

# Mediation

*(A resource for community advice offices and community-based paralegals brought to you by NADCAO, from the Paralegal Manual published by the Education and Training Unit and the Black Sash.)*

Where two conflicting parties cannot reach agreement on the issue causing the conflict, they can agree to ask a third party, a mediator, help them reach a solution. A mediator is a person who acts as a facilitator between the parties but does not make a decision about who is right or wrong. So, a mediator is not a judge. The mediator goes on assisting both sides until the parties themselves come to an agreement. If it is clear that the parties are not going to reach an agreement, the mediator might have to withdraw from the process. The parties will then have to find another way to resolve their conflict, for example, by using arbitration or going to court.

The main job of a mediator is to keep the parties in the negotiation communicating with each other. To do this the mediator must get the trust and confidence of both parties and keep this trust by always being objective. The mediator must try and find out exactly what the problem or conflict is about. When the two sides meet together, the mediator must encourage both sides to be realistic about what they want from the other side and what they are prepared to give.

If you are representing a person or group at a mediation you need to prepare for the mediation in the same way as for a negotiation.

## ***Examples of issues where you can use mediation***

- Consumer complaints  
You can use mediation or arbitration to solve consumer complaints. For example, a second-hand TV which you bought breaks down completely after a month. The company that you bought it from refuses to fix it. It is too expensive to go to court, so you could ask the company to agree to call in a third party to act as a mediator between you and the company. This is a cheaper and much quicker way of solving the problem.
- Community or neighbourhood disputes such as those between different political groups, or landlords and tenants.
- The criminal courts  
In some cases mediation could be used to bring the person who committed the crime together with the victim of the crime, to see whether they can reach any agreement as an alternative to laying a criminal charge.
- Education - disputes between students and teachers, students and administrators, parents and administrators, and so on.
- Environment - disputes between communities and authorities, for example about dams, waste disposal, land development and so on.
- Family or divorce - family and divorce disputes. Divorce cases are meant to be handled by mediation, before (if necessary) they go to court – especially where children are involved.

## ***Planning a mediation session***

You should be flexible when you plan a mediation session. For example, a more informal mediation between two neighbours needs a different approach compared to a mediation between a consumer and a company.

Below is an example of a mediation session. This example is for a formal mediation session around a conflict between two organisations, parties or groups. You need to allow time for translation, for each side to caucus (speak among themselves), or to give the mediator time to meet both sides separately.

## ***Outline for a mediation practice session***

1. **Introduction:** (5mins)  
Explain the structure and aims of the mediation practice session
2. **Opening of mediation:** (15mins)
  - a. Welcome
  - b. Introductions
  - c. Agreeing to rules and procedures
3. **Statement of positions:** (30mins)
  - a. Each side present their position (their point of view).
  - b. The mediator summarise these positions.
  - c. Allow clarifying questions.
  - d. Allow responses.
4. **Finding common ground (things that both sides agree on):** (30mins)
  - a. What is each side prepared to do - ask for practical suggestions and possible solutions.
  - b. Take responses to these suggestions.
  - c. The mediator summarises the common ground and adds alternative solutions.

(Note: if there is very little common ground at this point, this might be a good time for the mediator to speak to both sides separately.)
5. **Reassessing agreement:** (10mins)  
Give both sides a chance to caucus on how they feel about suggested solutions.
6. **Reaching agreement:** (30mins)
  - a. Ask each side to briefly repeat their position and say what they feel about the possible solutions.
  - b. The mediator goes over the common ground and summarises any points of agreement.
  - c. Encourage agreement on the remaining points.

d. Write down and read back whatever agreement is reached.

**7. Closure of mediation:**

**(15mins)**

- a. Discuss the way forward, including the enforcement, monitoring and publicising of the agreement, and the need for future meetings.
- b. Thank everyone.

**8. Assessment:**

- a. Discuss how useful the mediation practice session was - ask participants to comment first and then ask the observers.
- b. Ask if more mediation practice or training is needed.