

When The Dean Hires a Professional Mediator

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When The Dean Hires a Professional Mediator

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Introduction

In the ideal world, employees work in compatible teams that enhance productivity and faculty use good communication to help each other achieve excellence in research and teaching. In reality, people often dislike each other and exhibit behaviors that inhibit productivity. A separate article discusses skills the Dean or Associate Dean might use when leading a problem-solving session with faculty, staff, or students. This article discusses when the Dean's Office might seek the services of a professional mediator, how to tell if a mediator is a good match for the kind of issue your employees have, and where to find a certified, professional mediator.

When is Mediation the Right Process?

Mediation is among the many tools to manage people problems. While the term mediation is used casually to include all types of problem solving, **professional mediation** involves a neutral third party who uses advanced communication skills in a confidential session to help the disputing parties work out their problems collaboratively.

Mediation can be considered when one or more of these conditions exist:

- The disputing parties have tried and failed to solve the issue on their own.
- The disputing parties don't have the communication skills to work out their own issues.
- The disputing parties are motivated (in some way) to want to solve the problem.
- The disputing parties possess a sense of urgency to settle the issue.

- There is relative power-balance among the parties or a power-balance can be created by a skilled mediator.
- The parties are not currently in litigation or other formal grievance processes. In those cases, mediation should be coordinated so it works in concert with the litigation or grievance.

In general, the Dean's Office should determine that the disputing parties have tried to settle the issue themselves. Sometimes the parties can be referred to an ombudsman or other helpful individual for coaching on how to work through an issue on their own. The history of trying to work out a solution, even if the parties come up short, is promising for a mediation's successful outcome.

Mediation is less appropriate when:

- One party has substance abuse problems or mental challenges.
- One party has overwhelming power and can stonewall the process.
- One party is intractable and unwilling to move off of a chosen outcome.
- Parties are in the advanced stages of a grievance procedure or litigation.
- Actions of one or more parties involve significant violations of policy or law.

On the other hand, mediation is most appropriate when the parties have become frustrated that the problem is continuing and, perhaps, are beginning to take the issue personally. The parties are motivated to want to solve the issue and the relationship with the other person is not yet damaged to a point of no return.

If the conditions are ripe for mediation, the next step is deciding what kind of mediator is best for this specific issue and these specific individuals.

What Kind of Mediator is Right for the Issue?

What Mediators Do

Professional mediators usually are *certified* (by a court, the ADR Section of the American Bar Association, or a state/national mediator association). Mediators are not licensed. Qualifications for mediator certification vary by jurisdiction and are governed by ethical standards set by the certifying association, which also vary widely.

Mediators are not *arbitrators*. An arbitrator is a subject expert who investigates a dispute or is presented with the facts of a case and makes a decision *for* the parties to follow, such as labor arbitration. In contrast, mediators are facilitation experts who help the disputing parties create an agreement that meets their needs.

Most professional mediators share these characteristics:

- They are **neutral**—they do not know or have a relationship with any of the disputants.
- They are **impartial**—they have no stake in the outcome of the decision.
- They maintain **confidentiality**—they will not voluntarily disclose what was said during a mediation session (although in some states they can be compelled to do so in a court of law).
- They do not solve the problem for the disputants—instead they facilitate the parties' resolution of their own problem.
- They have a duty to ensure everyone has enough information to make his/her own informed choice.
- They do not force the disputants to settle.

Professional Mediator Types

Regardless of the certifying body, individual mediators have specialized skill sets and are experts at helping in the resolution of different sorts of problems. You should be aware of two professional mediator inclinations that may affect your decision on who to hire: mediator philosophy and mediator subject expertise.

Like other professions, mediators have philosophical approaches on how best to structure a mediation and what skills should be emphasized. There are three general camps of mediators: transformative, problem solving, and balanced.

Purely transformative mediators focus on how people communicate--believing that if you transform the people, they will then be able to work out their own issues. Based on this belief, transformative mediators are experts at managing disputant emotions and less focused on specific technical problems. If the disputants are engaged in petty conflicts that seem to stem from personality issues or general disdain, but don't have a specific tangible issue that needs to be solved, a transformative mediator may be the best for this situation.

Purely problem-solving mediators are trained to bring a laser focus on the negotiable issues. They excel at helping disputing parties work through thorny technical problems and may ignore the emotional content or relationship dynamics. If emotions are low and the disputants just need a little help to move through a process, a problem-solving mediator might be just what you need.

As with much of life, most situations are complex—there are some emotions to be worked through before the individuals can engage in problem solving the issues at hand.

Mediators who can manage emotions when necessary and help disputants through a tough negotiation are termed balanced mediators.

The second area that impacts mediator appropriateness for a specific issue is mediator subject expertise. Mediators tend to come from three types of people—counselors, attorney/judges, and the layperson practitioners. Counselors may lean toward more transformative approaches; attorneys toward a more problem-solving techniques; the layperson practitioners toward the philosophy of the institution that provided their training. All professional mediators are ethically-bound to avoid dual role relationships--simultaneously being an individual's counselor and mediator or attorney and mediator.

Many mediators specialize in particular types of mediation—business, personnel, child custody, juvenile victim-offender, housing, discrimination, school-based, family, court-annexed, tax appeals, and so forth. In the college and university setting, mediators specializing in human resource or personnel disputes may seem an obvious match. A mediator's overall skill expertise may be more important than his or her specialization, however, since a mediator specializing in higher education would be exceedingly rare. For example, if mediating with feuding faculty who are expressing high-conflict in their interactions, your best approach might be to bring in a child-custody mediator adept at working with parents engaged in extremely dysfunctional communication.

Tips are provided at the end of the article to help identify the approach a prospective mediator might hold.

How Can I Find a Certified Professional Mediator?

Inside Your Institution

Your Human Resources department may provide mediators or keep a list of qualified individuals at your institution. You should check that the available mediators have the right skills for your case. For example, if all the mediators are transformative and you have two very rational and usually cordial department chairs with a difficult technical issue, having a mediator who spends most of the time on their “feelings” might not be the winning combination.

Other internal resources may include:

- Ombudsman Office
- Student Mediation Services
- Mediation Instructors

When using a mediator from inside your institution, inquire to be sure that the mediator’s private notes or other documents are not vulnerable to open records act inquiries.

Outside of the Institution

State or local mediation associations typically carry a roster of certified, professional mediators along with their areas of expertise. If you are a state institution, other state agencies may have mediators on staff that could be borrowed.

Mediator Fees

If your Human Resources department has a mediator on staff, the service may be free. Generally, independent professional mediators charge by the hour. Some only charge for the mediation session; others charge preparation time. In general, mediators charge around \$100-\$300 an hour, with attorney-mediators at the higher end of the scale.

Sessions tend to be scheduled in two-hour blocks and, depending on the type of issue, several sessions might be necessary. Regardless of the fee structure, mediator fees may not be set contingent on settlement of a case.

The mediator also may ask you to provide a neutral location for the mediation sessions. A neutral location is equally inconvenient for both parties, private, and outside of the view of casual passers-by.

Negotiating the Mediator's Duties

Because professional mediators are neutral, impartial, and maintain confidentiality, do not expect the mediator to tell you what happened during the session. Mediation works, in part, because the disputants feel safe in expressing themselves and trust that the mediator will not disclose what was said. Additionally, disputants may be asked to keep confidential what was said in session. Generally, only the mediated agreement may be available to share with the administrator.

As the person hiring a mediator, you do have room to negotiate with the mediator around these issues:

- The content issues that are the most urgent and should be the focus of the session.
- Any behavioral issues you need the parties to work through.
- Whether you will receive a copy of any agreements the parties reach.
- Whether any agreements will become a part of the disputants' personnel files.

Culture and Mediation

While not covered in standard advice about hiring a mediator or in state codes of conduct, the cultural sensitivity of the mediator or the disputants may affect the appropriateness of the mediation process. Mediation models typically are European-American and are built for individuals who are verbally assertive. The standard model uses skills to moderate emotion when it is present. If you believe that cultural factors must be considered in how a mediation unfolds, this would be a key discussion point in the hiring of a prospective mediator.

Appendix A: Sample Mediator Interview Questions

Based on the comparison of codes of conduct, an organization or consultant may wish to ask a series of questions to a prospective mediator to see if you are hiring the right person for the job. Questions such as:

- Do you have any associations with the college/university or its employees that might create the “impression” of a conflict of interest?

Even when individuals are not required to withdraw, they should be expected to fully disclose any connection that may create the impression of bias. If there is a possible impression of conflict of interest, it should be dealt with up front with the disputants and they should be given the opportunity to have a different mediator.

- What is your position on giving advice or making suggestions during a mediation?

While codes of conduct vary in philosophy of how much a mediator may “lead” the parties toward a particular solution, all agree that mediation professionals cannot legally represent one or the other party or act as a counselor or psychologist while also in a mediator role. This would be called a dual role relationship, and would not be ethical practice. A prospective mediator who implies he or she might give legal advice or might suggest specific outcomes for the parties should be questioned in greater detail. The philosophy behind mediation is that the outcome is better if the parties create their own solutions. Depending on the situation you are trying to address, you may need a mediator who is more forceful/directive or one who is more facilitative. Asking questions about the mediator’s philosophical and ethical views of advice-giving will help you determine what a prospective mediator would bring to the table.

- What would you do to make sure that the parties have all the information they need to make good decisions?

This question tests a “holy grail” of mediation—self-determination and informed choice. Mediators have a responsibility to ensure that the parties are able to make their own choices—self-determination--and that they have the right information to make decisions—informed choice.

Be wary of answers that suggest:

- the mediator might overstep his/her role and tell the parties what to do without giving them a chance to work out their own solution;
- the mediator might pressure the parties to make a decision they don’t want to make;

- the mediator does not have the knowledge to tell when one party is coercing or bullying the other party—particularly in supervisor-employee conflicts;
 - the mediator doesn't value getting information from the parties about their situation;
 - the mediator does not permit the parties to seek outside information once the session begins; or
 - the mediator might permit one side to withhold vital information that affects the decision.
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- What is your policy on confidentiality?

In general, mediators should hold everything said in the mediation entirely confidential, except as required by state law. You should not expect that the mediator will report to you or others on the content of the mediation or what was said during mediation.

It is revealing, however, to ask the mediator about state laws. Can the mediator tell you what the state law is regarding mediator privilege? In most states, mediators are not legally shielded from a requirement to testify in court. A professional mediator may ask for a contract in advance that protects him or her from subpoena should the dispute wind up in a grievance or judicial proceeding.

For more information:

McCorkle, S., and Reese, M. J. (2015). *Mediation Theory and Practice*, 2nd ed. Sage.