Beginner's Guide to Mediation

Introduction

These notes are designed to help you and give you confidence if you are asked to become involved in a mediation for the first time, or if you are unsure about any of "the basics". They relate to commercial mediation. Other types of mediation (not covered here) are workplace, community and family mediation.

What is Mediation?

Mediation is essentially an assisted negotiation. It is a voluntary, confidential and "without prejudice" process provided by a neutral and impartial third party (the mediator). The mediator works with the parties and their advisers to help them find an acceptable solution to the dispute and thereby avoid, or bring an end to, proceedings.

Mediations usually take place on an agreed date with all the parties and their relevant advisers physically present at the agreed venue. If it is impossible to get everyone together in one place, a video or phone link might also be used.

Occasionally where many parties are involved in a dispute, two mediators may work together.

Why Mediate?

Take a step back - mediation offers the parties "time out" to step back and re-examine the situation and to be active participants in finding a solution which can work for all involved.

Prevent escalation - it can prevent a difficult situation escalating into litigation, as well as bringing costly proceedings to an end.

Flexible outcomes - the parties are not restricted to the outcomes which could be achieved at court but can, if they choose, reach practical arrangements or make new legal agreements. In property disputes, this flexibility often proves useful - in access or boundary disputes, or possession claims for example.

Preserve relationships - mediation also gives parties an opportunity to rebuild relationships where that is important

Keep control – the parties are in the driving seat. They can choose their mediator (whereas you cannot choose your judge) and they have an opportunity to meet their opponents and to review and assess evidence.

Save time – court action may take a year to 18 months or more. Mediation can be arranged at short notice and in the vast majority of cases, only requires one day.

Save costs – settlement saves time and costs. See further comments below about cases which do not settle on the mediation day.

Court encouragement - in addition, mediation is encouraged by the courts and parties unreasonably refusing to mediate may be subject to costs sanctions.

When does it happen?

Mediation can happen at any time from the earliest signs of a dispute to any time during proceedings. There is no universal right time and parties and their lawyers take different approaches. As a guide, the parties will normally wish to be comfortable that they have sufficient information to make a decision without having incurred a level of cost which in itself could hamper settlement.

If proceedings are on foot, the court will usually order a stay if necessary to allow a mediation to be undertaken.

How is it arranged?

Mediation is normally proposed by one party's lawyer and if the opponent agrees to mediate then the mediation is usually arranged between lawyers, or sometimes the parties themselves. Sometimes a date is agreed first and then mediators contacted to see who is available, but often a list of names (three is usually sufficient) is put forward by one set of solicitors and the other side choose their preferred mediator from that list. The mediator or their booking clerk is then contacted and a date and fee agreed. Most mediations are booked for one day.

Once appointed, the mediator will send out a draft mediation agreement and often other documentation to help the parties prepare, as well as an invoice to each side.

It is usual for each side to be responsible for an equal share of the mediator's fee, and they are separately invoiced. Sometimes a different arrangement is made between the parties in advance of the mediation or as part of a settlement.

Where does it take place?

The mediation typically takes place at the offices of one of the solicitors' firms involved, or sometimes in counsel's chambers. Mediations are also commonly arranged at other venues offering meeting rooms, particularly if the parties and their lawyers are geographically far apart and a meeting point somewhere in the middle can be found. In some property disputes, mediation at the subject property is helpful.

In a two-party mediation, three rooms are normally required, of which one must be large enough to accommodate everyone attending in a joint meeting.

What Preparation is necessary?

This topic is not covered in detail by this note. Please see the document "Preparing for Mediation" on the Documents page of The Property Mediators website. For present purposes, you should be aware that "Case Summaries" (or Mediation Summaries) and enough paperwork to educate the mediator sufficiently about the dispute are normally provided 1- 2 weeks before the mediation date. The Property Mediators prefer to receive completed questionnaires and these are also on our site but the mediator will read whatever is provided.

Who attends?

It is important that there is someone present on each side who has full authority to take settlement decisions. Problems can arise if the true decision maker is not in the room. In insured cases, this is a common issue which may need to be addressed beforehand.

The parties and usually their solicitors will attend. Sometimes counsel and/or experts and/or other advisers will be present. Consideration should be given to whether any participants would have difficulty staying after normal working hours if necessary, or how others not present could be contacted after that time.

What happens at the mediation?

The usual style of mediation in commercial disputes is known as "facilitative". The mediator provides a process to assist the parties in finding a resolution. The mediator remains neutral. This is the type of mediation discussed below. (Other styles are "evaluative" (where the mediator is asked to give a view and uses this to inform the process towards settlement) and "transformative" (where the main purpose is to mend relationships).

The mediator will normally call the parties' legal representatives before the day to talk about practical arrangements and get some understanding of the dynamics of the dispute, having already read information and documentation provided.

Mediation is a voluntary process and the mediator has no power to impose any particular approach or solution. The mediator does not give legal advice or make any judgments. S/he works confidentially with each party and usually, but not invariably, with the parties in joint session to explore areas where the parties' underlying interests may overlap and where movement towards resolution might occur.

The process is entirely flexible. By way of example, the course of a mediation may run as follows.

- The mediator ensures the venue is properly set up and greets the attendees.
- If the mediation agreement has not yet been signed, this is now done.
- The mediator has a first private meeting with each party and their representatives to run through the process, to ensure that confidentiality and "without prejudice" is understood and to answer any questions. Discussions which take place in private session with any party remain entirely confidential and the mediator does not reveal anything about those discussions to the other side unless specifically authorised to do so.
- The mediator may then have further private sessions or organise a joint meeting at which the parties and/or their representatives will be invited and encouraged to speak.
- There typically follows a series of further private meetings, and possibly further joint meetings, whether of all attendees or of particular groups (such as lawyers only or experts only). The mediator is likely to test each party's case to some extent in these meetings.
- Possible offers or solutions start to emerge and are negotiated, either by the mediator shuttling between rooms or face to face by the lawyers present or the parties.
- Once agreement has been reached, it will be reduced to writing by the lawyers and signed.

Is the outcome binding?

Most mediation agreements provide that there is no settlement until it is written down and signed by or on behalf of the parties. Once the settlement agreement is signed, it is binding as a matter of contract. In some land and property cases, it may not be possible to complete all the necessary formalities on the day and Heads of Terms are agreed. Lawyers will have to advise their clients at that point as to whether the document is binding or not.

What happens if the case does not settle?

There is no hard and fast evidence as to what proportion of cases which go to mediation settle on the day but commercial mediators and published statistics tend to agree that around 75% settle on the day itself.

In cases where no agreement is reached, settlement nonetheless often follows within a week or two as there is much to build on.

In some cases, some aspects prove to be capable of settlement on the day thus leaving reduced and more defined areas of contention to be dealt with afterwards.

At the very least, a route map to make future handling of the dispute more efficient can often be agreed.

How much does it cost?

Mediators vary in their charges depending on their background and expertise and the nature and value of the dispute. Many quote fee scales publically on their websites. For others, information has to be requested from their clerks or administrators.

Is my case suitable for mediation?

Yes! Even cases which appear to be totally intractable often settle at mediation. In commercial cases, the only real reason not to mediate is where a precedent is needed from the courts.

Any Questions?

Mediators are passionate about mediation and are always very happy to speak to enquirers – call one for a chat.

About the author: Sue O'Brien is a full-time mediator with The Property Mediators. She specialises in property, professional liability and probate/inheritance disputes.