

# MEDIATION? WHAT YOU NEED TO KNOW



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## What is mediation?

- It is a dispute resolution tool;
- In which the parties are assisted by a third person, the mediator;
- Who attempts to improve the process of dispute resolution; and
- To assist the parties to reach an outcome to which each of them can assent.

## Mediation can also...

- bring clarity to the situation by identifying and defining the issues;
- overcome or reduce communication problems between the parties;
- identify and acknowledge the parties' needs and interests, whether substantive, procedural or psychological;
- promote constructive and efficient negotiations;
- reduce anxiety and other negative effects of the situation so that informed and rational decision-making can take place;
- encourage the parties to take responsibility for the situation and the consequences of their decisions;
- improve, or at least not lead to a deterioration in, relationships between the parties; and
- provide the parties with a model, and some skills and techniques, for future decision-making without third party assistance.

## Issues which vary across the practice of mediation

- the length i.e. time limited or open ended,
- the degree to which the parties enter into it voluntarily or are influenced to participate, or are compelled to take part, by the legislature, courts or contract;
- the extent of the parties' choice of mediator;
- the qualifications, expertise and skills of the mediator;
- the independence and neutrality of the mediator;
- the extent and nature of the mediator's interventions;
- the mediator's responsibility towards the parties, towards outsiders, and towards standards of fairness and reasonableness;
- the degree to which any settlement is of the parties' own, consensual making;
- the extent to which the process has a therapeutic or educative function;
- the degree of confidentiality of the process;
- the extent and nature of the rules and procedures followed;
- the extent to which past controversies are canvassed and future interests are taken into account;
- the extent to which any settlement outcome reflects how a court may determine the matter; and
- the legal status of any settlement outcome.

These variables indicate why many aspects of mediation cannot be confirmed by a black and white definition. For example, confidentiality is often regarded as one of the cornerstones of mediation, but in practice different degrees of confidentiality may apply to different situations. Some mediations are confidential in all respects, but there are many situations in which all or part of what is said will not remain confidential because of the wishes of the parties, the nature of what is disclosed, countervailing principles and policies, or the orders of a court.

## What can mediation be used for?

- Mediation can be used to define which issues are in dispute and which are not. This process is sometimes referred to as scoping and is regarded as an appropriate role for mediation in some disputes.
- Most mediation takes place in the context of a dispute between two or more parties where the process is used in an attempt to settle the dispute. This can be called dispute settlement mediation.



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- Mediation can be used to manage conflict even where it is known that the conflict will continue. This form of mediation can be called conflict containment mediation.
- Mediation can be used in the process of contract formation. Here mediation is used not to assist in settling existing disputes, but to manage procedures during the negotiations, to resolve the terms of a contract and to provide ways of dealing with disputes should they arise during the future contractual relationship between the parties. This may be referred to as transactional or deal mediation.
- Mediation can be used where a public authority is required to determine policy, standards or procedures in rules and regulations. Here the process serves to allow affected parties specifically, and interested members of the public generally, to participate in and influence the policy-making process. This can be referred to as policy-making mediation.
- Both transactional mediation and policy-making mediation involve elements of conflict prevention. More generally, mediation can be used to assist parties to anticipate problems, grievances and difficulties and to plan processes for dealing with them when they arise. This can be referred to as preventative mediation. It has many potential applications in large public and private sector organisations.
- Mediation can serve a number of subsidiary purposes, for example, it can directly and indirectly educate and train the parties in a method and style of decision-making which can be used in the future. This role can be very important in an environment where conflict is common and the parties' general dispute resolution skills are limited. Where successful, it can develop the parties' confidence in managing their own affairs. Some parties use mediation as a filtering mechanism in the litigation process, that is, to evaluate the other side's facts, arguments and witnesses in order to assess how to proceed with the matter. It can be used to 'negotiate' the facts, in the sense of developing a common version of historical reality. Mediation is one part of a growing problem-solving industry which is examining and developing systems, methods and techniques of decision-making, dispute resolution and problem-solving.

## What are the pros and cons of mediation?

### Pros

- Mediation focuses on the parties' needs and interests, whereas litigation focuses on legal rights, wrongs and duties. So a judge is severely restricted in what he/she can award or decide. A judge has to stick to the pleaded cases, the evidence and the law. Mediation knows no such restrictions with the result that much more creative, beneficial and fair solutions tend to emerge.
- There is nothing to lose by trying mediation since litigation, tribunal and arbitration rights are not compromised. If an agreement is not reached in mediation, the parties can resort to other rights and processes.
- Mediation can deal with the situation where neither side wants to make the first move for fear of appearing weak or neither side wants to make a concession or put any of its cards on the table in case the other side exploits this.
- Mediation can effectively deal with those disputes which are not solely about whether A owes B money and, if so, how much. Mediation provides opportunities for creative settlement which a court, tribunal or arbitrator cannot impose. Consideration of non-legal factors (eg the need to save face) can occur.
- Mediation is more informal and less adversarial than other dispute processes. It is a less stressful process than a court or tribunal proceeding.
- Mediation involves simple procedures which parties can modify by agreement.
- Mediation offers potential savings in time (particularly management time) and costs. It can help keep costs within budget. It can free up management to focus on business needs and development.
- Parties can have a significant voice in the selection of the mediator. Neutrals may be selected for their expertise in the subject matter of the particular dispute. The parties can choose a neutral who they trust and respect.
- A neutral can help the parties deal with issues beyond legal issues, such as commercial and emotional issues.
- Mediation can help to preserve commercial, employment and personal relationships and confidentiality, by avoiding damaging public conflict. There is no presence of unwanted parties, such as competitors, regulatory agencies or journalists. Any challenge to the creditability of a party or its representatives will not be made public.
- No precedent is set by an agreement reached in mediation.



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- Mediation improves communication between the parties and may encourage them to adopt a more co-operative approach in their future dealings.
- Experience shows that the chances of a successful resolution using mediation are high. Even if mediation is not successful, a lot can be gained as a result of enhanced mutual understanding about the dispute or issues.
- Preparation for mediation is also preparation for any other dispute resolution process if mediation is not successful.
- Experience shows that a high rate of compliance is more likely when parties reach their own agreement in mediation, so problems with enforcement of a mediated agreement seldom arise.
- Mediation can support a progressive corporate culture.

### **Cons**

- The client may not wish or may not need to compromise
- Its another layer of cost
- Parties could use it to delay things deliberately
- Parties can use it as an excuse for a fishing expedition
- A party could use the process to circumvent the truth or to avoid full disclosure

### **What are the other options?**

- Negotiation between the parties
- Negotiation between solicitors
- Round table meetings between both parties and their solicitors
- Expert evaluation
- Arbitration
- Adjudication
- Part 36 (or other protective offer)
- Litigation
- Med-Arb

### **Civil/Commercial Mediation**

- Usually a single session although it can be a long session (small claims take on average 3-4 hours)
- Lawyers almost always take part
- The mediator often holds individual sessions with the parties and all information is confidential unless the party agrees to release it to the other side

### **When is mediation unsuitable?**

- When a precedent is needed because an area of law is previously untested or unclear.
- There is no dispute e.g. debt collection.
- An injunction is needed, for example, to prevent publication of a statement or to protect someone from violence.
- There is no wish to settle, on the part of either or both parties.

### **Choosing the Mediator**

- Mediation skills are extremely important. Choose a mediator with a recognised qualification.
- Consider the pros and cons of appointing through a recognised provider (such as CEDR and ADR Group) or selecting an independent mediator.



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- Mediation has no statutory regulation at present. A mediator who is a member of a regulated professional body such as the Law Society, Bar Council, Institute of Charter etc, etc will ensure minimum standards and have indemnity insurance.
- Check the fees structure carefully and whether it includes preparation time or additional time if the mediation runs over time on the day.
- Check if the mediator has premises. If not, there may be additional cost for room hire.
- Expertise in the particular area of law the case covers is not vital.
- The mediator needs a breadth of experience.
- The mediator should have a very good understanding of dispute resolution and be able to help document the agreement.

## The Mediation Process

There is no set process. The Mediator will guide the parties in choosing a process that works for them. A typical mediation process could entail:

### Pre Mediation

Pre Mediation contact between the parties

- To agree to a Mediation and
- To agree on a Mediator

### Pre Mediation contact – usually on the phone – between the Mediator and the parties

- To agree the terms of the Mediation – usually embodied in a ‘Mediation Agreement’.
- To ensure that the parties have exchanged key documents and that the Mediator has copies.
- To enable each party to supply the Mediator and each other with a short outline of their case to clarify the issues.

### At the Mediation

A joint meeting chaired by the Mediator between both (or all) parties and their advisors at which:

- Usually the Mediator asks the parties to start by signing the Mediation Agreement.
- The Mediator reminds the parties of the “ground rules” for the Mediation (ie that it is confidential, “off the record” and non-binding).
- Each party has the opportunity to make a statement of its own case direct to the other party or parties.
- The Mediator may chair a discussion/exploration of each party’s position (provided that this does not become destructive).

### A series of private confidential meetings between the Mediator and each individual party. During these meetings the Mediator will:

- Explore each party’s own case to ensure that the Mediator understands it
- Help each party understand the other party’s case
- Help each party by “reality testing” both the strength of their case and their best alternatives to a negotiated agreement
- Help the parties to frame realistic offers in confidence
- Obtain the parties’ authority to put offers to the other party through the Mediator or encourage them to put offers directly to the other party
- Assist the parties in considering or responding to offers

**A joint meeting, at which the terms of settlement are agreed, recorded in writing and signed. At this point the settlement becomes binding.**



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## Post Mediation

If the case did not settle on the day of the Mediation a good Mediator will contact the parties afterwards to see if (s)he can assist the parties in bridging the remaining “settlement gap”. Most mediations that do not settle on the day settle shortly thereafter.

Where the case settled on the day the Mediator should still contact the parties to ensure that all is going smoothly and to offer to help in “smoothing out” any difficulties.

## The Mediator will.....

- Give the parties hope!;
- Resist the temptation to impose a solution, which in practice could just alienate one or both of the parties;
- Seek by a range of techniques to build rapport with each of the parties which in turn leads to trust;
- Give each party the opportunity to be heard and to feel that they have “had their say”, where necessary “soaking up” destructive emotion;
- Encourage the parties to look forward, not backward;
- Encourage the parties to concentrate not on their “rights” but on their needs;
- Look for ways to “add value” or to create a “win/win” situation;
- Judge when to convey information or offers;
- Be skilled in “reality testing” techniques to enable the parties to assess their positions;
- Help the parties to assess their individual Best Alternative to a Negotiated Agreement reached at the Mediation;
- Help the parties to grieve for any unrealistic expectations.

## The Agreement

The parties are not restricted by their legal rights or the potential legal outcomes in the settlement they reach. This means that a Mediation can result in settlement on terms that would not have formed part of any court judgment but which work for the parties and;

- That create value;
- That can leave both parties “winning” (or sharing the pain!);
- That reflect the parties’ respective business or commercial needs;
- That may preserve relationships.

## How to get the most out of mediation

Try to:

- Concentrate in preparation not mainly on legal rights, but on creative settlement options;
- Arrive without pre conceived “bottom lines” which stand in the way of creative thinking and create “loss of face” issues that can block settlement;
- Come with authority to settle!;
- As far as possible, come with a realistic appraisal of the position;
- During the opening to speak directly to the other party, not the Mediator. You’re not negotiating with him/her!;
- Not give up hope. All mediations have a low point, often after the first offer is made.

**THIS LEAFLET HAS BEEN PRODUCED TO PROVIDE GENERAL GUIDANCE ONLY. IF YOU REQUIRE SPECIFIC ADVICE THAT WILL BE TAILORED TO YOUR CASE, PLEASE SPEAK TO A MEMBER OF THE TEAM.**