

MEDIATION GUIDE

Introduction:

1. The aim of this guidance is to give information to those who are new to mediation on what to expect. It is also hoped that it will give some assistance to those more experienced in mediation on what to expect in particular cases. Textbooks have been written on the mediation process and this guide can be no substitute for a more in-depth consideration of the process. What is intended is a simple and straightforward overview rather than a comprehensive study.

Mediation Process:

2. One of the strengths of mediation is the flexibility of the process to adapt to the circumstances of the individual parties and the particular dispute. Essentially, the mediator's role is to assist the parties to a dispute in exploring how the dispute can be resolved without a Court Hearing. Time is set aside for the parties to meet in circumstances where the mediator manages the process and assists the parties through direct and indirect discussion.
3. Fundamental to this process is that it is confidential and without prejudice to any Court or similar proceedings that may commenced or may be already underway.
4. There is no rigid procedure. Most frequently mediations are scheduled at a time and place convenient to all the parties usually, but not essentially, with a day set aside for the purpose.
5. Each party will normally have a private meeting room allocated to them for the occasion and a joint meeting room, capable of accommodating all the parties simultaneously, should also be available. In most cases the mediation commences with an opening joint meeting, discussed below. In practice the mediator will often meet with the parties in their private meeting rooms to ensure that everything is ready prior to the opening joint meeting taking place.

6. Prior to the mediation the parties will be provided with a Mediation Agreement that governs the process. The Agreement will normally be signed prior to the mediation or the parties will attend on the mediation day on the basis that the Agreement will be signed at the outset.
7. It assists the mediation process if each party is asked to produce a case summary. The contents of the case summary are discussed below. Parties are encouraged to exchange the case summaries between them, prior to the mediation day, as well as supplying their summary to the mediator.
8. The mediation process is confidential; an additional level of confidentiality attaches to private discussions with the mediator. Meeting privately with the parties the mediator will make clear that these private discussions are confidential and that nothing will be taken by the mediator and disclosed outside the room, without the consent of the people present. This additional layer of confidentiality is intended to enable parties to speak candidly with the mediator. This facility tends to improve the prospects of a resolution, despite confidentiality remaining in place. On this basis, prior to the mediation, there is no reason why a party cannot send documents on a confidential basis, including additional comment to assist the mediator, stating that it is not to be disclosed. It is wise to mark any such document clearly as being confidential and for the mediator only.
9. The basic structure of mediation, as the process is developed, is that the mediator will see the parties jointly, as in the opening meeting, or privately in their separate meeting rooms. Because the process is flexible the meeting arrangements can be changed with the consent of the parties so that the mediator can hold such meetings as seem appropriate to assist the process including seeing individuals on their own or holding joint meetings, for example, just with clients or lawyers. Obviously, such meetings are only held with the consent of all concerned.

Case Summary:

10. The Case Summary is not a formal document and is prepared solely for the purposes of the mediation. Its principal purpose is to outline for the mediator the issues that are likely to be discussed and the view being taken of the case. Because other parties to the mediation will normally see the Case Summaries it is an opportunity to set out to those other parties the view being taken of the case for the purposes of mediation.
11. The contents of the Case Summary are exclusively a matter for the party preparing it and their legal representatives, if appointed. As a guide to its contents it is helpful if the following matters are dealt with:
 - 11.1 An introduction to the background to the case setting the matter in context.
 - 11.2 The basic facts leading to the dispute, setting out how the dispute has arisen.
 - 11.3 An outline chronology.
 - 11.4 Identification of the people involved in the case, including, where appropriate, their title and role in a Company or organisation involved in the dispute.
 - 11.5 The principle legal issues.
 - 11.6 A summary of the areas of agreement and difference between the parties on matters of law and fact.
 - 11.7 The negotiation history. (Because the mediator is primarily facilitating a discussion and not acting as a Judge it is not necessary to conceal details of any offers that have been made even if these have been under Part 36 of the Civil Procedure Rules.)
 - 11.8 An outline schedule of any financial claim and a counter schedule is also of assistance.

Agreed Bundle of Documents:

12. Parties should try to agree the contents of the Bundle to be used at the mediation. It is not essential that the parties agree this; however, it should not normally be an area of difficulty. The Bundle should contain the core documents that the mediator needs to see in order to understand the principle issues in the case and be prepared for the mediation meeting. It is not necessary to provide the mediator with comprehensive bundles of documents, along the lines of a Trial Bundle. Part of the benefit of mediation is that the formalities and scope of a Court Hearing are avoided.
13. The Bundle should, in essence, be a core bundle containing the principle documents, for example any written agreement upon which the dispute is based. If Court proceedings are underway then the main Court documents, such as the Claim and the Defence should be included. Statements from the main witnesses, if prepared at the point of mediation, can also be helpful.
14. Having said that mediation Bundle should be the core documents, the parties should not feel constrained from having other documentation available at the mediation if they feel that this will assist during the course of the meeting.

Opening Statement:

15. The opening joint meeting will usually take the form of personal introductions and a short comment from the mediator regarding the arrangements for the day and the mediation process. Each party will then be invited to make an opening statement.
16. The opening statement is not the same as the opening statement made in Court if the matter was being considered by a Judge. As with the Case Summary, what is said at this stage is up to the party making the statement although some guidelines may assist.
17. This is the opportunity to talk directly to the other party or parties in the dispute. What is said at this stage can have a significant impact on the discussions for the rest of the day. Although each case is different, it is the chance to persuade the other party to listen to you and really understand your perspective on the case.

18. The opening statement does not have to be lengthy and can be described as 'opening comments'. It is helpful to highlight the principle issues which need to be discussed in order to explore how a resolution might be achieved. It can also be helpful to say something positive about attending the mediation; perhaps indicating that you approach the mediation with an open mind.
19. There are no rules that say that opening statement can only be made by the senior lawyer for a party or that only one person may speak. Many effective opening statements are made by the parties themselves rather than the lawyers. What is generally important is that what is said has been considered before the meeting, particularly in terms of its likely impact upon the other parties to the dispute.
20. The basic rule, for everyone to observe, is that each party listens to the opening statement of the other parties without interruption on the basis that in their turn they will be listened to in the same way. The mediator will chair the meeting and may seek to encourage the parties to continue a dialogue around the table in the joint session before, if appropriate, inviting the parties to go to their respective private meeting rooms, as a preliminary to the mediator having a private discussion with them there.
21. The opening statement is the opportunity to communicate with the other side. It is they who need to be persuaded, not the mediator.

Other preparation for the Mediation Meeting:

22. When preparing for the mediation meeting it is important to remember that the primary purpose of the mediation is to explore a resolution of the issues in dispute. Care should be taken to ensure that all the information required to achieve this is available to each party. Additionally, each party should have at the mediation a member of the team who has sufficient authority to resolve the dispute. It is often helpful to ensure that telephone contact can be made with any other person whose input might be important in terms of finding a resolution, particularly outside office hours.

23. Mediations tend to go through three phases: exploration, negotiation and settlement. Be prepared to assess and re-assess your own case and the other parties in the early stages and recognise the need to move from exploration into detailed discussion about how any issues may be resolved. Mediation carries with it the benefit that the parties can agree aspects of a settlement arrangement that may not be available to the Court.
24. Parties will be encouraged, at least in the private meetings, to assess the alternatives to a mediated resolution. This will include assessing the prospects of success, should the dispute continue and the costs position. It is of assistance for parties to attend the mediation with at least a general assessment of their costs to date and the costs to the end of any proceedings.

Conclusion:

25. Mediation has been shown to have a high success rate in resolving many different types of disputes. By agreeing to mediate parties are entering into a process that has very good prospects of finding a resolution, often in ways which would not be available through a Court or similar Hearing. It is important to understand the mediator's role and the process. The mediator does not make a judgment as to who is right and who is wrong, but assists the parties to reach a mutually acceptable solution. Often this is the best opportunity for direct negotiation producing a quick and satisfactory solution to otherwise expensive and time consuming disputes.