



## Mediation Unit of the Office of the Ombudsman for UN Funds and Programmes

### SHORT GUIDE FOR MEDIATION LAWYERS AND PARTIES REPRESENTED BY LAWYERS IN MEDIATIONS

#### What is mediation?

Mediation is a voluntary, informal, and confidential process, which takes place with the consent of all parties involved. In mediation, a trained neutral person, a mediator, assists the parties to work toward a resolution of a dispute with the parties themselves remaining in control of the final decision.

#### What is the role of the mediator?

A mediator is impartial and independent and does not have any personal interest in the outcome of the dispute. Their role is to create a confidential and safe environment, which encourages all parties to participate in a problem-solving process. A mediator is not a judge or arbitrator and does not determine the final outcome of the dispute. A mediator uses their skills to allow the parties to be heard in a respectful, non-judgmental way, and assists them in reaching their own solution.

#### Are parties required to be represented by a lawyer in mediation?

A lawyer is not required to participate in mediation. The parties often represent their interests in mediation themselves, especially in the United Nations context. That said, if a party wishes to engage a lawyer to represent -their interests in the mediation process or to draft the final settlement agreement, such party is encouraged to do so, especially at the stage of drafting the terms of the settlement agreement.

The lawyers that represent the interest of the parties in mediation, as opposed to in court proceedings, should have a different set of skills beyond those typically required of attorneys representing clients in the adversarial proceedings such as courts. These skills are not inherited, they are learned and practiced. Below is a summary of skills that these lawyers should have to be successful.

#### What are the skills that lawyers should have when representing their parties in mediation?

##### 1. *Trustworthy*

One of the main assets the mediation lawyers have is trustworthiness. The lawyers that have built a reputation of trustworthiness would have the confidence of the clients and the other party, making it easier to achieve a settlement faster and efficiently. For example, trustworthiness can be demonstrated when a lawyer truthfully states in mediation that the offer that is being proposed in mediation is the final offer of their client.

## 2. *Active listeners*

Lawyers in mediation should be good listeners, paying attention to everything that is said, and removing the victimization or demonization to the other party from the communication. Active listening enables the parties to feel heard and to reciprocate in the same manner, creating trust and credibility. Being an active listener is not an easy task, and as Ernest Hemingway said, “most people never listen”. Active listening allows them to understand the other party and/or at the very least to know what their interests are. Research shows that 93% of what we communicate is non-verbal. This means that a good lawyer in mediation practices “active listening” while observing body-language, the facial expressions, the tone, and silence.

## 3. *Prepared*

It is fundamental for the lawyers participating in the mediation to prepare for negotiations and think through and anticipate the different possibilities that may come up with their party. It may be that the client would like to have a joint session or a private session (i.e. confidential time during the mediation without the other party or his/her lawyer being present). Accordingly, lawyers will benefit from learning adaptability and flexibility in order to respond to requests and questions from their clients and the other party. They need to be prepared to respond to the multiple options, both as to the process and substance, that can be presented.

How can a lawyer can prepare for mediation?

- i. They can have a pre-mediation call with the mediator prior to the mediation session. This call will normally be set up by the mediator, but it can be requested as well such as by lawyers;
- ii. They should ensure that the confidentiality agreement covers all important aspects of the case. They should also prepare a term sheet with appropriate release language and make use of visuals because sometimes they may help the other party to contextualize the situation;
- iii. They should prepare a mediation brief. Lawyers should provide the mediator with all the advocacy points needed for the case and that they wish to present and be considered;
- iv. They should think of creative initial offers and demands, which could be made in consultation with their clients. They should also consider non-monetary factors in their offerings or demands, such as an apology;
- v. They should also prepare their client before the mediation session, e.g. by informing them about the process, what may happen, and other key aspects like joint sessions and private caucuses;
- vi. Joint sessions are generally encouraged. They are used for breaking the ice, establishing the way forward, and can expedite the process;
- vii. They should not finalize the session without some type of progress, whether as to the process or substantive matters. There will be moments where parties will get frustrated or where settlement does not seem feasible but remember that agreements can happen right after the worst moments. To that end, it is important that a

mediation lawyer always stays optimistic and persistent. Lawyers in mediations will prepare and identify innovative resolution options and will not finalize the session leaving the parties hopeless of a settlement, including by informing the parties of other available options and next steps.

#### **4. Empathic**

Lawyers in courts are practiced in stating their arguments, while undermining the arguments of the counterparty., This approach is not useful in mediations; where the goal is to reach a mutually determined agreement. Being empathic in a mediation setting means to understanding the interests of the other party and being open to considering resolutions that will meet those interests, as well as your clients.

#### **5. Creative**

Lawyers that represent parties in mediations need to be innovative on the options and possibilities that they could offer their clients, generate with them, and eventually the counterparty. Litigation often does not allow the same level of creativity as alternative dispute resolution processes. In most litigated cases, the dispute is narrowed down to a number or other resolutions, which benefit only one party. Mediation offers multiple options, and multiple factors are identified that play a role that could be important for both parties in order to reach an agreement. Parties usually have complementary interests, and this opens the door for the lawyers participating in the mediation to offer creative solutions to reach a common ground.

#### **6. Flexible**

Lawyers in mediations assess the situation and strategize their negotiation depending on the features and progress of the process. They can change their approach throughout the process as well as make use of the different tools available to them. This is key, particularly in cross-cultural mediations given that different values, beliefs, and morals are involved, as it would happen often in the context of the United Nations.

#### **7. Self-aware**

Effective lawyers in mediation reflect on the approaches they use and how they communicate with their clients and the mediator. They should seek feedback and be mindful of gender, race, ethnic, and other intersectional cultural issues.

#### **8. Confident**

Lawyers in mediation should be confident about their clients' case and interests but at the same time be open to admit the weaknesses of the case. Mediation lawyers should understand their client's case thoroughly and clearly communicate its strengths and weaknesses to their clients and when appropriate to the mediator.

#### **9. Patient**

Mediation usually takes more time and energy than expected; it could be physically taxing, and there would be moments where the parties become frustrated or angry. Lawyers should be patient and resilient, but at the same time, they should also know when to take a break from the negotiations or when to finalize them.

As you can see, mediation is an art and a skill that can be learned with a lot of practice. Effective mediation lawyers will be able to bring the interests of both parties to a common ground of understanding which will lead, hopefully, to a settlement agreement that would satisfy both parties' interests<sup>1</sup>.

We hope that this material provided useful information on the key skills that lawyers should have to successfully represent their clients in mediation. If you would like to know more about our office and the role of mediation to solve a dispute you may be involved in, do not hesitate to contact us at [mediation@fpombudsman.org](mailto:mediation@fpombudsman.org); or visit our website at <https://fpombudsman.org/>. You can also check our course on “Managing conflict effectively in the United Nations Workplace” at <https://fpombudsman.org/online-course-managing-conflict-in-the-un-workplace/>, or in your LMS platform if you are a UN contract holder.

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<sup>1</sup> This note has been prepared based on the article by Hon. Daniel H. Weinstein titled “*Reflections of a Leading Neutral on Mediation Advocacy*.”