

# What is Mediation And Why Mediate?

Mediation is essentially a managed conversation, with a view to finding a resolution of a dispute, which is acceptable to both parties. 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. In times of Covid, all my mediations have been by Zoom, but at the time of writing, it looks like we may be able to resume face to face mediations sometime in the summer of 2021. Even then, if it suits the parties to do so, I am perfectly happy to hold the mediation by video, as this medium, I have found, works very well, and indeed is preferable for some parties, since it avoids travel and generally reduces ancillary costs.

## Why Mediate?

During more than 30 years’ experience of litigation, I found that almost always, a few weeks before trial, both sides would start scratching their respective heads, and wondering whether there isn’t some way of settling this dispute. Of course, by then, the major costs have been incurred, and tension and stress levels are very high. Early 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. It can prevent a difficult situation escalating into litigation, or if litigation has started, it can bring it (and the attendant costs) to an end. 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

many cases, mediation also gives parties an opportunity to preserve or rebuild relationships, where that is important.

A further feature of mediation is that it is very much the parties' process. You choose your mediator (you cannot select your judge), and you can direct how the conversation proceeds – you can, for example use the opportunity to resolve a separate, but allied, issue, which may have cropped up since the dispute started – or introduce creative ways of resolving matters which may never have been raised in the formal court documents or in the lawyers' correspondence. You may not even have had a chance to meet or speak to the persons handling the case on the other side, and had the matter proceeded to trial would never have done so prior to Court.

Litigation is a notoriously lengthy process. In the UK delays are much shorter than in many other jurisdictions, but can still easily take 18mths or more to get to trial. Contrast mediation, which can be arranged at short notice and, in the vast majority of cases, requires no more than a day (sometimes a long one!).

Settlement saves time and costs. Litigation costs, in my experience, quite soon become disproportionate to the amount in issue, and in any event can be eye-wateringly high. The newspapers frequently feature very sad stories of parties who are ruined by having taken a case to court, and lost. Even winning parties are not immune to costs orders being made against them, if they have unreasonably refused to mediate. Mediation is routinely encouraged by the courts, and parties unreasonably refusing to mediate may be subject to costs sanctions.

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. My own view is that mediation is always better sooner rather than later.

Mediation is often proposed by the Court, or by one party's lawyer, and if the opponent agrees to mediate, then the mediation is usually arranged between lawyers, or sometimes by the parties themselves. Sometimes a date is agreed first, and then several mediators are 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 chooses their preferred mediator from that list. The mediator is then contacted, and a date and fee agreed. Most mediations are booked for one day. Once appointed, I send out a draft mediation agreement, as well as an invoice for each side.

Usually, each side agrees to be responsible for an equal share of my 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. Pre-Covid, the mediation would generally take 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 site of the property is helpful. During the pandemic, all my mediations have been by Zoom, and I have found this format surprisingly successful and attractive for all parties concerned.

With face-to-face mediations, in a two-party mediation, three rooms are normally required, one of which must be large enough to accommodate everyone attending in a joint meeting. When mediating by Zoom, this platform offers a “breakout room” facility, for me to discuss matters privately with each side, and we can have as many rooms as we like.

It is very 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 or large organisation (e.g. local authority) 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.

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. I would normally telephone or Zoom the parties’ legal representatives (or the parties) before the day fixed for the mediation, 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 I have no authority or power to impose any particular approach or solution. I don’t give legal advice or make any judgments. I work confidentially with each party separately, and often, but not always, with both parties in joint session to explore areas where the parties’ underlying interests may overlap and where movement towards resolution might occur.

The process of mediation is entirely flexible. As indicated, I will normally end up shuttling between the 2 rooms (either actually or virtually) until the gap between

the parties has been narrowed or entirely bridged. Once agreement has fully been reached, it will be reduced into writing by the lawyers and signed. My mediation agreement provides 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 property cases, it may not be possible to complete all the necessary formalities on the day, but some Heads of Terms are agreed.

Commercial mediators and published statistics tend to agree that around 75% of dispute settle on the day itself. In cases where no agreement is reached, settlement nonetheless often follows a few weeks, because much of the hard work of negotiation has been completed. In some cases, some aspects prove to be capable of settlement on the day, 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.

My fees tend to vary depending on the amount in issue, the complexity of the case, and the volume of paperwork to be considered. I'm very happy to give you an estimate by phone or e-mail.

Although there is no statutory regulation of mediators, the Civil Mediation Council (CMC) runs a system of voluntary regulation for civil/commercial and workplace mediators and providers. Mediators and providers registered with the CMC abide by a Code of Conduct, have been trained to acceptable industry standards, have suitable insurance, carry out continuing training and development, and offer access to a complaints process if needed. I am a Fellow of the CMC, which is the award they reserve for the most experienced mediators.

I am often asked whether it is necessary to attend the mediation with a lawyer. There is no single answer to this question. Higher value disputes usually have lawyers present at the mediation as advisors. It really depends on the disposition, resources, and inclination of the parties. Generally, I find that lawyers are helpful in managing expectations, and giving their clients the support they sometimes need in reaching a settlement.

### **Is there a right time to mediate?**

Of course it's very much up to you, but I think, as mentioned above, the sooner the better. Certainly, once each side knows the essence of the other side's case, I feel it's time to start talking, and better do that before the expensive process of full formal disclosure of documents, because in most (though not all) the important documents are known about at an early stage.

I hope that helps – call me if you want an informal chat, on 07930355934. If I'm not available, leave a message and I'll call you back.

Whether with me or someone else, I really hope you are able to reach a full and satisfactory resolution of your dispute, enabling you to get on with what you would really prefer to be doing!

STEPHEN SHAW

