

# ***BETTER ACCESS TO JUSTICE IN TURKEY CONFERENCE***

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## **WORKSHOP**

# **MEDIATION ADVOCACY: SUCCESSFULLY REPRESENTING CLIENTS IN MEDIATION**

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# Program Workshop Mediation Advocacy

- Introduction of the advocate's role in mediation
- Referral to mediation, court connected mediation
- Factors favoring and disfavoring the use of mediation: when to advice clients to mediate?
- Mediation advocacy: success factors in representing clients in mediation



# Mediation advocacy

Representing a client in mediation  
instead of representing a client  
during court proceedings



## Assumptions of litigators

- The parties' relationship has ended (irreversibly).
- Creative/interest based negotiation is good, but in this case impossible: the other side cannot be trusted and /or is incompetent.
- The goal: get the best outcome for *your* client, (usually considered in terms of money).
- The negotiation routine: adversarial & positional. Lawyers argue who has best legal case and exchange money offers.



## Advocacy changes in mediation:

- Prospect to talk directly to other party
- Opportunity to look for interests and search a creative solution based on those interests  
(focus on *both* parties' real need)
- Sustainable solution to which both parties can agree



## Negotiation changes in mediation:

- Two (or more) negotiating partners:
  - The other side
  - The mediator
  - (Your own client)
- Clients are usually present
- Sometimes parties are separated



# Referring cases to mediation

What are the 3 most important success predicting indicators for referral to mediation?

(according to the research in Dutch court connected mediation programs)



- The parties want to resolve their dispute.
- They are willing and able to negotiate the conflict or at least they want to discuss it (negotiating space).
- The conflict is not extremely escalated.



## Success predicting motives

- Want to retain control over outcome
- Look for a quick solution
- Look for a economic or business result
- A legal ruling will not resolve the conflict

### Combination of factors:

- 70-90% settlement rate (i.o. 75%)
- High level of satisfaction
- Short lead time, little mediated hours



# Mediation advocacy

Representing a client in mediation  
as a lawyer: 'often preferred'





## For best results ...

- Be an “active customer”, the mediator is there to help you and your client reach a beneficial outcome.
- Think about: What can the mediator do for me and my client?
- And use the full potential of the process



## Use the full potential of the process 1

- The mediator has power over the process: who talks to whom, joint sessions or caucus, when will what issues be addressed, etc.
- Use that to your advantage:  
e.g. ask the mediator to focus discussion on your key issues, or emphasize your clients goals (money, business interest, relationship)



## Use the full potential of the process 2

- Use the mediators's neutral role =>
- Use the mediator as an evaluator to break impasse on content =>
- Mediator will help counsel, as long as it does not:
  - Forces him to take sides, jeopardizes his neutrality
  - Negatively interfere with the process (e.g. spoil the chances to reach a settlement)



## Use a mediator's neutral role

- Ask the mediator to offer your proposal or argument as his own
- Ask the mediator to confirm the fairness of an offer
- Ask the mediator to deliver undesirable information to the other side – or to your own client



# Use the mediator as an evaluator 1

1. Do you really need the mediator to evaluate?

- Is the real blocking issue disagreement about a legal or content issue?
- Will the mediator's evaluation solve the problem?

2. If the answer is NO: think again.



## Use the mediator as an evaluator 2

### 1. What kind of opinion do you want?

- Mediator's *personal view* of the fair result (No!)
- An *expert judgment* about what "really" happened (No)
- What is needed to break the *bargaining* impasse (Frequent)
- A *prediction* of the likely result at trial (Maybe)



# Lawyers' role in a mediation

- Mediator does not decide, => no need to be convinced (with legal arguments):

**Plead or legalize.**

**Try to win the mediator over to your side.**

**Ignore the other side and their interests.**

**Bounce with clients' emotions.**

**DO NOT**

**DO**

- Convince the other party!
- Make sure all interests are being dealt with.
- Client is party, lawyer is coach/sparring partner: have facts on file, support, time-out, legal check, brainstorm options.

**Remember**

- THANK YOU!
- Charts downloadable:

[www.adrcenter.com/international](http://www.adrcenter.com/international) Turkey

