

Summary of Lecture

Mediation Part 1

 by Roger Batchelor

Mediation is best understood as **negotiation with a referee**. Folberg defines it as "a process of assisted negotiation in which a neutral person helps people reach agreement," while Nutshell describes it as "an extension of the negotiation process" — a "short-term, structured, task-oriented, participatory intervention process." Unlike arbitration or court judgments, mediation is **non-binding**: no decision is handed down, no order is issued. The mediator can only help parties arrive at their own agreement and assist in drafting a binding contract if they do.



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ADR Lecture 9 Mediation Part 1 – Kahoot! Course

This is to supplement the courseware for Crestpoint University – Alternative Dispute Resolution

Negotiation

Parties work it out themselves. No referee, no guaranteed outcome.

Mediation

Neutral third party assists. Still non-binding – parties must agree voluntarily.

Arbitration

Arbitrator renders a binding decision, like a court judgment.

Litigation

Judge or jury decides. Decision is binding and subject to appeal.

Mediation in Action: Four Examples

These examples illustrate the spectrum from pure negotiation to mediation, and contrast mediation with arbitration and litigation.



Frank N. Bines — Litigation

A butcher sues his supplier for bad meat. The case goes before a judge who **will hand down a binding decision**, regardless of whether either party likes the outcome.



Ray Gume — Arbitration

A produce supplier's contracts require arbitration for all claims. When a customer fails to pay, the arbitrator renders a **binding decision on damages**.



Karl & Fred — Negotiation

A luthier negotiates directly with a guitarist who refuses delivery of a custom guitar. Karl offers concessions. No mediator needed — their strong relationship makes direct resolution likely.



Karl & Whine — Mediation

With a more difficult client, Karl proposes mediation: *"It's kind of like marriage counseling for business. If we don't like what she suggests, we're not really any worse off than we are right now."*

What Mediators Do — and Don't Do

Because mediation is informal and flexible, there is no universally accepted rulebook. However, general rules of thumb apply in most settings. The American Arbitration Association has published its own "Mediation Procedures" as a widely-used guideline. Mediators may take a more or less active role, always subject to the parties' approval.

Mediators DO

- Assist parties in developing an approach to solving the problem
- Help keep discussions on point and focused
- Help parties understand each other better
- Ensure parties consider probable costs and results of litigation
- Encourage solutions not previously considered
- Help draft a valid settlement agreement if one is reached

Mediators DON'T

- Dictate how mediation proceeds without party authorization
- Cut parties off simply because the mediator has heard enough
- Speak on behalf of either side or introduce new points favoring one party
- Force parties to reach an agreement
- Limit the realm of solutions available to the parties
- Enforce or police compliance with any agreement reached

❏ Even in mandatory mediation, parties **cannot be compelled** to reach an agreement. The mediator has relatively little power over the parties themselves — a key distinction from mandatory arbitration.

Key Terms

Equitable Relief

Rather than awarding money, a court may order a party to act – or *forbear* from acting – in a certain way. For example, ordering a manufacturer to stop letting harmful chemicals seep into groundwater.

Pecuniary Damages

The monetary award a party may receive upon winning a suit. Can be further classified into **general damages, punitive damages, special damages, consequential damages**, and more.

Advantages of Mediation

Despite offering no guaranteed outcome and no binding authority, mediation carries significant practical advantages over litigation.



Inexpensive

Seeing a case through trial is costly. Mediation avoids the bulk of those expenses.



Swift

Sessions can be scheduled at mutual convenience, free from clogged court calendars, in a variety of locations.



Simple

No complex procedural or evidentiary rules. A general rule of fairness applies; the worst penalty for foul play is walking away.



Flexible Scope

Unlike trial pleadings, mediation topics can shift as circumstances change, enabling parties to act as problem-solvers rather than adversaries.



Flexible Solutions

Settlements can include actions or restraints not available as court remedies, going beyond pecuniary damages and hard-to-obtain equitable relief.



More Agreeable Outcomes

Voluntarily reached settlements are more likely to be fulfilled than obligations imposed by a court.

Disadvantages of Mediation

Mediation is not always the right choice. Understanding its limitations is essential to advising clients well.

No Guaranteed Settlement

Parties may spend time and money only to end up in court anyway. Worse, **ammunition exposed during mediation** becomes far less useful at trial.

Lack of Procedural Protections

Mediation lacks the constitutional and procedural safeguards of court. Parties with **disparate power or resources** may reach inequitable settlements without protection.

No Legal Precedent

Cases aimed at **broader social impact** – such as discrimination suits seeking a Supreme Court ruling – cannot achieve that goal through mediation.

No Formal Discovery

Parties cannot compel disclosure of information. If key facts are held by the opposing party, mediation offers **no mechanism to obtain them** – only good faith.

Should You Recommend Mediation? Two Client Scenarios

The decision to mediate depends entirely on which advantages and disadvantages apply to the specific case at hand.

✓ Nora — Mediation Recommended

Nora faces eviction for nonpayment of rent – a clear breach she will likely lose at trial. She wants to stay in the home she has rented for 5 years. Her landlord is too angry for direct negotiation. A mediator could help them reach a structured repayment arrangement – automated future payments plus a lump sum with fees – which would still cost less than broker fees and moving her large antique glass cat collection.

✗ Sam — Mediation Not Recommended

Sam was struck by falling iron near a construction site. To prove the company's negligence – including a poor safety training program – his attorney needs **compulsory discovery**, which is only available through litigation. Without it, the case cannot be adequately built. Mediation's lack of a formal discovery process makes it the wrong tool here.

- 📌 **Bottom line:** Mediation is a powerful tool when flexibility, speed, and voluntary agreement are achievable – but it is not a universal solution. Always match the dispute resolution method to the specific needs and vulnerabilities of the case.