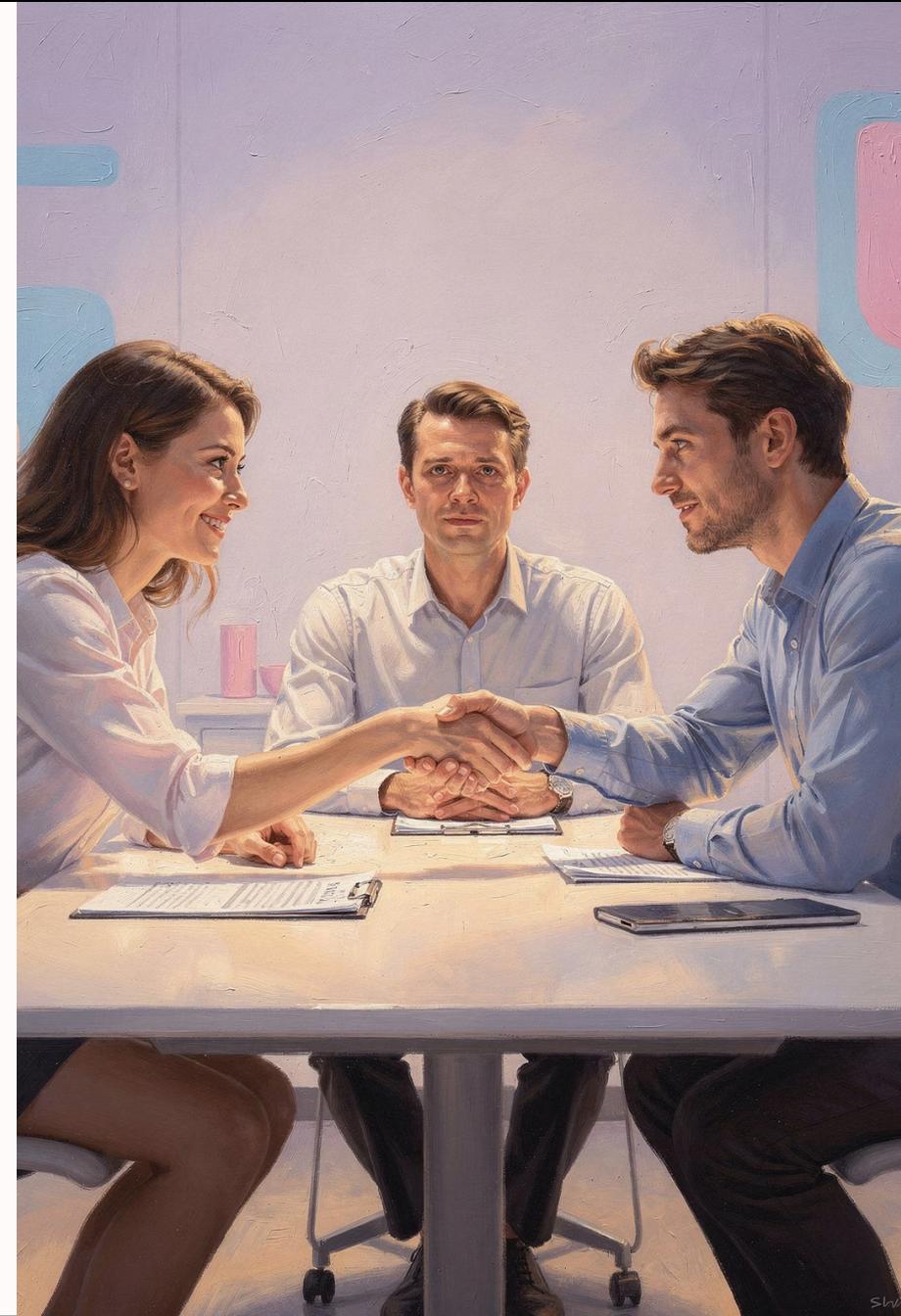


# Lecture 9: Mediation

## Part 1

 by Roger Batchelor

Negotiation with a referee — a neutral third party who helps disputing parties reach their own agreement, without binding them to any outcome.

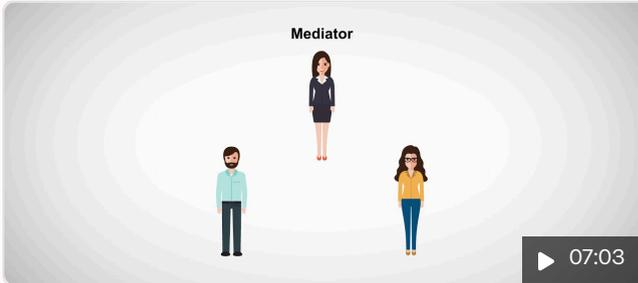


# What Is Mediation?



"Mediation is a process of assisted negotiation in which a neutral person helps people reach agreement." — Folberg

Dauer calls it a **"special form of negotiation."** Nutshell describes it as **"an extension of the negotiation process"** — short-term, structured, task-oriented, and participatory.



Mediator

07:03

YouTube

**Alternative Dispute Resolution: Mediation**

Visit us at <https://lawshelf.com> to earn college credit for only \$20 a credit! We now offer multi-packs, which allow you to purchase 5 exams for the price of 3, or 10 exam...

# Mediation vs. Arbitration vs. Court

## Court

A judge renders a binding decision. The losing party may appeal, but a decision **will** be handed down.

## Arbitration

An arbitrator issues a **binding decision** — like a court judgment — barring extraordinary circumstances.

## Mediation

**No decision, no order.** The mediator helps parties reach their own voluntary agreement. Nothing is binding unless the parties agree.

# Mediation in Action: Karl & Whine

Karl O'Santana, a luthier, suggests mediation when client Whine Ona refuses to honor her custom guitar order. His pitch: **"It's like marriage counseling for business. If we don't like what she suggests, we're not worse off than we are right now."**



# The Mediator's Role

## ✓ Mediators DO

- Help parties develop a problem-solving approach
- Keep discussions focused
- Help parties understand each other
- Encourage creative solutions
- Help draft a valid settlement agreement

## ❑ Mediators DON'T

- Dictate how mediation proceeds without authorization
- Speak on behalf of either party
- Force parties to reach agreement
- Limit the solutions available
- Enforce or police any agreement afterward

# Flexibility & Formality



Mediation is becoming more formalized — **"in many jurisdictions mediation programs are being grafted onto the judicial department, by statute or by rule of court."** — Dauer

Yet it remains a **loose and flexible** problem-solving mechanism. The American Arbitration Association has published Mediation Procedures, used as a guideline — but not universally required.

# Mandatory Mediation

When parties are **compelled by law** to mediate before seeking further remedies, the mediator still cannot force an agreement. Unlike mandatory arbitration — where a result is inevitable — mandatory mediation can only *encourage* negotiated settlements.

- That outcome is by no means guaranteed.

## ARBITRATION

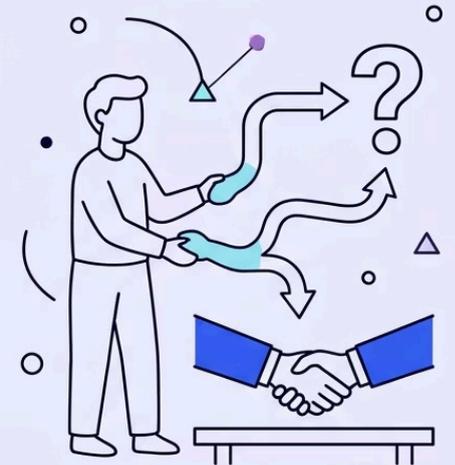
Result Inevitable  
Binding Decision



Arbitrator Has  
Authority

## MEDIATION

No Guaranteed  
Result



Voluntary  
Agreement Only

Mediator Has  
Limited Power

## KEY TERMS

# Legal Terms to Know

## Equitable Relief

Instead of money, a court orders a party to **act or refrain from acting** in a certain way (e.g., stop releasing harmful chemicals into groundwater).

## Pecuniary Damages

The **monetary award** a winning party may receive. Includes general, punitive, special, consequential damages, and more.

# Advantages of Mediation



# 6 Advantages of Mediation

1

## Inexpensive

Far cheaper than taking a case through trial.

2

## Swift

No clogged court schedules — sessions arranged at mutual convenience.

3

## Simple

No complex procedural or evidentiary rules to follow.

4

## Flexible Scope

Topics can shift as circumstances change — parties act as problem-solvers, not adversaries.

5

## Flexible Solutions

Settlements can include actions not available as court remedies.

6

## More Agreeable

Voluntary agreements are more likely to be honored than court-imposed judgments.

# Disadvantages of Mediation



# 4 Disadvantages of Mediation

## 1 No Guaranteed Settlement

Parties may spend time and money only to end up in court — and may have already exposed their "ammunition" to the other side.

## 3 No Legal Precedent

Cases aimed at broad social impact (e.g., discrimination suits) require a high court ruling — mediation cannot deliver that.

## 2 Lacks Procedural Protections

Parties with disparate power or resources may be overwhelmed without constitutional or procedural safeguards.

## 4 No Formal Discovery

Parties cannot compel disclosure of information — they must rely on the other side's good faith.

# Case Study: Nora & the Landlord



## Should Nora Mediate?

Nora failed to pay rent — a clear breach. She is **likely to lose in court** and desperately wants to stay in her home of 5 years.

**Mediation is ideal:** The landlord is too angry for direct negotiation. A neutral mediator could help arrange automated future payments plus a lump-sum back-rent settlement — cheaper than moving costs and broker fees.

# Case Study: Sam & the Falling Iron

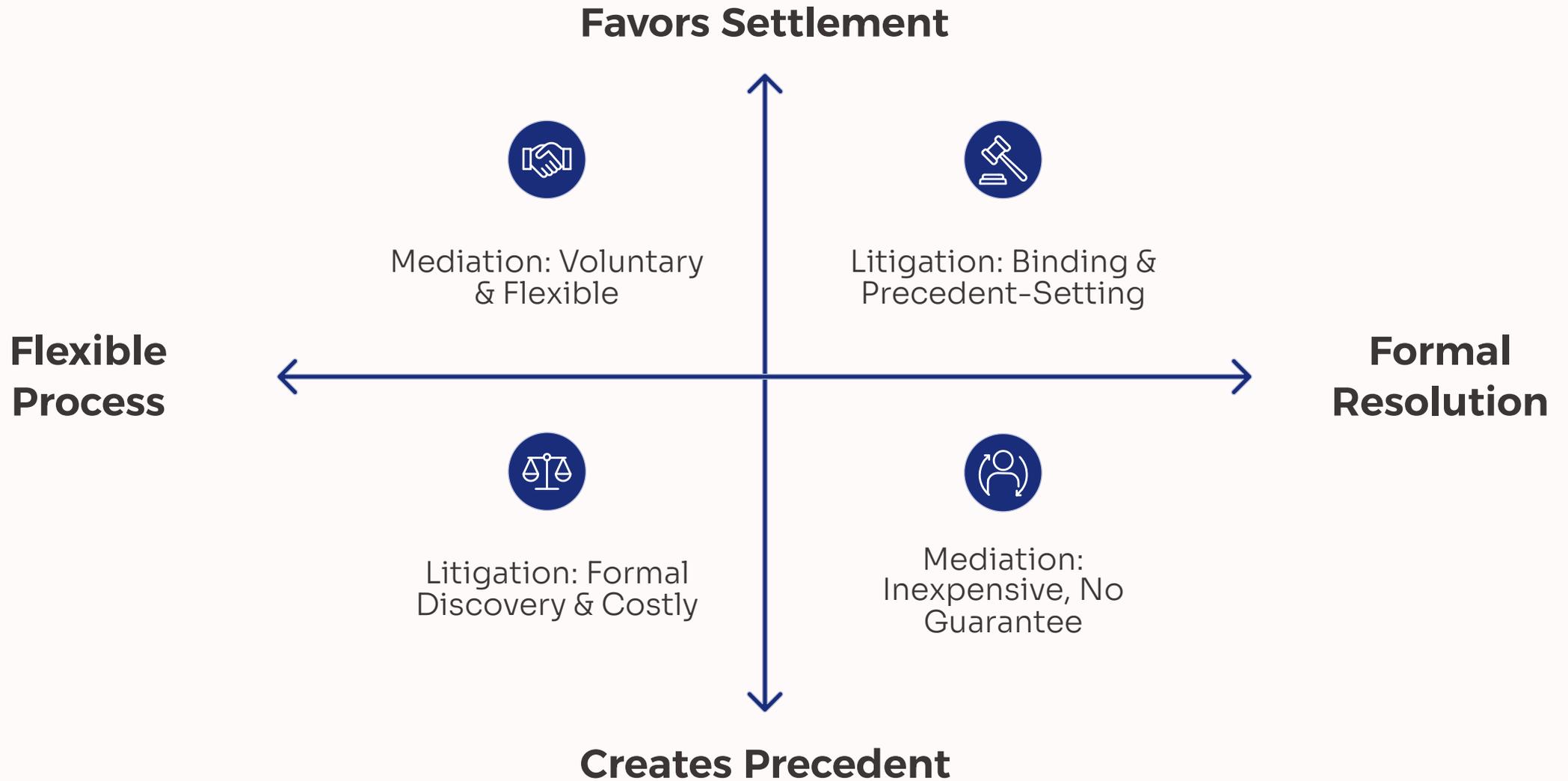
## Should Sam Mediate?

Sam was struck by falling iron from a building. The company denies fault. Attorney Robert considers mediation for a swift resolution.

- ❑ Without compulsory discovery, Sam cannot prove the company had a poor safety training program — critical facts only available through the trial discovery process. **Mediation is not the right choice here.**



# Should You Recommend Mediation?



The answer depends on the facts of each case. Weigh the advantages and disadvantages carefully — mediation is a powerful tool, but not always the right one.