

A Primer on Mediation

The world is full of conflict. The way people resolve their differences is a measure of their maturity. After jousting went out of favor, and dueling became illegal, society invented the lawsuit. Courts provided a forum to present the stories of the parties and an objective, neutral decision maker or jury who would issue a decision.

Lawsuits, given legal fees and those of experts, are expensive. They often take years to resolve. The courts are overwhelmed with cases. Particularly now, in tight fiscal times, their budgets are stretched. If the only justice you hope to find is in a court room, be prepared to qualify for a doctoral degree in patience.

A relatively small portion of lawsuits today actually results in a trial. Before any merits hearing is held, most cases settle. Sometimes the parties just agree to drop the suit. Sometimes the parties work out their differences directly, without the involvement of the court or a mediator. But many cases that settle do so after mediation.

Most Vermont courts mandate mediation for all civil and environmental cases, requiring the parties to choose a mediator, share the fees for the process, and complete a mediation session, on a timeline set by the court. Mediation has many advantages: it is usually less expensive than taking a case to trial; it can result in resolution of a dispute far more expeditiously than a trial would; and it can lead to remedies which might not be available in court. A judge will decide a case one way or another, but not necessarily in a way that is good for either party. In mediation, it's possible to achieve that end.

Being prepared for mediation is at least as important as being prepared for a trial. Knowing what to expect, exploring the possible outcomes in advance of the session, and understanding how the process works, you can only help yourself to achieve the best settlement. That is the purpose of this pamphlet.

How It Works

The parties and their lawyers sit down with the mediator for a joint session at the beginning of most mediations. The mediator explains the process, states plainly that a mediator is not a judge and cannot bind the parties to any outcome, makes promises about maintaining confidentiality, and then invites each side to outline its position to set the stage. Usually the mediator requests statements

and copies of pleadings from each side a few days before the session, to save time having to learn the nature of the dispute, but hearing the words said aloud allows the mediator to begin to judge the depth of the parties' feelings and the extent of their expectations.

Most mediators then separate the parties into different rooms, a process called "caucusing," meeting with the plaintiff (also known as "appellant" in cases of appeal) first for an initial session, and then with the defendant (or "appellee"). This first meeting alone with the parties is likely a time for further information gathering. By the end of this session, the mediator should know the legal and practical positions of the parties and have determined how far apart the sides really are. At this moment, the mediator knows more than the two parties about the dispute.

During a subsequent round of meetings, parties may note a sea change in the mediator's attitude. Having learned the opposing parties' positions, this time the mediator appears as an advocate for the other side. Expect to learn all of the weaknesses of your case then, as well as the strengths of the opposing party. Participants at mediation must avoid feeling discouraged at this moment. This is a necessary part of the experience. Its purpose is to focus on the realities of the case, destroy illusions, and remind everyone that justice is blind. A powerful argument in favor of a mediated settlement is the reality that a court, whether a jury or a judge, may favor the other side or disappoint both sides in deciding the case.

By the third and later rounds, if the mediation is to be successful, the parties make proposals to each other through the mediator. Most parties begin by asking for what they sought in the first place, and those offers are usually rejected. Where you start is often a good predictor of where you will end up. The process, like wine, needs a chance to breathe. Once a rhythm is established, the mediation will lead to a final result, which usually includes the drafting of a settlement agreement and a motion to dismiss the litigation.

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Privilege

Vermont law addresses mediation in two ways. The Vermont Mediation Act is found in Title 12, Sections 5711 to 5723. The Vermont Rules of Evidence address mediation in Rule 408.

At the heart of both of these laws is privilege. This is the right of all parties to keep what is said at mediation out of court, not only for what they tell the mediator but also what they tell the opposing party. Effective mediation depends on maintaining the confidentiality of the parties' offers to resolve the dispute. The mediator will not testify at a hearing or otherwise disclose what the parties say to each other or what an individual party wants kept from the opposing party during or after mediation is over. Nor can either party use an offer or acceptance of an offer to settle a claim as evidence to support proof of liability or lack of liability. Courts are directed to declare that information inadmissible.

This does not mean that information gleaned from the conduct of mediation, which is subject to the process of discovery, escapes introduction in court, if mediation is not successful. For instance, at mediation it becomes clear to you as plaintiff that the defendant has a document that has a material bearing on the outcome of the case. Just because you learned about it at mediation is no defense against your formal request to produce a copy and the defendant's obligation to produce it.

That the plaintiff would have accepted \$1,000 to dismiss the case is irrelevant and inadmissible in court. How early one side stopped negotiating in good faith or left the building enraged by the process is equally out of bounds. The mediator completes a form, when mediation is not successful, merely alerting the court to the fact that the parties showed up and tried to settle it, reaching no result.

Having confidence in the mediator is central. That confidence is earned or lost by the mediator's respect for keeping what you say confidential, but you must be careful to instruct the mediator clearly and plainly what you want disclosed and what you want left unsaid.

Mediators

Mediators are not licensed in Vermont. To become a mediator in environmental court or family court, there are special courses to complete. The most important prerequisite is complete impartiality. That is why mediators are obliged by statute to reveal all known facts, including financial or personal interests or an existing or past relationship with a party or participate, that a reasonable person would consider likely to affect the mediator's impartiality. Then each party gets to decide whether a potential mediator is acceptable, with full knowledge of the mediator's history and allegiances.

Mediators adopt different styles for different cases and different parties. Sometimes, mediation may feel more like a therapy session, as the mediator attempts to draw out the real source of the conflict between the parties and resolve it. Other mediators remain all business, leaving feelings out of the equation. Cases about money are usually easier to settle than those about principle, but even the hardest cases have been resolved when a good mediator is fortunate enough to have people of good faith on both sides of the dispute.

Participants

Everyone with an interest in the outcome of the dispute ought to attend mediation, otherwise the settlement may not happen. If one of the parties has authority only to attend and then later to present a settlement agreement to other, absent parties, mediation is much harder to achieve. Going through the experience of mediation changes you; those who stay at home miss out on the dynamic involved in the mediation process.

Creativity is easily the most useful quality to bring to mediation. If all you are doing is arguing over whether or not something should happen, the process can bog down. The party who can introduce a whole new idea or approach to settlement has an advantage. That party knows how to bargain.

You do yourself a disfavor if you can only see your own case. A judge will look at both sides, and you should too, if only to understand the ambition of your adversary and predict how strong or clear your case is if it goes to court.

This Isn't Arbitration

Arbitration is another process used to resolve disputes. Unlike mediation, the result is determined by the arbitrator, not the participants. There is a hearing, and the parties present their evidence. Then the arbitrator rules, and the outcome is fixed, with no chance to appeal to the courts (with a minor exception relating to the conduct of the arbitration itself). Arbitration is often required by a contract, as a condition of the agreement, by labor agreements, or by statute. Towns must arbitrate, for instance, to resolve disputes over the location of town lines.

In mediation, the parties are not obliged to settle. They are obliged to try. No party can be blamed for failing to settle. The whole point of the process is voluntary settlement, and the only way it will work is if all parties accept the result by signing the written agreement.

The Settlement Agreement

Talk is cheap. Written words settle cases. Pay close attention at this point in the mediation. Sure, you're exhausted, your feelings are hurt, your body aches, and you didn't like what was served for lunch. But the agreement is what lasts, not the promises made to the mediator or through the mediator to the other side.

Read the agreement aloud. Eyes can play tricks on you. The ear is the best judge of whether what was agreed to is written clearly and plainly in the agreement.

There may be various versions of the agreement passed back and forth between the parties. Make sure you write boldly on the top of any agreement other than the final that this is just a draft in order to avoid mistakes at this critical period of the process.

Some settlements include clauses promising that the parties will treat each other with respect, remaining at least neutral when talking about each other to third persons. A settlement of an unjust termination case, for instance, might specify that the employer say no more than that the employee left for personal reasons, limiting the likelihood of a post-mediation penalty.

Some agreements include enforcement provisions ensuring that the prevailing party in any dispute will pay that party's attorney's fees if the agreement has to be taken to court to be implemented, or mandate further mediation or arbitration as a way of resolving differences in interpretation of the agreement.

Some require the parties to keep the terms of the settlement confidential.

How Can You Mediate a Zoning Case?

You built a porch and now the town says you should have obtained a variance first, because it happens to sit within the setback established by the zoning bylaws. You challenge the decision, first by appealing the zoning administrator's decision and then, if you

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aren't satisfied by what the zoning or development review board decides, appealing to the environmental court. The court orders mediation.

You sit in one room; the town is in the other. You want a permit. The town stands firm on the proposition that to grant you a permit violates the bylaws. It believes that if it gets out that you got a permit on appeal without having to follow the rules, no one will take zoning in your town seriously again. Is there no hope for this to settle?

A good mediator understands that such cases require a more diligent search for a middle ground. Perhaps the setback is arbitrarily too wide for the neighborhood, and the town can commit to changing the bylaw. Perhaps the landowner will agree to pay a fine commensurate with the town's expenses and the offense, thereby acknowledging the mistake, in exchange for a permit for the porch, implicitly granting a variance.

Because the authority to represent the town in a zoning appeal belongs to the selectboard, not the zoning officials in a town, there will always be a necessary tension. selectboards that settle zoning disputes without consulting the board and the zoning administrator are asking for trouble. So be prepared to alert the proper officials to the time of mediation, and call those involved to discuss possible settlements during the day.

Zoning cases are no more difficult to settle than any other type of civil action. A little flexibility, coupled with a little appreciation for what is most important, is indispensable to mediation of such cases.

Who Succeeds in Mediation

Those most successful in mediation share common qualities. They are patient. They are prepared to stay all day and into the night if it takes that long to reach a settlement (they don't schedule appointments or dinner engagements on the day of mediation).

They understand their opponents' position. They can put themselves in the shoes of the other side and appreciate the needs of their opponents. They can overlook rude behavior, seeing the dispute not as a conflict between personalities but as a disagreement over ideas, rights, and property.

They can articulate priorities, both their own and the other party's, and know how to distinguish what is important from what is merely symbolic or emotional.

They are focused, serious, and committed to finding a way of achieving their objectives by a peaceful, sensible resolution of the dispute.

Want to Read More About Mediation?

These resources may be useful to you.

- Robert A. Baruch Bush and Joseph P. Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (2004).
- Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (2003).
- Bruce M. Patton, William L. Ury, and Roger Fisher, *Getting to Yes: Negotiating Agreement Without Giving In* (1991).

The Vermont Institute for Government

The Vermont Institute for Government (VIG) is a nonprofit organization dedicated to ensuring that government remains responsive, accessible, and competent, by improving educational opportunities for local officials and the public regarding how government works. Since 1989, VIG has been creating educational materials, offering

workshops, and collaborating on a variety of trainings and educational events for Vermont's town officers and citizens.

This pamphlet is one in a series of VIG publications on Vermont local issues. For more information and additional resources, please visit the Vermont Institute for Government website: vtinstituteforgovt.org.

Please note: This pamphlet was revised and updated in the spring of 2020. Changes in the law subsequent to that date may make some of what is written here no longer valid. Always check the latest versions of the law before proceeding.