

# **ROLE OF ATTORNEYS IN MEDIATION PROCESS**

## **Overview**

A party who chooses to resolve a dispute through mediation may or may not be represented by a lawyer at any point in the process. At the option of the party, for example, a party may:

1. Be represented by a lawyer from the moment that party's first pleading is filed;
2. Enter the case unrepresented, and secure representation at some point later in the case prior to or during the mediation process;
3. Complete the mediation process and consult a lawyer only to review the terms of the mediated agreement; or
4. Complete the mediation process and enter an agreement without a lawyer's assistance.

The traditional role of the lawyer has been to represent the interests of his or her client, by advising the client regarding procedure and substantive law, counseling the client, and managing the legal process for the client. While the lawyer will continue to perform each of these traditional functions in the mediation process, the manner and the context in which those functions are performed will be different. The vital distinction is that mediation is a *non-adversarial* process, through which each party is encouraged to take responsibility for resolving the dispute.

For many lawyers, the threshold questions are whether they should attend the mediation session(s) at all, and if they do, what role they should take in the session(s).

## **Various Roles a Lawyer Might Assume in Mediation**

### **Before Mediation**

By assisting the party in making informed decisions about the mediation process before the process begins, the lawyer encourages the party to take responsibility for resolving the dispute, consistent with the principles of mediation.

The lawyer explains to the party the nature of the mediation process, what to expect during mediation, the relevant law governing the mediation process, and how the mediation process complements the court procedures. The lawyer helps the party make an informed choice of a mediator based upon such factors as the nature of the party's case, the background and experience of the mediator, and the potential fees involved. The lawyer may review with the party the listings and profile sheets for certified mediators contained in the [Directory of Court Mediators](#).

The lawyer assists the party in determining whether timing is a factor in choosing mediation. For example, the lawyer may recommend mediation at the beginning of the case in order to explore settlement before positions become entrenched, or may recommend that mediation be deferred until completion of all or part of the discovery process.

The lawyer advises the party on the substantive law relevant to the case. This enables the party to understand the range of outcomes that are possible if the case is litigated and to formulate a range of acceptable outcomes for the mediation process. For example, in a personal injury case, the lawyer may advise the party on the range of outcomes regarding liability, the range of possibilities for a money judgment, and such options as structured settlements. Advice that helps the party understand that there may be more than one solution which meets that party's needs helps the party enter mediation willing to consider various options for settlement.

### **During Mediation**

As before beginning the process, the lawyer continues to advise the party on the substantive law relevant to the case, helping the party understand what information might be important to share or to learn during the mediation, the options that might be available, the potential consequences of each option, and the possible outcomes to anticipate if agreement is not reached through mediation.

Throughout the mediation process the parties are encouraged to take responsibility for resolving the dispute. This responsibility includes participating actively in problem-solving discussions with the assistance of a trained neutral mediator. The lawyer's role is to assist the party in negotiating for himself or herself, bearing in mind the non-adversarial nature of mediation.

The lawyer guides the party in negotiating by encouraging the party to express thoughts and feelings, helping the party define interests, and helping the party gather necessary information, generate options, and examine consequences.

The lawyer can guide the party through settlement discussions whether the lawyer attends the mediation sessions or not. The lawyer may consult with and advise the party before and after the session(s). The lawyer might also advise the party of when it would be wise to request a break in mediation for the opportunity to consult the lawyer for additional information and advice. In some cases, the party and the lawyer may arrange for the lawyer to be available by telephone for consultation while the mediation is being conducted.

The lawyer manages the legal process for the party while mediation is being conducted, keeping the party informed of important dates, responding to and filing necessary pleadings, and conducting discovery.

### **Attendance at the Mediation Session(s)**

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## **Statutory Authority**

Va. Code § 8.01-576.5 provides that a lawyer for any party may be present during the mediation session(s). It does not, however, suggest what factors to consider in deciding whether the lawyer should attend the session(s), nor does it address the extent of participation by the lawyer which is appropriate during the session(s).

The choice of whether the lawyer attends the session(s), as well as the extent of participation by the lawyer, ultimately belongs to the party. The party makes his or her choice after discussion with the lawyer and consideration of the lawyer's advice. Because the success of the mediation process depends, among other things, upon each party making informed decisions in resolving the dispute, the lawyer's task at this stage is to enable the party to make an informed decision about these issues.

## **No Prejudice if Party Attends Without Lawyer**

A party suffers no prejudice if he or she chooses to attend mediation without his or her lawyer present.

Dispute resolution proceedings are not on the record. Rules of evidence do not apply. Mediators do not make any findings of fact and do not impose any decisions upon the parties. While mediators may encourage and assist the parties in resolving their dispute, they are prohibited from compelling or coercing the parties into a settlement. Va. Code § 8.01-576.9. See also the Standards of Ethics and Professional Responsibility for Certified Mediators, Appendix B.

Mediators in Virginia make no reports to the court which could result in prejudice to a party. Va. Code § 8.01-576.9 provides that, in reporting the outcome of the dispute resolution proceeding to the referring court, the mediator shall indicate only the terms of any agreement reached or the fact that no agreement was reached. The mediator is prohibited from disclosing any information exchanged during the proceeding, as well as any observations regarding the conduct and demeanor of the parties and their lawyers.

Mediators must advise each party, in writing and at the commencement of mediation, that each has the opportunity to consult with an independent lawyer and is encouraged to do so. Va. Code § 8.01-576.12. Even when the lawyer is not present at the mediation session(s), a party may consult with his or her lawyer before and after the mediation session(s), or by telephone during breaks in the mediation session(s). In addition, mediators are required to encourage each party to review any mediated agreement with his or her lawyer prior to signing it. Va. Code § 8.01-576.12.

## **Factors Affecting the Decision to Attend**

Since nothing about the mediation process itself suggests that a lawyer *must* attend the mediation session(s), the decision depends primarily upon the party's needs within the

context of the mediation process. While some people attempt to generalize the role of lawyers according to case type (e.g., "You need a lawyer in a personal injury mediation, but not in a domestic relations mediation."), it is the needs of the parties (such as the information, resources, and real and perceived power of each) that drive the decision to have a lawyer present in mediation, not the case type.

Because mediation is a cooperative problem-solving process in which the mediator facilitates communication between the parties, the fundamental consideration is whether the party is capable of participating effectively in the process without the lawyer's presence. This consideration encompasses two distinct levels of inquiry: whether a party suffers from any personal impediments to effective communication, and whether the nature of the relationship between the parties impedes effective communication.

If the party can participate effectively in the mediation process without his or her lawyer present, the lawyer need not attend the mediation. If circumstances are such that the party cannot participate effectively in the process without the presence of the lawyer, despite the guidance of the mediator, it may be in the party's best interests for his or her lawyer to attend the mediation session(s). The subsections which follow will illustrate this distinction.

### **Concerns with a Party's Ability to Communicate**

Any significant impediment to a party's ability to communicate, to understand, and to make informed decisions should be considered in deciding whether it would be appropriate for the party's lawyer to accompany the party to the mediation session(s).

For example, mediation would be deemed inappropriate for a party who is drug or alcohol dependent and actively under the influence. The potential impact of such impediments is one of the reasons that parties are required to attend a dispute resolution evaluation session. If any such impediment is apparent, the neutral who conducts the dispute resolution evaluation session, or the mediator at a later point, may recommend that mediation is not an appropriate process in this case, or that mediation proceed only under certain conditions.

On occasion, a party's lawyer may have concerns about the party's ability to communicate, to understand, and to make informed decisions in the context of mediation, although the basis for these concerns is not so significant that the case is deemed inappropriate for mediation or subject to special conditions. For example, the party may become very easily flustered or have a very short attention span. In such cases, the lawyer should explore his or her concerns with the party, explaining the nature of mediation and probing the party's ability to communicate, understand, and make informed decisions on his or her own behalf.

If the party wishes to proceed with mediation, the party should seriously consider the option of having the lawyer accompany him or her. If the party prefers to attend mediation without the lawyer, the party and the lawyer should be reassured that the

Standards of Ethics and Professional Responsibility for Certified Mediators impose a continuing duty upon the mediator to assess the appropriateness of mediation and the ability of the party to participate effectively in the process.

### **Concerns About the Parties' Relationship**

The second level of inquiry in determining whether the party can participate effectively in the mediation process without the presence of his or her lawyer focuses on the relationship between the parties. This inquiry can be framed as a "balance of power" question: does each party have reasonably comparable power in the relationship to engage effectively in the problem-solving process?

"Power" in the mediation context is the ability of one party to affect the outcome of the mediation process. When each party has a comparable real or perceived ability to control a range of outcomes for the other party, the power between the parties is considered "balanced."

If the power is relatively balanced between the parties, each party can participate in the mediation process effectively. If one party has significantly less power than the other party, the lawyer should discuss with the less powerful party whether the party believes that the imbalance would affect his or her ability to participate effectively in the process.

Not every power imbalance would preclude participation in the mediation process. The lawyer should advise the party that the skill of the mediator includes the ability to recognize and address power imbalances and the subtle shifts in power which occur throughout every mediation. In some cases, the lawyer can assist the party in equalizing power simply by being available with information and advice between mediation sessions.

In those cases where the party chooses to have the lawyer accompany the party to mediation, the lawyer's presence at the mediation session(s) in itself may be enough to help balance the power between the parties. Or, the lawyer may contribute to the balance of power by keeping the party focused on the problem-solving process, informed of relevant legal guidelines, and aware of the potential consequences of the various options under consideration.

### **Extent of Lawyer Participation**

The mediator, the parties and the lawyers each have roles to play in the mediation process. The mediator must control the process of mediation in order to focus the parties on their task and guide them through the problem-solving process. The parties each must express their own thoughts and feelings, as well as the interests which each believes should be considered, in order to reach a satisfactory resolution of the dispute. The lawyers must represent their clients' interests in order to fulfill their ethical obligations.

Some preliminary discussion between the lawyer and the party on this topic is indicated. Through this discussion, the lawyer may suggest to the party that various levels of lawyer participation are appropriate, and emphasize to the party that the lawyer's role in mediation is non-adversarial. The lawyer should explore with the party the range of participation that is possible.

### **Observation and Private Advice**

The lawyer may participate in the mediation session(s) by simply observing the mediation and advising the party privately during breaks in the session(s). This affords the party the fullest opportunity to engage in collaborative problem-solving, while preserving the opportunity for immediate consultation with the lawyer. The lawyer and the party have the option of requesting breaks for consultation whenever either believes they are warranted.

The cases in which this approach is desirable are those in which there is or has been a significant relationship between the parties which is expected to continue, as in domestic relations cases where the parties have children together or sexual harassment cases where the parties have an ongoing employment relationship. These relationships generally benefit from the parties' direct participation in the cooperative problem-solving process of mediation.

The observation/advice approach may also be appropriate when one party has his or her lawyer at the mediation session(s) and the other party is present without a lawyer.

### **Direct Participation**

In cases where there is no significant relationship between the parties, and where the lawyer has concerns about the power dynamics between the parties; (as in a personal injury suit), the lawyer may participate more actively in the mediation session(s) on behalf of the party.

Direct participation by the lawyer may vary from the lawyer occasionally supplementing the party's comments to the lawyer speaking on behalf of the party. For example, the lawyer might summarize the procedural posture of the case, outline issues to be decided, and define settlement goals. Note, however, that given the non-adversarial nature of mediation, the lawyer would not "examine" a party or raise objections to a party's statements.

When the lawyer participates directly in the mediation sessions(s), and particularly when lawyers for each party do so, there is a risk that the process will become an adversarial settlement conference rather than non-adversarial mediation. While the role of direct participant is familiar to the lawyer and is appropriate in adversarial contexts, it has its drawbacks in the non-adversarial context of mediation. A party is less likely to speak in mediation if he or she believes that the lawyer will do so on his or her behalf. Similarly, a

party is unlikely to accept personal responsibility for the settlement of the dispute if he or she is depending on the lawyer to settle it.

### **Caucus Sessions**

A mediation technique, which a lawyer may encounter if he or she attends the mediation session(s), is the *caucus*. A caucus is a separate session between the mediator and each party to the dispute, outside of the presence of all other parties. A caucus session with a party would include the party's lawyer, unless the party instructs otherwise. Mediators should not engage in caucus with a lawyer outside of the presence of that lawyer's client.

Through caucus, the mediator explores privately with the party such matters as impediments to settlement and the consequences of various alternatives. Not all mediators use this technique. A caucus session requires specific disclosures and raises certain confidentiality and trust issues.

### **After Mediation**

The lawyer assists the party in reviewing the terms of any mediated agreement, testing the party's understanding of the terms, and in some cases, preparing formal agreements

The lawyer also helps the party complete the legal process when mediation is concluded, whether mediation resulted in complete, partial or no agreement. The lawyer assists the party in re-entering the system upon completion of mediation. If full or partial agreement has been reached, the lawyers for both parties may request that the agreement be entered as a court order, where appropriate. Va. Code § 8.01-576.11. If no agreement or only partial agreement has been reached, the lawyer assists the party in continuing the process, which eventually will dispose of the entire case through trial or further settlement efforts.

### **Enforcing the Mediated Agreement**

Because mediation is a voluntary process in which the parties take responsibility for and create their own solutions, parties are more likely to abide by the terms of any agreement reached. Thus, it is rarely necessary to take any action to enforce a mediated agreement. If and when necessary, the lawyer assists the party in enforcing the terms of the agreement as any other written contract.