

Selecting The Most Appropriate Process

The goal of dispute resolution is to resolve a dispute as efficiently and effectively as possible, in a manner which takes into account both the nature of the dispute and the goals, needs, and interests of the parties. This includes consideration of which process is most likely to result in a “good” outcome, that is, one that is fair, wise, efficient, enduring, and implementable.

There are a number of helpful guides to selecting a dispute resolution process. These include: the parties' goals, timing (the procedural status of the dispute), outcome control, formality and cost, relationships, and personalities.

In addition, because mediation is increasingly becoming the dispute resolution process of choice, criteria for evaluating when mediation may and may not be appropriate are outlined.

(a) Guides in Choosing a Dispute Resolution Process

(i) Goals

- * What would you like to achieve as a resolution of your dispute?
- * Which process or processes are more likely to help you attain your goals?

If the parties want a public pronouncement of rights and responsibilities; an opportunity to take the witness stand to protect a reputation interest; a legal precedent; or a formal written enforceable decision, adjudication is appropriate. On the other hand, if the parties want more than traditional legal remedies, such as improved communication, preservation of a relationship, an apology, a change in attitude or behaviour, or the creation of a framework for resolving future disputes, consensual processes such as negotiation or mediation are more appropriate.

(ii) Timing (Procedural Status of the Dispute)

- * Has litigation been commenced and, if so, at what stage is the dispute in the litigation process?
- * What information do you need to be better able to assess the strengths and weaknesses of your case?
- * Is it important that discoveries be completed before settlement attempts are made?

Consensual dispute resolution processes work well at many stages:

- * Prior to commencement of litigation, processes like negotiation and mediation avoid the polarization and positional rigidity often generated by filing a claim.
- * Early in the litigation process, mediation can be used to assist the parties in shifting the climate to a more collaborative approach; clarifying the issues in dispute; assessing the strengths and weaknesses of their cases and the other side's case; designing a settlement process tailored to their needs; becoming more aware of the impact of continuing the conflict on each side and the “costs” of not settling the

dispute; and moving toward a recognition that negotiating their own settlement will benefit them (their businesses, their families, etc).

- * Mediation also works late in the litigation process, especially if the parties are disillusioned by the costs and delay, and have been shaken in their confidence that they will succeed at trial.

Processes such as fact-finding, early neutral evaluation, and arbitration are most economical if used early in the process, before discoveries and pre-trial conferences. Mini-trials and summary jury trials, typically used in complex cases, are most effective after discoveries are completed so everyone has the information needed to evaluate the case fully.

(iii) Outcome Control

- * To what extent do you wish to retain control over the outcome of the dispute?
- * Do you want to be involved in creating your own solutions?

Consensual processes such as negotiation, mediation, and those where third parties give decisions which are non-binding or advisory in nature, such as early neutral evaluation and mini-trials, permit the parties to accept or reject proposed solutions. Disputants lose control over the outcome in adjudicative processes, but obtain the certainty that the dispute will be resolved, whether in their favour or not.

(iv) Formality and Cost

- * Do you desire a more formal or more flexible process?
- * To what extent is cost a factor in selecting a dispute resolution process?

Consensual dispute resolution processes are often more flexible and less formal, since they rarely employ fixed rules or procedures. Disputants often find them less stressful, quicker at obtaining a resolution, and less expensive. One economic advantage of mediation is that parties may attend without their lawyers so that they are only paying for the services of the mediator. On the other hand, a less formal process may be abused by parties more easily, may not adequately protect parties' legal rights, and may not provide an adequate check on power imbalances -- possibly leading to unfair agreements.

(v) Relationships

- * Do you wish to preserve and maintain an ongoing relationship?
- * Do you want to learn how to better communicate and problem-solve with the other party(ies)?
- * How do you feel about having a face-to-face discussion with the other party(ies)?

One of the most important factors in choosing a dispute resolution process is whether or not there is potential for an ongoing relationship between the parties. Disputes involving ongoing relationships (for example, divorcing parents, family business disputes, disputes involving wills and estates, many commercial disputes...)

are suitable for a form of mediation which assists participants to communicate, problem-solve, and build for the future. In contrast, tort lawsuits, such as those involving personal injury or property damage, where there is no past or future relationship, may benefit from an evaluative form of mediation or an adjudicative process.

(vi) Personalities

- * What are the personalities of the disputants, their attorneys, and the potential providers of dispute resolution processes?
- * How risk averse are the disputants (i.e., how much do they desire certainty and predictability)?
- * To what extent, if any, do disputants want an opportunity to express feelings?
- * Are the parties able to communicate clearly?
- * What are the negotiation styles of the solicitors involved?
- * Do the parties want the assistance of someone with expertise in the subject-matter of the dispute?
- * If the parties are considering an informal, consensual process, what role should their legal representatives play?

Some disputants want a clear structure and firm control; they do not want to meet the other disputant(s) face-to-face to work out their differences; and/or they want a decision made by a third party with “authority” or “expertise.” Others may feel constricted by a formal structure; they may prefer a process where expression of feelings or empathy and the preservation of ongoing relationships is encouraged; and/or disputants may view themselves as the “experts” in matters concerning their disputes and, therefore, as being in the best position to generate and select options for settlement.

(b) Factors to Consider in Deciding Whether to Mediate

The following list of guidelines are meant to assist you in deciding whether mediation is an appropriate process for a particular dispute. While none of the criteria listed below are a pre-requisite for a successful mediation, their presence will tend to enhance the likelihood of reaching a mediated resolution.

Mediation may be appropriate where...

1. The parties have the ability and desire to move from an adversarial interaction to one which will support joint problem-solving and a mutually satisfying resolution.
2. The parties agree that the timing is right to work toward resolving the dispute (i.e., they have the information they need; they are emotionally ready to try to resolve the dispute; the damages are quantifiable...)
3. The number of parties and/or the complexity of issues makes direct negotiation difficult or impossible.
4. The parties desire to resolve the dispute in a private forum because confidentiality is a concern and the parties want to avoid publicity or media coverage.

5. The parties seek improved communication and wish to preserve their relationship.
6. The parties desire a timely resolution of the conflict.
7. The amount in dispute is small in relation to the cost of litigating.
8. The parties wish to create a framework for resolving future disputes.
9. The parties seek broader solutions than can be obtained in court (either because the legal remedies are inappropriate or there is no legal remedy available).
10. The outcome at trial is unpredictable and the parties do not want to risk obtaining an unfavourable decision.
11. The parties wish to maintain control over the outcome of the dispute as opposed to authorizing a third party to decide.
12. The parties agree that there is some productive objective for engaging in mediation, even short of full settlement (i.e., clarification of facts, issue identification, information exchange, settlement of certain issues...)

Mediation may be inappropriate where...

1. A legal precedent or a formal public judicial pronouncement on the issue(s) is required.
2. The claim involves allegations of fraud, bad faith, delay or harassment, or there are serious credibility issues (i.e., it is more important to fix blame/find fault than attempt to resolve the dispute).
3. There are philosophical or factual matters in dispute which do not allow for compromise.
4. A rights-based determination will effectively resolve the dispute.
5. Public vindication is required to protect a reputation interest.
6. There is a history of violence or one or more parties are afraid to discuss their needs in a face-to-face encounter.
7. The level of mistrust between the parties is so deep-seated that neither would believe anything said by the other.