

# ENVIRONMENTAL ROUNDTABLE

non-profit organizations, and many other creative means to reaching a resolution that best satisfies each party's interests.

Mediation works because the goal is to reach a resolution that everyone can live with, not winning a lawsuit. Since the parties in a mediation session are discussing their interests that matter most to them, they are more likely to reach a satisfactory resolution. In light of these considerations, expressing an interest in mediation to the opposing party should not be construed as a sign of weakness, but a sign of common sense.

## When is mediation appropriate?

Although mediation can assist parties in reaching settlement or at least narrowing the issues in most cases, it will not work in all scenarios. For example, it is not likely to work if one party is attempting to establish or expand a legal precedent or both parties zealously believe the interpretation of the law supports their positions. In those situations, an initial judicial determination may be necessary before any mediation sessions could be constructive.

If a party is not sure whether to pursue mediation, one option is to have a mediator perform a conflict assessment or initial screening to determine whether mediation or some other form of collaborative decision-making may help the parties resolve their differences. In a conflict assessment or initial screening, the mediator conducts confidential conversations with the parties to explore whether there is any common ground between the parties' initial positions, the willingness of the parties to consider alternative means to meet their interests, the parties desire to reach settlement and avoid litigation, and whether there are any barriers to using mediation. Without disclosing any confidential information, the mediator recommends whether mediation or some other form of collaborative decision-making would likely be constructive. Ultimately, the parties choose which avenue to pursue.

## Types of mediation to consider

Should you decide to pursue mediation, the next step is hiring a mediator. While there are different schools of mediation, like facilitative mediation and evaluative mediation, any mediation has core concepts in common that include a neutral mediator and a voluntary and confidential process where the parties determine the outcome.

## During what stage of a case is mediation most appropriate?

*Mediation can help parties reach mutually satisfactory settlements at any stage of a dispute. Nevertheless, there are advantages and disadvantages to mediating a case during the pre-application stage, post-application pre-hearing stage, and appellate stage.*

	Advantages	Disadvantages
<b>Pre-Application Stage</b>	Developer is most flexible because it has less of an investment in the current proposal.	Technical issues may be difficult to assess, especially to project opponents who may not yet have retained experts.
<b>Post-Application Pre-Hearing Stage</b>	Project becomes more tangible and issues become more focused with the filing of the application. Parties not yet likely entrenched in positions.	Parties may be busy preparing for hearings. Technical reports from experts may not be completed.
<b>Appellate Stage</b>	Decision may have clarified some issues, narrowed issues actively disputed, and served as a catalyst for further discussions.	Parties have already spent considerable time and invested substantial resources in the process and may now be completely entrenched in their positions. Parties may have also damaged relationships in litigation process.

In facilitative mediation, the mediator takes an active role in structuring and controlling the process to assist the parties in reaching a mutually agreeable resolution. However, the facilitative mediator does not make recommendations to the parties, give his or her own advice or opinion as to the outcome of the case, or predict what a court would do in the case. The mediator is in charge of the process, while the parties are in charge of the outcome.

Evaluative mediation on the other hand, is based on the belief that mediators with expertise in the issues in conflict can help the parties reach settlement if the mediation gets "stuck" by confidentially assessing the weaknesses and strengths of their legal positions. Evaluative mediators believe that an objective "weather report" of a parties' likelihood of success in court could provide additional clarity that may make a settlement option more or less attractive compared to going to court. In evaluative mediation, the mediator controls the process and may also suggest solutions for resolving the conflict.

While there are differences in these approaches, many mediators use tools from

each school of mediation depending on the facts and circumstances of the dispute. In interviewing a mediator, it is important that the parties find a mediator that they believe will best assist them in resolving their dispute.

Until they actually participate in a mediation session, some lawyers and engineers may continue to question the value of mediation and whether it would be helpful in their particular case. When I was an attorney at the Environmental Board, I witnessed countless cases that would have benefited from mediation but instead ended up in protracted litigation. While I respect and value the importance of due process, every marginally controversial land use application need not take several years to wind its way through the appellate process at a tremendous expense to the parties. There is no question that mediation will not be able to resolve every environmental and land use dispute. But given the real possibility of reaching a resolution that all parties can live with at a fraction of the time and cost of litigation, mediation should be considered in every case.

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