



Mediation Basics

Podcast Transcript

Prevention and Protection a United Educators Risk Management Podcast

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HEATHER: Hello, and welcome to Prevention and Protection, the United Educators Risk Management Podcast. I'm Heather Salko, senior risk management counsel and today we'll be discussing mediation basics. Joining me is Tracy McPherson, senior claims counsel. Welcome Tracy.

TRACY: Thank you, Heather.

HEATHER: Before we get started, I want to let listeners know that in addition to this topic you can find other podcasts and risk management publications on our website, EduRiskSolutions.org. Prior to working in risk management, I worked in the United Educators claims department. And as part of the normal course of handling claims, settlement discussions often arise and mediation is often presented as an option to resolve those claims.

When the topic of mediation did arise, I heard some common questions including:

- What is it?
- How do we do it?
- Where will it happen?
- Is it going to cost me anything?
- Who from the institution is going to participate?
- Is someone going to force me to settle?
- How does that even work?

A lot of people don't know much about mediation, so we are here to demystify the process a bit today. Tracy, can you tell us what mediation is?

TRACY: Mediation is a way of resolving disputes outside of formal litigation. It's a form of alternative dispute resolution that uses a neutral party to guide the negotiations. Often mediation comes up during the course of litigation as a tool to resolving the dispute sooner and to avoid the pitfalls of litigation. Sometimes court sponsored settlement conferences with a judge take on many of the same characteristics of mediation.

HEATHER: But mediations aren't always with a judge, so that brings us to the question of who is this mediator we hear so much about. It's the person who is the neutral party, who has been trained to conduct mediations and that person can be a judge, often is a retired judge in my experience in handling claims. More often, it's a lawyer who has agreed to do this or has that as part of their professional practice. And that mediator is generally agreed upon by both parties. Tracy, is the mediator paid?

TRACY: Yes, the mediator is paid and often times the parties split the cost of mediation, but like all elements of mediation, that too can be negotiated.

HEATHER: Can we also negotiate where the mediation takes place?

TRACY: Sure. That's the beauty of mediation. All elements to it are flexible and really up to the parties. Typically, the mediation happens at the mediator's office or some other neutral place that is not the plaintiff's home office, or not the defendant's office but a place that's neutral to the parties.

HEATHER: Can the parties have it in court if they would like?

TRACY: Yes, the court will often times make offices or space available to parties to have a mediation because of course, the court is also interested in having the case resolved.

HEATHER: Great. So, we've heard a lot about flexibility already and that is really one of the beauties of the process of mediation. What I find a lot of people really like best is that the mediation itself is not binding on either party once they agree to attend.

TRACY: That's right. Unlike litigation or arbitration, which are binding on the parties, mediation is not. Parties can enter in the morning with the very hopes of getting the case resolved but find during the day that it is not possible to resolve the case that day and no harm, no foul.

HEATHER: People just keep going on with the litigation as though the mediation had not happened?

TRACY: That's correct. They can certainly do that. We do find though that once a party starts the process of mediation, very often, even if it doesn't resolve that day, it will eventually resolve.

HEATHER: And you did mention process, so I think it's time for us to turn now to that topic of the process of the actual mediation. Who participates in the mediation, besides the neutral mediator?

TRACY: Well, typically each side has a party representative and of course, our member institutions, colleges and universities, one or two people from the institution will show accompanied by their attorney. If they're not represented then they, of course, don't have an attorney with them, but in our experience, parties are represented routinely at mediation. It does not include witnesses. The mediation is not a place where parties present evidence or testimony.

HEATHER: So it's not a hearing, it doesn't take that form.

TRACY: No, it is not a hearing.

HEATHER: So, does anything happen before the people come to mediation on that day?

TRACY: Very often, the mediator will ask each side to present a written statement giving a rough outline of their position about the case. Sometimes those statements are exchanged between the parties. Sometimes they are provided just to the mediator confidentially.

HEATHER: So the mediator comes with a body of knowledge. My experience is that the parties typically get together in a room at the beginning of the day. They may or may not speak with one another but that is the opportunity for the mediator to explain to everyone what he or she expects from the mediation, their particular ground rules for how the day will be conducted. What their personal—they, the mediator—their personal preferences are in terms of how they like to communicate. And then they will often give the parties an opportunity to speak to one another if they do choose.

TRACY: That's correct. And as you point out, that can be beneficial to that particular mediation. In other cases, the parties are at such discord that speaking to each other or exchanging any sorts of discussion is not in their best interest.

So as we've emphasized throughout our talk this morning, Heather, all of those points can be negotiated. The parties can agree not to be in the same room from the very beginning, but as you point out, very often there is a short opening session where everybody's in the same room.

HEATHER: Yes. And then after that opening session, the parties will split off and the mediator engages in what we typically call shuttle diplomacy. He puts the two litigating parties in separate rooms and he or she moves between them conveying offers and counteroffers for as long as it really takes for that entire day, if need be.

TRACY: Right. As long as the parties are willing to stick it out, the mediator is there to guide the negotiations by being the messenger for the respective offers and demands. Sometimes the mediator will use his or her abilities of persuasion to guide the negotiations, but as a general rule, that mediator is a neutral party. He's not there to rule, or to decide, or determine whether or not one party or the other has the stronger case.



HEATHER: Yes. So then settlement negotiations continue until there is either an agreement reached or an impasse. And the mediator will occasionally make a settlement recommendation if it looks like the parties are deadlocked. But again, the parties are free to accept or reject that mediator's recommendation, which is often just based on the mediator hearing the positions of both parties, seeing where they are in negotiation, and really trying to help everyone find a final settlement that would make everyone satisfied that day.

TRACY: Yes. That's exactly right, Heather.

HEATHER: So if there is an agreement, Tracy, what happens?

TRACY: Well, typically what will happen is the parties will agree right then and there to a writing of the essential terms of the agreement. For example, the amount of money; if it's, for example, an employment matter, whether or not the employee is going to be returning to work or not returning to work, just the very basic essential terms.

And then the parties' lawyers will go back at the conclusion of the mediation over the next week or two and negotiate a more fulsome, thorough written agreement that the parties would execute later on.

HEATHER: If the parties don't reach an agreement on a settlement that day, what happens?

TRACY: Well, they go on about their business and the litigation continues in the ordinary course. As I mentioned before, the terms of the mediation or the points that were exchanged during the mediation remain confidential. They can't be introduced as evidence at the trial, but also we find that the discussions that were started at a mediation will also continue. And many times will result in an agreement sometime later.

HEATHER: So we've answered the very basics of what mediation is, who does it, and who participates, the fact that it is not binding, where it takes place and the general process of the mediation day. I think the last thing we need to talk about and our listeners might be interested in are, you know, we hinted at this a little bit, but what are the true benefits of going to mediation?

TRACY: Well, there are many. First and foremost, as you have emphasized, the parties have the ability to control the outcome of their dispute. They don't have to rely on a judge or a jury. They get to control the outcome. They also get to control the process. They can negotiate the terms of the mediation and how it's going to play itself out. So that inevitably has a cost benefit as well because when the parties are in control, they get to resolve the matter on their terms and typically much sooner than the litigation process itself would allow.

HEATHER: And litigation can be not only costly as we keep saying, but a huge distraction for those people on campus or in a school who are going to be involved in answering, discovery, appearing as witnesses, and perhaps having to attend a trial. So there are benefits outside of monetary savings, in terms of time and energy of personnel who can be better devoted doing their actual jobs instead of litigating on behalf of their institution.

I think one of the last things I really do like to emphasize to members when I talk to them about why mediation makes sense is it truly does avoid any risks if you are able to reach an agreement. It is just over and done with, everyone moves on and then finally, it actually can lead to settlement faster. Chances are your case is going to settle, is that correct?

TRACY: Yes, in our experience at United Educators, the vast majority of our matters settle before litigation.

HEATHER: And have you found it to be a useful tool?

TRACY: Yes. Mediation is one of our most useful tools. We, in fact, often consider the appropriate time for mediation when we are developing strategy for all of our claims.

HEATHER: Wonderful. Well, unfortunately that's all we have time for today. We could talk about mediation for a long, long time. And we at United Educators do hope that you as a listener have learned the basics about mediation, and have found this to be an interesting topic, and helpful to your work managing risk on your campus. Let me remind you that you can find additional resources on our website, EduRiskSolutions.org. Finally, I'd like to thank Tracy for joining me today and for her expertise.

TRACY: Thanks, Heather, my pleasure.

HEATHER: From United Educators Insurance, this is the Prevention and Protection Podcast.



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