions, address misperceptions, and keep a clear focus on the negotiation tasks they must complete to explore all opportunities for agreement. If the mediator has not previously met separately with each party in a private meeting or caucus, it is common for caucuses to take place at this stage. Reframing is a communications tool that mediators use to keep the discussion

constructive and assist the parties in staying focused on resolution. A frame is the set of underlying assumptions that shape the frame holder's view of the situation. When the frame holder's words and behavior give clues to his or her frame and the mediator believes that a different frame will assist the disputants in approaching settlement.

Mediators use reframing to move the parties

From	To
Emphasizing the past	Looking at the future
Personal attacks and threats	Attacks on the problem
Saying it's the other's problem	Defining it as a shared problem
Inflexible demands	Aspirations

For example, when a party makes a threat, "If you don't promote me now, I'll drag you and this company through every court in this state!," the mediator may reframe the statement to delete the threat. His or her purpose in doing so is to prevent escalation of the conflict, through defensiveness or counter threat from the other side. To reframe this statement the mediator might say "So you are determined to get an agreement with a job assignment that recognizes your contributions and abilities." If the sender of the message accepts this reframe, the other party (a) does not need to respond to a threat and (b) can respond to the sender's real interest, a different job."

6. *Reviewing Agreements*: When the parties have worked through all of the issues, it is often necessary to review the tentative agreements reached and to enter into final bargaining over how to fit them together into a complete agreement.

7. *Drafting the Agreement*: If necessary, a clear, complete memorandum or formal contract of the agreement should be prepared. If the mediator prepares the memorandum, the parties frequently consult with key advisers before signing. Proposed terms may need to be checked with corporate counsel, union attorney, higher management, employee's spouse, or union representatives. In case there are problems or concerns, it is a good idea for everyone to agree that the parties will return to mediation to deal with the concerns.

I. The Role of the Mediator

The role of the mediator is to move the parties beyond personality clashes and historic grievances to improved communication so that any

future dealings may take place without repeating the difficulties of the past. By putting a stop to the fighting and petty quarreling, the mediator sets the stage for the parties to look realistically at their interests and negotiating positions. Taking some tension out of the parties' communication allows everyone to look at the areas of disagreement in more creative ways to seek previously unconsidered options.

Mediation works because it adds a new dimension to the negotiations. A skilled, experienced mediator can

- increase communication and direct dialogue without jeopardy to the parties' basic bargaining positions or strategies;
- translate positions and proposals into understandable and straightforward language;
- move discussions into areas that have not been fully explored;
- simplify positions, attempting to identify what is important and what is expendable;
- contribute to each party's understanding of the other's view of the issues;
- set the pace of the negotiations, slowing it down or speeding it up as appropriate;
- encourage constructive movement and conciliatory gestures;
- assist all parties to evaluate the merits of their positions realistically and assess accurately the likely consequences of the alternatives to negotiated agreement;
- work to ensure that no one becomes defensive or aggressive because of a misinterpretation or an unjustified emotional reaction;
- make suggestions to encourage reasonableness, rationality, and constructive, creative proposals;
- listen for and highlight commonalities and shared interests;
- record a settlement memorandum as a final document or a draft to be transformed into a legal document.

J. The Logistics and Duration of a Mediation Session

The only space and equipment requirements for mediation are a place with auditory and visual privacy and enough chairs for all participants. The employee is likely to be more relaxed and less intimidated if the mediation is held off the work site at a neutral location. The amount of space and the amenities should provide basic comfort for the participants. It may be helpful to have a table for the parties to use for papers and note taking. Some mediators like to use an easel pad or blackboard to record key points so everyone can see them. It is important that the session be free from interruptions and that participants arrange a block of time when they will all be available. Occasionally it may be appropriate to meet for long periods of time, but many mediators find that after a session of about two hours, it is hard to sustain the energy level and attention necessary for everyone to be productive.

The variables that drive the length of the process are largely outside the mediator's control. The answers to three questions will provide a good indication of the level of effort necessary. First, how complex are the issues in the dispute that must be explored? Second, what is the status of the relationship between the parties? Is there a high level of animosity, mistrust, and miscommunication? Last, how skilled are the parties in communication and negotiation skills?

A simple case with straightforward issues, low to moderate mistrust, and two parties with good communication skills may take two to four hours. Complex cases with multiple parties, problematic relationships, large issues, and/or parties with poor skills may take ten to twenty or more hours of a mediator's time to explore all possibilities for negotiated settlement. In the example of the four employees who filed a grievance involving larger issues and with some impact on the other sixteen employees in the department, the entire case took about fifteen hours: initial meeting with four employees and two supervisors (five hours); separate meetings with four employees and direct supervisor (two hours); meeting with all twenty employees and three supervisors (eight hours).

K. Finding a Mediator

Since mediation is an unregulated field, some of those holding themselves out as mediators have little in their background that qualifies them to skillfully intervene in disputes. At this time, there are no state-licensed or -certified mediators, although many mediators come from

a recognized professional background, such as law, psychology, or social work. It is important to ask mediators, about their background and what specific training and experience they have that qualifies them to help clients. As with many other professions, satisfied clients are often best evidence of competence.

The background of a competent, professional mediator should include

- thorough knowledge of mediation, negotiation, and conflict resolution theory and practice;
- a solid understanding of psychology and human relations;
- excellent communications ability;
- flexibility, patience, and a sense of humor;
- familiarity with the issues involved in the dispute (or the ability to get up to speed on the issues quickly because of relevant professional background and knowledge); and
- experience in handling issues of comparable complexity to those involved in the dispute.

There is considerable debate over the question of how familiar the mediator should be with the substance of the dispute. Without some familiarity, the mediator may not be of much assistance to the parties on developing settlement options and packages. However, if the mediator has substantial knowledge of the disputed issues, he or she may be, or may appear to be, partial to a particular outcome. One school of thought argues that mediators do not need specific knowledge of the issues to be effective because the parties have the knowledge necessary to reach a resolution. The mediator's job is to provide procedural expertise, learning what he or she needs to know about the substance from the parties as the mediation progresses. The opponents of this position believe that the lack of background in the area of dispute causes the mediator to slow the process down while the parties educate him or her.

The parties should also assess the personal qualities they need in a mediator. Some mediators follow the parties' lead, attempting to facilitate and create a structure within which competent parties negotiate. Others are activists. They control agendas, develop options and proposals, and offer advice. In addition to style, the parties must have sufficient rapport and trust that each can talk freely with the mediator, confident that the mediator's intent is to help the parties have the best opportunity for a satisfactory negotiated agreement.

In New Mexico, there are a number of places to find names of qualified mediators. The State Bar of New Mexico alternative methods of Dispute Resolution Committee maintains a directory of ADR providers with statewide listings by city. (Contact 1-800-876-6227 for current person handling the directory.) The Society of Professionals in Dispute Resolution is a national organization with a directory of practitioners listed by state (Contact 1-202-783-7277, 815 15th St., Suite 530, Washington, D.C. 20005.) The American Arbitration Association is a national organization that maintains rosters of mediators. (Contact 1-602-234-3033, N. Central Ave., Suite 608, Phoenix, AZ 85012.)

❖ See Part 3 of this book on resources.

L. Use of Information from Mediation

A clear, written mediation agreement covering this issue may become very important if the dispute is not resolved informally and the parties litigate. New Mexico has no statutory privilege for mediator confidentiality. Without a contractual agreement between the parties that explicitly states that admissions and statements made by parties during mediation are inadmissible, invoking the state and federal rules of evidence protecting settlement negotiations, there is some risk that a mediator could be subpoenaed by one side to testify about statements that were made by the other side during mediation.

The mediation agreement has specific contractual provisions that prevent all parties from using information developed during the mediation to prove that someone admitted something, agreed to possible settlement terms, or made an offer to settle. There are no cases or statutes in New Mexico specifically supporting the privacy provisions of the mediation agreement. However, courts in other states have consistently upheld these kinds of provisions and forbidden a party to mediation from using information revealed during mediation to gain unfair advantage over another party.

Another issue that relates to information developed in mediation is whether the organization management will receive a report or any communication from the mediator about the results of the mediation. Any requirement by the organization that the mediator provide more than a summary (e.g., "the parties reached an agreement spelled out in the attached memorandum"; "the parties failed to reach an agreement and the mediation is concluded") raises significant problems. If a participant in the mediation believes his or her behavior will be positively or negatively

represented to those in authority who have the ability to reward or sanction it, he or she could undermine the mediation process by resorting to dishonesty.

Mediation has proven to be a useful, flexible conflict resolution option. It can be adopted for use in public, private, large, and small organizations. As important as the efficiency and cost savings it offers when compared with arbitration and litigation is the opportunity for managers and employees in conflict to communicate directly and respectfully in order to resolve disagreements and build effective working relationships.