

THE SUPREME COURT *of* OHIO

DISPUTE RESOLUTION SECTION

Core Values for Mediation

Introduction

Core values for mediation are guiding principles that direct behavior and action. These core values are found in statutes, regulations, rules, standards and ethics that inform and govern mediators and mediation practice. They help define and guide best practices. Core values also create a guide for staying on the right path to achieve selected goals. To be an effective mediator, it is important to be able to define and describe the key characteristics of mediation and explain the core values of mediation.

One common way of describing mediation is that it is a structured, yet informal, process. As in any structure, the foundation is of critical importance, and in mediation core values create that foundation. To examine the core values, one can begin with the meaning of the verb mediate - to be in the middle, to act as an intermediary between two or more opposing participants. In its most fundamental context this is what mediation means.

This definition, however, does not present enough guidance for the mediator to be effective. The core values - guiding principles - that influence the mediation come from its early roots, cultural values, social conditions and other institutional factors. Mediation is commonly structured as a six stage process: (1) pre-mediation preparation; (2) introduction; (3) explanations concerning the dispute; (4) identification of issues and concerns; (5) generation of solutions; and (6) conclusion. Within this structure, the mediator must be able to explain the stages of mediation and the core values that provide a foundation for mediation. The mediator's work in every stage should be consistent with the core values.

The most pronounced characteristic of the mediation process is that it is a discipline based in practice. That is why training programs that teach the fundamentals of mediation include opportunities to practice the skills needed to be an effective mediator. To say that mediation is a practice is not to use the word practice as a noun, e.g., "a law practice." In mediation, the practice is a verb - engaging in the work; much like a yoga class is a practice. The mediator works continually within the process to gain expertise and confidence. The mediator must be mindful that he or she takes on a special role that is distinct from being an advocate or counselor. The mediator will not decide the facts or determine the outcome. Mediation does not require either agreement or final resolution. Although mediation can help the participants reach resolution and sometimes repair relationships, it is always up to the participants to decide on any outcomes. In a trial or arbitration the goal is to reach a final outcome, such as a decision or an award. In mediation, the goal is to provide the participants with an opportunity to increase their understanding of their unique situation and to explore whether a mutually acceptable resolution is available.

Success in mediation can mean that the participants have reached a full or partial agreement, narrowed or defined the issues to be resolved, improved relationships, established a dialogue, expressed interests and perspectives, had an opportunity to be heard, or been able to give - or

receive - an apology. Mediation is successful when the mediator follows the core values and supports the participants as they work toward removing barriers and creating a resolution. Learning about core values will help the mediator mediate in a way that provides the best assistance to the participants and guide how the mediator conducts himself or herself in that process. Below are discussions of the common use of the core values in mediation.

Core Values

Self-Determination Self-determination is the cornerstone in the foundation of core values for mediation. It is the mediator's job to support the parties in making their own voluntary and informed decisions. Any decisions the parties make must be free from undue pressure from the mediator. The mediator should empower and encourage the parties to consider their own needs and interests, to gather and obtain sufficient information to make informed decisions and to understand the implications of those decisions.

Neutrality The mediator does not seek any particular resolution of the dispute. The mediator usually does not give advice; and the mediator does not make decisions. Neutrality is an important way for the mediator to support party self-determination by focusing on a constructive decision-making process rather than a particular outcome.

Impartiality The mediator conducts the mediation in a way that is not partial, biased, or prejudiced. The mediator conducts the mediation in an even-handed manner. Impartial conduct removes any impression of favoritism and promotes respect of each party's exercise of self-determination. Impartiality requires the mediator to avoid having his or her own beliefs, preferences and other personal perspectives substitute for those of the parties.

Conflict of Interest A conflict of interest exists when there is any relationship between the mediator, any participant, or the subject matter of the dispute that compromises or appears to compromise the mediator's impartiality or neutrality. Checking for potential conflicts of interest before and during mediation and disclosing anything that might suggest partiality is critical in maintaining neutrality and impartiality. It is also important for the mediator to avoid subsequent relationships with the participants or their representatives that might influence or be reasonably viewed as influencing the mediator's neutrality or impartiality during the mediation or compromise assurances of confidentiality during the mediation.

Competence The mediator has a duty to maintain and improve mediation skills. In addition, the mediator will conduct mediation so as to provide a high quality process that maintains the integrity of the process and is true to the core values of mediation. A mediator should be honest and forthcoming with the parties regarding his or her qualifications to act as a mediator.

Confidentiality Ohio's enactment of the Uniform Mediation Act (UMA) protects "mediation communications" in Ohio's courts, legislature, and administrative agency processes and limits the communications the mediator can have with the court and others. It is important for the mediator to inform the participants that he or she will not be communicating with the court or others about what is said in the mediation unless there is a specific exception under the UMA. When the participants agree to confidentiality, they may word that agreement to extend their own obligations not to speak about anything communicated during the mediation process beyond the obligations imposed by the UMA. This can be useful in promoting candor within the mediation, but the participants may want to create exceptions to the confidentiality agreement to permit disclosures that would be healthy (talking with family members about what was said) or

seem important (reporting threats of harm). A confidentiality agreement in other words may be worded to be broader than agreeing to abide by the obligations of the UMA. A broader agreement can create new obligations for the participants that carry the possibility of monetary or other damages for breaching the agreement by telling a friend, business associate, or competitor for example, what was said during mediation. When they can speak candidly, the participants can voice their underlying interests and move beyond their stated positions to make progress toward a mutually acceptable solution.

Flexibility and Informality The mediator may adopt a particular style or a model of mediation, such as a facilitative, evaluative, or transformative style. The mediator, however, must adjust the process to meet the needs of the participants. The mediation process is informal in that there are few rules. The mediator may suggest rules and the participants may agree to them. For example, some mediators ask parties to use rules of common courtesy or establish ground rules such as speak directly to the mediator or do not interrupt when someone else is speaking. In mediation, participants can speak openly in ways that are comfortable for them. The mediator's efforts to work flexibly and adapt the mediation to the needs of the participants should be guided by whether the particular approach will support or undermine core values.

Fairness of process Fairness in mediation means that the parties experience the process as being fair to each of them. It is important for each party to feel respected, heard, and included. Sometimes mediators confuse their responsibilities to offer a fair process with a duty to ensure a "fair" outcome for the parties.

Voluntariness of the (Settlement) Agreement For court mediation programs parties may be ordered or strongly encouraged to participate in mediation, but any agreement they make must be a voluntary exercise of self-determination. Stating that an agreement reached in mediation must be voluntary means it is without undue pressure from the mediator or others and that there must be an absence of coercion to settle. As a core value, voluntariness of the agreement is distinguished from voluntary participation. Courts may refer matters to mediation, typically through a court rule or a general order to mediate.

Cooperation Mediation is significantly different from a trial or arbitration because it requires cooperation to reach a resolution. Parties may come to mediation with an expectation that one of them will "win." If the mediator cannot engage the participants in a cooperative process, the mediation will not go forward. There are several benefits to cooperation. First, if the parties cooperate, they can better understand that they share the power to make agreements. Second, their own agreements are usually more appropriate to their unique situations. Third, agreements parties make themselves are more sustainable over time. Cooperation can be misconstrued. The parties are not required to like each other or to compromise their own integrity. Cooperation focuses on the value of mutually acceptable resolutions and sometimes, the value of improving relationships, which are more often the product of working together.

Conclusion

Reviewing and reflecting on the core values as well as statutes, regulations, rules, standards and ethics that inform and govern mediators and mediation practice are important tasks to help mediators develop skills and engage in a meaningful and helpful process. Core values also help mediators to stay in compliance with statutes, regulations, rules, standards and ethics regarding mediation.