

Mediating Complaints of Discrimination

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Introduction

The causes of racial and cultural conflict are often subtle and difficult to detect. However, the negative effects suffered by people of color and whites alike are devastating to the future of our society. It is vital that we as a nation resolve to eliminate the causes of racial and cultural conflict.

Mediation is one conflict resolution option which involves a neutral, impartial third party who assists people in conflict to resolve their differences. The process has been successful in the areas of domestic relations, contract disputes and environmental issues. This success has been documented by numerous authors. However, little has been written about the use of mediation to resolve issues of discrimination. For a fair examination of this topic, it is necessary to set forth two assumptions. First, mediation cannot be viewed as a replacement of the existing formal processes for resolving discrimination complaints. Rather, it can be a vital option for resolving these issues within the public justice system. Mediation should not be viewed as a panacea. That is, it should not be considered the best method of resolving every complaint. It is one process, albeit a very valuable one, to address charges of discrimination. The second assumption is that disputes do not solely belong to judges, lawyers, or mediators. Regardless of the fact that complainants must file actions against the covered entity, the dispute must belong to the individuals, that is, the party(ies) who feel discriminated against and the party(ies) who are alleged to be doing the discriminating.

Considerations for Mediators

Substantive Expertise. Is it necessary for the mediator to be an expert on the subject of civil rights in order to effectively mediate complaints of discrimination? The debate regarding the extent to which mediators must be substantive experts in the areas in which they work is found throughout all arenas of mediation practice. One school of thought proclaims that, since mediators are responsible for the problem-solving process, and the parties are responsible for the solutions, interveners are not required to have more than an acquaintance with the subject matter. Another school of thought proclaims that mediators who are not thoroughly familiar with the laws, regulations, and precedent setting decisions may actually harm the parties or allow them to enter into a settlement that may not be practical or implementable.

It is difficult to imagine attempting to assist individuals to reach a settlement without a basic understanding of the history of the civil rights movement, the components of the basic legislation, the rights and responsibilities of both the individuals and the organization involved, the investigative process, and possible remedies exercised in similar situations. This level of substantive expertise enables the mediator to assist parties to develop solutions which will, if necessary, withstand a review of persons in authority for purposes of ensuring compliance with regulations, protecting individuals' rights, and protecting the organization's liability and reputation.

More important however, is the ability of the mediator to assist the parties to resolve the real issues which led to the action or the threat of action in the first place. Often mediators find themselves in a position of

helping people to unravel complex issues with possible multiple causes. On occasion, individuals find themselves in the process of filing discrimination complaints against agencies or corporations because there appears to be no other alternative for dealing with an antagonistic or deeply troubled relationship with peers, a supervisor or service provider. The complaint may not be a legal discrimination complaint, but it may represent a real conflict or problem. In order for the parties to enter into a settlement that will work, they need to address the "real issues," that is, they need to talk about what is at the root of the problem, and they need to agree on how they want the actual complaint to be addressed.

Procedural Expertise. The mediator needs to understand the difference between the process of investigation and the process of mediation. The former calls for a third party to examine both sides of the complaint and discover whether there is substantial evidence which points to discriminatory practices or behaviors on the part of the respondent. Mediation is a process in which the mediator facilitates the exchange of information, clarifies the parties' needs and interests, defines their commonalities and differences, and works toward a mutually acceptable settlement. The mediator does not impose or compel a settlement. While the mediator's goal is not to fix the problem, a familiarity with successful solutions in similar cases is extremely beneficial. The mediator can pose questions which will serve to unlock the creativity of the parties, expand their vision, and enable them to consider more than one solution.

A solid understanding of formal procedures will enable the mediator to assist parties to clarify where they are in the process and where they want to end up. If the parties resolve the issues but fail reach an agreement on how they want the complaint to be handled, they may face future difficulties with one another or with formal authorities.

A primary cause of conflict escalation lies in the frustration of not being heard or validated. This should not be confused with the need for agreement with a particular point of view. Racial and cultural conflict have many underlying causes such as the existence of prior discriminatory practices, inequitable allocations of resources, ignorance on the part of authority figures and unbridled or misappropriated anger on the part of one or more parties. In all likelihood, these problems cannot be alleviated by a particular settlement agreement. However, mediation can play a pivotal role in first clarifying the reasons behind racial or cultural tensions while assisting parties, where appropriate, to focus on seeking resolutions.

Defining Meaningful Outcomes. Parties who feel pressured into seeking specific solutions to specific substantive problems may feel less inclined to fully participate in mediation because they may fear that the solutions will be of a limited nature as opposed to making significant strides toward developing a deeper understanding of one another's behaviors and values. Meaningful outcomes can be defined by the parties in several ways. Salvaging or strengthening the relationship between the disputing parties may be a primary goal. Clarifying what occurred, and the intentions and circumstances surrounding incidents of racial intolerance, may be another, and perhaps one of the most important outcomes. Other parties may define the most desired outcomes as those which result in an alleviation of feelings of hate or acts of violence. Still others will want specific agreements pertaining to specific issues. These agreements might involve money, changes in employment status, changes in policy, or a specific message to be carried by community leaders or the media.

Sustaining an ongoing dialogue may be the most useful tool in promoting a growing understanding of divergent viewpoints and may lead to solutions to existing problems. In some circumstances, the very

notion of needing to reach a specific, permanent solution may cause a party to resist any forward movement due to a sense of loss of control or a feeling of being trapped. On the other hand, mediation that remains deliberately vague when parties are anxious to pin things down serves little purpose. Depending on the complexity of the issues and the history of the parties' relationship, solutions may need to be temporary or incremental. Parties may need the opportunity to test their agreements, or provide the opportunity for each to change his or her behavior or demonstrate his or her real intent.

Defining the outcomes most important to the parties is critical to the success of mediation; just as the agenda may evolve, so might the parties' expectations. People involved in racial or ethnic disputes need and deserve the opportunity to talk about the sensitive issue of discrimination. If they can successfully discuss the issue, they are much more likely to reach an agreement that may make a difference in their lives. Mediation which avoids this issue or otherwise endorses mediocrity is patronizing, self-serving and headed for failure.

Cross-Cultural Expertise. Effective mediation of discrimination disputes requires a solid understanding of cross-cultural issues. The mediator needs to know how people from various cultures and backgrounds view conflict and the processes for resolving conflict. Effective mediation requires more than a textbook understanding of culture and civil rights, it requires experience, a willingness to participate in an on-going educational process, and an awareness of how one's own experiences have shaped biases and beliefs. A mediator cannot promote the understanding of all sides of an issue and engage the parties in interest-based negotiation and then practice biases and prejudices in his/her own life. In order to be effective, the mediator has to "walk the talk."

How a mediator views the role of conflict in our society and the extent to which he or she appreciates and values conflict is also critical to his or her ability to assist disputing parties to raise conflict constructively. Similarly, the mediator who understands and respects the parties' definition of meaningful outcomes will be able to structure a culturally-sensitive process which will meet the specific needs and respond to the concerns put forth in each individual case. An open, inclusive approach to the mediation process will invite clarification of issues and expectations. It will reinforce the importance of meaningful dialogue on the issues that matter, as opposed to those presenting issues which occupy time and cause unnecessary delays in progress. Parties involved in racial or cultural conflict need the assistance of a mediator who follows his or her conscience, values conflict for the opportunity it presents, and uses the consensus-building process to reach agreements.

A sense of humility on the part of the mediator is sure to encourage people involved in racial or cultural conflict to engage in mediation. The reason being that humility is a strong indicator of inner-security and wise maturity.

Working with Power Imbalances. Traditional systems have taught lawyers to argue, criticize and persuade. Parties in a discrimination case are often protected by legal representatives who advocate for their interests. Mediators are taught to listen, synthesize and empathize. Mediation is a practical, relatively informal process which is unencumbered by judicial proceedings and legal technicalities. In this process, the parties retain control over the critical decisions. They are encouraged to remain flexible so that they can creatively customize solutions. How can an informal process such as this protect the rights of the un-empowered or under empowered party?

Many minority activists have strongly cautioned women, people of color and disabled people against the

use of mediation to resolve issues of discrimination. Their concern is that the great disparity of power between the more powerful, (the public agency or the private corporation), and the less powerful, (the complainant), results in a win for the covered entity and a loss of human rights for the complainant.

While recognizing that there is seldom a "true balance of power" between parties, the mediator has several sources of influence that can be exercised to "level the playing field." First is the parties' perception of the practitioner as a trusted professional with a reputation for having substantive expertise and experience in the area of discrimination. This source of influence enables the mediator to offer a facilitative process to the parties which guarantees each the opportunity to be heard and understood. An understanding, on the part of the other party, doesn't imply acceptance. However, if the mediator can preserve the safety and confidentiality of the communication between the parties and if the mediator can assure them that they are not required to "settle," the parties are much more likely to focus on what is of primary importance as opposed to winning. While some organizations such as the U.S. Army Corps of Engineers offers mediation as an option for complainants and mandates it for managers, where the complainant elects to use it, mediation does not need to be the final process. It works best when both parties understand that, should they not be able to reach an acceptable settlement which resolves the real issues, which is implementable, and is meaningful and fair to everyone involved, they have the right to proceed to more formal measures.

Associational Power. The mediator has what is often referred to as associational power. That is, he/she can recommend that the parties consult with experts such as lawyers or EEO specialists to gain a better understanding of various options and the pros and cons of each. While the mediator may provide the parties with general information pertaining to the process, regulatory time frames, potential remedies, etc., giving either party legal advice or information which would compromise the neutrality of the mediator or the process is crossing the line between facilitating an educational process and practicing law without a license.

Procedural Power. The mediator has procedural power in terms of how the topics for discussion are described or framed and in what order they appear on the agenda. Mediators exercise procedural power as they assist the parties to move from positional bargaining which consists of demands, offers and counter offers, to interest-based negotiations where the parties focus on their needs and on developing an understanding of the needs of the other party.

Power of Neutrality. It has been said that a person who was once a successful advocate for human rights issues ought not to mediate these disputes because of the challenge of remaining neutral. On the contrary, a mediator who has a deep appreciation for the struggles of women, people of color and disabled people can quite effectively advocate for a process which will result in agreements which stem from a higher level of empathy on both sides due to the opportunity to talk about what hurts, feels unfair, and is misunderstood. In short, the mediator who is not afraid of conflict and who understands the benefits and costs of remaining in conflict will be able to assist the parties to transition from a conflicted state to one of understanding.

Managing Communication. The effective mediator does not interrogate individuals in order to find fault or cross examine in order to discover the facts of the matter. The mediator facilitates a process which enables people to talk about that which is important to them. Often that which is most important is not factual in nature but is grounded in emotions or perceptions. What may be most important is how a person feels about a situation or how he/she views the situation. The mediator is a listener. That means

he/she doesn't try to impose a solution. The mediator not only seeks to understand the party, he/she reframes what the party is saying in such a way as to enable the "opponent" to gain a deeper understanding of the issues, feelings, history and needs of the other side.

The Mediator is an Explorer. The explorer draws out the interests of the parties which may involve drawing out concerns and fears which have heretofore blocked the ability of the party to creatively resolve the issue.

The Mediator is a Coach. The mediator is a coach for each of the parties. Being tolerant of ambiguity is a must in order to be effective in this role. As a coach, the mediator is required to track both the issues and the process. He/she helps each party to present issues in a clear productive manner. As a coach, the mediator assists each party to analyze new or difficult information. Each party may need some guidance in their effort to explore or weigh alternatives prior to developing a specific settlement. Mediation can offer the parties the opportunity to resolve not only the discrimination complaint, but other personnel, social, or psychological issues which plague the parties.

Mediation is frequently faster and less costly than the formal procedures which may lead to painful appeals and expensive litigation. Effective mediation is not a process which is seeking a quick superficial solution which reads well on paper, and satisfies the documentation requirements of the regulations, but does not meet real individual or organizational needs. It is a process which:

- Helps the parties to identify the real issues
- Provides parties with a face-saving opportunity to apologize, retract former damaging comments, and clarify misunderstandings due to rumor or misperceptions
- Offers parties an opportunity to explore the emotional and substantive costs of winning and losing
- May lead to important attitudinal or behavioral changes
- May lead to the development of positive, productive working relationships and
- Resolves deep-rooted organizational or individual problems.

Mediation is not a form of poor man's justice. It is not a disguised form of discovery. It is not meant to hold agencies and corporations less accountable for acts of discrimination or racial intolerance. Mediation is a process where parties bargain in good faith and seek just and fair solutions to the problems which have made relationships or the atmosphere antagonistic, unfriendly, or downright intolerable.

Conclusion

Violence, hatred and racial tension are repugnant elements in our society. While mediation should never be considered a panacea for resolving racial or cultural disputes, it may be a useful option as long as it offers an inter-cultural approach to conflict, emphasizes constructive dialogue versus debate and domination, and enables disputing parties to raise important issues while maintaining their dignity. Effective inter-cultural mediation activates the possibilities of a freer, richer, more stable, efficient community.