

Introduction

Toolkit Mediation. Generating Outcomes as Mediator and Negotiator is a manual for how mediation can be used by various professionals for their own purposes. Managers, mediators, negotiators, trainers, coaches, consultants, lawyers, judges and other professionals can all benefit from using mediation techniques. This practical handbook contains an overview of the rich amount of tools a mediator has at his/her disposal and is written to offer a clear guide on how to 'technically' apply these tools. In particular, it includes comprehensive and easy-to-use practical checklists and overviews.

Mediation theories and techniques are based on contributions from social sciences, management theories and research on organizational development. In (social) psychology and business studies (f.e. game theories), much research has been done on how conflicts develop and escalate and how to deal with such conflicts. From these insights, new negotiation theories, like problem-solving negotiation, have developed. Meanwhile, mediation has developed into a self-determining interdisciplinary profession with professional requirements of its practioners and with its own techniques and theories. Mediation techniques can also be applied in a variety of circumstances outside a formal mediation process.

They can offer a valuable contribution to improve the result of a negotiation or in effectively dealing with day-to-day issues as a manager.



Mediation is a method consisting of several phases or stages in which the involved parties, under the guidance of an independent third party – the mediator – attempt to resolve or prevent a conflict, or dispute that has arisen between them in a structured process of balancing interests. The mediator diagnoses the conflict together with the parties and guides the negotiations between them with the aim of reaching jointly supported sustainable solutions based on their real interests, which, when relevant, are recorded in a list of agreements or settlement agreement.

Legal Mediation or Proactive Mediation

As we teach it in The Academy of Legal Mediation, in the Legal Mediation or Proactive Mediation approach, the autonomy, personal, business, and commercial interests of the parties take centre stage. The mediator not only facilitates but is also actively, solution-oriented, and evaluative (light). A legal or proactive mediator, like a facilitating mediator (see I-2.1. on approaches and mediation style), first establishes a relational foundation between the parties and ensures that the interests surface. Subsequently, a legal/proactive mediator actively explores a relational as well as a substantive solution, ideally resulting in a business deal.

A proactive mediator checks with the parties and/or their (legal) advisor whether the arrangement is legally, practically, and commercially feasible, meets the actual interests

of all involved, and aligns with the corporate culture or situation. As a result, the business and legal agreements made by the parties are sustainable. A legal/proactive mediator is specialized and knowledgeable in the field of mediation where they operate, working at the same level as the parties' lawyers and other advisors.

Legal or Proactive Mediation can be seen as 360° mediation, a total solution in the shadow of the law on both a relational, business, and legal level, where the proactive mediator is the organizational pivot.



See the P's of Proactive Mediation (I-3).

A legal or proactive mediator

- ☐ A legal or proactive mediator actively supports the parties in 360 degrees:
 - People, Problem & Process are explored, Perspectives, Planet, (wider scope than just those at the table) & Profit are taken into account. Party Autonomy is the leading principle, leading to a Paradigm shift, resulting in: Potential (potent) outcomes.
 - What opportunities are there, and what are the focal points?
 - What is the substantive and legal framework, what are the options, and where are the limits?
 - In what way can an expert possibly provide a solution?
 - Can a mediator's proposal (I-7) break the impasse?
 - Does a hybrid process or combining different conflict resolution methods in this case add value?
 - Active participation in generating options (III-15)
- ☐ The added value lies in the (legal) expertise regarding the mediation process itself (knowledge of legal and administrative mediation instruments, the ability to prepare or guide the preparation of a mediation settlement agreement, a professional mediation agreement, knowledge of mediation clauses, (I-8), etc.), as well as specialization in specific areas of mediation with accompanying process, business/subject matter and, where necessary, legal expertise.

Mediation encompasses more than just the application of skills, techniques, and interventions (III). The goal of a formal mediation goes beyond initiating or improving mutual communication and interaction between parties or clarifying perceptions and emotions. Mediation is a phased method (II-9) of conflict or dispute resolution that, like

arbitration and conciliation (binding advice), often takes place “in the shadow of the law”.¹

This means that during a mediation process, litigation is a possible alternative that plays a role in the parties’ considerations. The law and the legal context form a (reference) framework during mediation, but not a straitjacket.

The way in which the mediation process is carried out in a specific case is flexible and determined by the mediator and the parties. A mediator has their own specialization and mediation style (I-2.1) and their own skills that underlie the specific interventions used and techniques employed. Parties should be able to choose a mediator with a style and approach to the mediation process that they can agree with.



They should even be able to choose a non-independent, partial, or omni-partial mediator, provided it is an informed choice carried and consciously made by both parties (whether it is advisable for a mediator to be partial is a different discussion, see II-2.1). It is known in social psychology that it is not possible to be truly neutral and objective, not even as a mediator (II-2.1).

The responsibility for resolving their conflict or dispute lies with the parties, as well as its substantive aspects. The mediator encourages the self-effort of the parties to get their stalled negotiations back on track and then translates the potential solutions into a business/personal/legal context to reach a settlement agreement or list of agreements.



From my point of view, mediation is simply said adding an impartial or omni-partial third party to a problem-solving negotiation. Through third party intervention, prior negotiation deadlocks between the parties can be dealt with in order to find a solution to the disputed issues. Other mediators regard mediation more as a process to improve the communication and interactions between the parties or to clarify the respective perceptions and emotions. However, mediators with different views regarding the mediation process and differing styles and strategies can use this toolkit. It is up to each mediator to apply the techniques described in this book for his or her own purposes and to the extent they choose.

This publication is a vital guide for anyone involved in a (potential) dispute, or engaged in a negotiation. In fact, a negotiator can use mediation techniques to shape the result of a negotiation favorably. A mediator can learn how to apply other techniques from negotiation theories, f.e. more directive or less neutral interventions. A manager cannot afford to ignore modern conflict management in his/her work. A coach, consultant or (psycho) therapist can apply mediation techniques in interactions with clients. Of course, the objectives for using these techniques differ depending on the profession. A mediator is a neutral and independent third party who assists others in resolving their disputes, while a negotiator is always involved as a party and, therefore, uses mediation

1 The expression “in the shadow of the law” refers to the article by R.H. Mnookin and L. Kornhauser (1979), ‘Bargaining in the Shadow of the Law: The Case of Divorce’, The Yale Law Journal, vol. 88, no. 5, Dispute Resolution (April), p. 950-997.

techniques to improve his/her own outcome. Moreover, negotiation does not necessarily imply conflict. A manager can be involved in a dispute as a party, but can also be consulted to act as an intermediary by others who are in a dispute. A coach, consultant or therapist quite often deals with just one party instead of two.

For mediators, this book can contribute to further improve professionalism. A mediator can utilize many different interventions and techniques to control the mediation process. In practice, however, most mediators mainly apply their own set of preferred tools. During an actual mediation, attention is divided between choosing what interventions should be used (or not to intervene at all) on the one hand and managing the process on the other hand. Also, in most mediation trainings the focus is especially on the process aspect: what should be done in what phase of the mediation? The in-depth technical aspect of the interventions often receives less attention. This book is written to close this gap.

The toolkit has an interdisciplinary approach where mediation is regarded as a self-determining profession. Negotiation theories as well as knowledge from social psychology are addressed. From the teachings of these different disciplines the practical application or consequence of a mediation, negotiation or conflict situation is described.

Cautionary Note

Toolkit Mediation. Generating Outcomes as Mediator and Negotiator gives an overview of the treasure trove of interventions, techniques and methods that can be applied in a mediation or negotiation. The approach of the book is to offer a technical basis, or training on how the technique of an intervention works. This has to be separated from the question of whether and when it is wise to use this particular intervention in a specific context. For many mediators, the feeling that they need to do something all the time is a big pitfall. Ask yourself regularly during a mediation whether it is useful to intervene at that particular point in the mediation, whether you (and not the parties) are the only one who really works during the mediation, or whether the parties are engaged in a productive discussion so that it is wise to just watch and see what happens. Finding the perfect balance in a mediation is the big challenge. It means being directive enough to control the process without letting the communication be inappropriately dominated by the mediator (f.e. constant active listening).

Owners manual of the Toolkit Mediation. Generating Outcomes as Mediator and Negotiator

At the start this book you find a checklist with four rows that provide an overview of the tools mediators or negotiators have at their disposal. This overview is elaborated in the book. The technique, method or situation is described or presented in a checklist or model. The technical application of an intervention is illustrated by an example.

This book is a toolbox: it is not necessary to read it from cover to cover in order to benefit from it. You can browse by using the checklist and the icons. Accordingly, only the tools that are needed at a specific moment can be extracted from the book.

With the help of icons each chapter contains cross-references to other parts of the book where more detailed information can be found on a specific topic or related topics as well as references to other literature or to web addresses. With the help of the 'discussions' icon, contradictory views on a subject are pointed out. Moreover, the toolkit contains many practical hints.

Overview of the icons



'Technical' application and explanation of an intervention, technique or method.



Recommended literature dealing with a theme more in-depth.



Hint.



One-on-one discussion: caucus or negotiation.



This item is elaborated in another part of the toolkit.



This item is elaborated in another part of the toolkit.



Discussions on this issue/ contradictory opinions.



Website for more information.



Definition