

## THE MAGIC OF MEDIATION: WITH OR WITHOUT LAWYERS

Conflict : Your great neighbor isn't so great anymore since she adopted a 10-year-old hound dog who barks all night long.

You backed into a light pole at the ball park and your insurance company only wants to pay \$750 for the damage but your estimate calls for \$1,200 in repairs.

You and your spouse have been divorced for several years but recently your spouse remarried and all of a sudden you are having difficulty with visitation with your children.

Conflict can be found in all facets of our lives. At times, conflict in our lives is easily solved, but other times it is not. Mediation is a method to solve conflict.

Mediation is a form of Alternative Dispute Resolution (ADR). Without getting into technical matters, ADR started many years ago, almost as a movement, as a method of resolving disputes or conflicts without court intervention and allowing a quicker resolution of court cases. It really is a means of solving the problem of lengthy court dockets and saving the parties money. You have heard the horror stories - a lawsuit taking five or ten years to be resolved including appeal time or costing more in legal fees than it should. Think about that - ten years of your life to resolve a dispute. There are many other methods of ADR - arbitration, summary jury trials, and others - but we are just going to focus on and discuss mediation.

Mediation is an informal process in which a neutral third party assists the opposing parties to reach a voluntary, negotiated resolution of a dispute or conflict. The decision to mediate is completely voluntary for the parties involved. Mediation gives parties the opportunity to discuss the issues involved, clear up misunderstandings, determine underlying interests or concerns, find areas of agreement and, ultimately, to incorporate those areas of agreements into resolutions. A mediator does not resolve the dispute or impose a decision on the parties. Instead, the mediator helps the parties to agree on a mutually acceptable resolution. The mediation process is confidential. Information disclosed during mediation will not be revealed to anyone, and is required to be kept confidential, even if the matter is not ultimately resolved. A party represented by an attorney is allowed to have the attorney present in mediation.

**WHO CONDUCTS THE MEDIATION?** Mediation is handled by a neutral third party often called a "Mediator." A "mediator" is any person certified pursuant to the provisions of the Dispute Resolution Act or the District Court Mediation Act to assist in the resolution of a dispute.<sup>1</sup> These are the two statutes in Oklahoma that provide rules, procedures and definitions for mediation.<sup>2</sup> In order to be certified as a mediator, each of these mediation acts require at least 20 hours of training and education. This training generally requires participation in a mediation with an experienced mediator.<sup>3</sup> Generally, mediators are not restricted to persons with prior training in the law or social services. They may have varied backgrounds, but should possess a tolerance for structure, flexibility, and a belief in the capability of an individual to suggest and jointly negotiate and agree to solutions to his or her own problem." The "mediator" is an

“impartial person” and an “advocate for settlement” without any power to “judge” the case, “render any decision on any disputed issues,” or “force a settlement.”<sup>4</sup> Family and divorce mediators are required to have additional training under both statutes. Some mediators are specially trained in certain fields. For example, let's say you have a dispute with your home builder about a defect or flaw in the home she built for you. If you both agree to mediate the dispute, you may want to agree to hire a mediator with experience in construction or architecture.

**HOW IS THE MEDIATOR SELECTED?** Under the Dispute Resolution Act, the mediator is assigned by the Dispute Resolution Center. In private mediation, usually, the parties must agree on the selection of the mediator for their dispute. In court ordered mediation, sometimes the mediator is appointed by the court.

**WHO PAYS FOR THE MEDIATION?** Mediation may occur before legal action is filed and before the dispute enters the courthouse, which may allow more privacy, or it may occur after a lawsuit has been filed. In pre-litigation mediation, the parties recognize they have a conflict and agree to try mediation. Normally, if the parties hire a private mediator, they will split the fee of the mediator. Sometimes, one party will agree to pay the entire fee just in an effort to resolve a conflict without court intervention. In most areas of Oklahoma and for most kinds of common disputes, parties can instead use the Dispute Resolution Centers (sometimes called Early Settlement Centers) for a small fee. Such Centers use volunteer mediators. When mediations occur after the parties have filed suit in court, a judge may have ordered the parties to attend a mediation session. Some courts provide “free” mediation using volunteer mediators. In others, parties may have to pay the mediators. In those cases, parties usually split the fee. The fees for mediation vary in range from free, a nominal fee of \$5 up to \$150 per hour or more, depending on the program and the mediator. Some mediators will charge a flat fee, for example \$150 per party or \$300 per day. Be sure and inquire about the fee when you are contacting mediators. Mediators usually provide written agreements outlining their fees and other important matters.

**EXAMPLE OF CONFLICT:** You are renting a house and have been living there for years, problem free. An early cold freeze hits and your pipes burst causing damage to the house and some of your contents. The landlord is slow in fixing the problem and you withhold the rent. The landlord threatens to sue.

**Now that you know what it is and who does it, where can you find mediation programs?**

1. Schools

I bet you did not know that you can find mediation programs in the schools that your children attend. PROS stands for the Peaceful Resolution for Oklahoma

Students. PROS is a peer mediation program that is a collaborative project of the Early Settlement Programs administered by the Supreme Court of Oklahoma, Administrative Office of the Courts and the Oklahoma Bar Association Law Related Education Program. PROS teaches students problem solving techniques in a positive and constructive manner and it has been shown to dramatically lower incidences of student conflict and violence - certainly an issue of national concern.

## 2. State Mediation Programs

The Oklahoma Dispute Resolution Act, discussed a few minutes ago, allowed for the implementation of the Alternative Dispute Resolution System, which is administered through the Administrative Director of the Courts. This program provides for settlement programs and training. There are 12 Early Settlement Offices spread throughout the state serving all 77 counties. For specific information on an office serving your county consult the ADR website at [www.oscn.net](http://www.oscn.net). A related program is the Oklahoma Agriculture Mediation Program, which provides volunteers for mediation of agriculture-related disputes. The Office of Juvenile Affairs, Merit Protection Commission, Workers' Compensation Court and other courts and venues have mediation programs, some of which are implemented and administered through the ADR System.

## 3. Employment Issues

Those of you who own and operate your own business are probably acutely aware of the rise in employment-related litigation. You should also know, that the United States Equal Employment Opportunity Commission has a free mediation program. The EEOC began its Alternative Dispute Resolution (ADR) Program in 1992 in a few select offices around the country. The success of the program prompted Congress to fully fund ADR programs in all EEOC offices and the Oklahoma Area Office of the EEOC has a free mediation program. Mediation through the EEOC is voluntary and confidential. For more information about the EEOC program, consult the website [www.eeoc.gov](http://www.eeoc.gov) <<http://www.eeoc.gov>> .

### EXAMPLE OF CONFLICT:

You own a successful business with a great sales force. You are in the process of adding personnel and you restructure the chain of command. You decide to promote Jane Doe into a newly created position. John Smith has worked as long and as hard as Jane. John is a fantastic sales person, but lacks managerial finesse. John feels he has been passed over because he is a male. You have legitimate reasons for your selection, but John files a discrimination complaint with the EEOC. You

want John to continue to be a productive member of the team, but you don't know how to solve the problem. You agree to free EEOC mediation. You find out that John has issues with his company car, and Jane's promotion sent him over the edge. You reach a mutual agreement and John stays on board as a productive employee.

#### 4. Private Mediations

Private mediators may advertise in the yellow pages. In addition, the Oklahoma Bar Association Alternative Dispute Resolution Section may be a resource for identifying a private mediator. There are also many regional or nationwide providers of Alternative Dispute Resolution services such as the American Arbitration Association, JAMS, and the Center for Public Resources that can be accessed through the internet or by telephone. It is recommended that you check credentials of and get references for a private mediator.

**EXAMPLE OF CONFLICT:** You own a small printing company and you print a \$10,000 order for one of your best customers. The printing run has one color that is slightly off, but in your opinion it does not effect the entire order. The customer does not want to pay. You want to try and preserve your relationship with this customer but you must collect all or a portion of the bill.

### **WHY YOU SHOULD PARTICIPATE IN MEDIATION**

1. Mediation is an efficient process that saves time and money. Successful mediation avoids time consuming investigation or litigation and achieves prompt resolution of the conflict. The majority of mediations are completed in one session, which usually lasts for one to eight hours.
2. Mediation is fair. Mediators are neutral third parties who have no interest in the outcome. Their role is to help the parties resolve the dispute. Settlement is not forced on anyone.
3. Mediation is a confidential process. The sessions are not tape-recorded or transcribed. Notes taken during the mediation are discarded. Settlement agreements secured during mediation do not constitute an admission by a party of any violation of the law.
4. Mediation is voluntary, informal and flexible.

5. Mediation promotes communication and cooperation.
6. Mediation preserves on-going relationships - business & family.
7. Mediation reduces hostility.
8. Mediation allows you to make mutually acceptable agreements tailored to meet your needs.
9. Mediation can result in a win-win solution.

Thank you very much for inviting me to speak today and I'll be happy to answer your questions.

#### Endnotes

<sup>1</sup> 12 O.S. § 1802 and 12 O.S. § 1825.

<sup>2</sup> 12 O.S. § 1801, et seq. and 12 O.S. § 1821, et seq.

<sup>3</sup> 12 O.S. § 1801, et seq.

<sup>4</sup> 12 O.S. § 1824.

### **OPENER FOR GROUPS MAINLY COMPOSED OF BUSINESS OWNERS**

What if I could tell you, the average business owner, that you might save more than \$100,000 in legal fees if you give mediation a try? I say \$100,000 because the costs of litigation are skyrocketing - and I did not pull this number out of a hat. This number was recently quoted by a prominent, well respected defense attorney on an Oklahoma City television show "The Verdict." This is the amount of money that it may cost to defend, for instance, the average employment law claim. This figure represents not only attorney fees, but the costs of the litigation, deposition fees, expert fees, copy charges, subpoena fees and witness fees. What if, just by agreeing to participate in a program - early in the conflict - you could save this money? Well, the opportunities are out there. I am here today to explain to you what mediation is, where you will find it and how it benefits you or your business.

### **Public Speaking Tips**

**Know the room in which you will be speaking.**

Being familiar with your surroundings will make you more comfortable when you deliver the speech to your audience.

**Know the material.**

Do not read the material to the audience. Most people hate listening to someone read a speech because the speaker loses inflections in their voice, the text is not spoken language, and there is little or no eye contact. You are encouraged to give the speech using the outline provided and to use the full text only to become familiar with the material.

**Make eye contact.**

Include the audience in your speech by making eye contact with as many people as you can.

**Convey your enthusiasm for the subject.**

If you sound dull and boring, your audience will think you are too.

**Imagine yourself giving the speech.**

Visualize yourself successful and you will be successful.

**Concentrate on the message.**

Focus your attention on the message of your speech not the medium of the message.

**Avoid using jargon.**

Assume your audience knows nothing about the law. Describe concepts using everyday language, not legal terms.

**Be honest with your audience.**

If you are asked a question you can't answer during the question & answer at the end of your talk, admit you don't know. The audience will respect your honesty. Instead say, "I don't know the answer, but I will find out for you." And follow up with that person after you've researched the answer.