



What is Mediation ?

The process of Mediation is one of the most common forms of Alternative Dispute Resolution, or ADR. The 'Alternative' referred to is the alternative to a trial and process leading up to trial.

Some may be unaware of exactly what is meant by 'a Mediation'. The following is a simple guide to a process which is a lot less harrowing and expensive than a trial.

Mediation can take place at any time but is better done when all the relevant facts are out in the open. Nobody is going to feel comfortable discussing settlement terms when they are uncertain about some important aspects of the case.

When both sides have their respective positions clear in their own minds, it might be sensible to consider Mediation.

A cost/benefit analysis might show how Mediation would compare with a trial and how both might compare with settling through solicitors. A trial should be the last resort of the litigant so it is unlikely that the cost/benefit projection will show this as a fruitful route to follow.

Trying to settle by negotiation can take a lot of time and can be nerve-racking and works best only when both Parties have decided that dialogue and negotiation through a trusted third party is a sensible way forward. It can take some time for this synchronisation to take place.

By opting for Mediation, the Parties agree to meet with a readiness to try to find a mutually agreed settlement.

The Mediator is sent all the relevant papers by one or both/all of the Parties' solicitors, so that he/she can understand the background to the dispute. The Mediator sees the case summaries of the respective legal teams and might make some initial approaches to the Parties (or their lawyers, before the Mediation) so as to clear up any misunderstandings or obvious queries or inconsistencies. The Mediator should take the opportunity of enquiring as to the Party's experience of Mediation, to gauge the amount of help that might be necessary to overcome any anxiety.

Before the Mediation, each side decides who shall be present and who shall lead the negotiations. The leader might be one of the Party members or might be a lawyer. The team must include someone with the necessary authority to settle the dispute at the Mediation.

Before the meeting, the Mediator will agree the format of the Mediation with both/all Parties so that each knows who is going to be present and who has authority to settle.

On the day of the Mediation, the Parties meet at the appointed venue in their own rooms and the Mediator introduces himself. The room is a private one and available to the Party for the duration of the Mediation.

To commence the Mediation, it is customary for the Mediator to call the Parties together in a third room. The Mediator will then emphasise the two senses in which the Mediation is confidential. It is confidential as between the Mediator and each of the Parties and also confidential as regards the outside world. (At some point later in the Mediation, the Mediator might ask that the confidential views or information of one Party be divulged to the other, so as to make progress in the Mediation. Only with the tacit approval of the Party will the Mediator so divulge this 'confidential' information.)

The Mediator will ask the Parties to confirm their respective powers to settle the dispute. The Mediator will emphasise that all discussion is without prejudice - meaning that nothing said is binding on the Parties until they want it to be, when it is then committed to writing. Up until that time, any offer made can be withdrawn or varied.

The Parties are then invited to state their cases briefly - opening statements - and many believe it preferable that this should be done by the Parties themselves rather than their legal representatives, as the effect on the opposition can be greater.

Some discussion might continue after the opening statements but it is usual for the Mediator to break up the joint meeting and hold private meetings - caucuses - with each Party in turn.

The Mediator uses his skills to steer the Parties towards settlement during the course of the allotted period. The time available might be agreed in advance or be open ended.

At any time that a Party chooses, it can leave the Mediation. The Mediator will do all in his/her power to prevent this, but this option is always available in any Mediation process.

When the Parties have agreed a settlement (and, surprisingly, between 70% and 80% of all Mediations do reach a settlement), an agreement is drawn up, usually by the legal representatives, for the Parties' signature. The agreement may call for certain actions to be taken, such as payment of an amount from one Party to another, but it should settle the matter once and for all without further ado and not least remove the uncertainty of taking the matter to a trial, perhaps winning the case, but then possibly having to fight the whole matter again if the opposing Party were to lodge an Appeal.

The mediator is usually paid in advance by both Parties and his fee will either be in the form of a lump sum or on an hourly rate depending on the size and complexity of the dispute.

Peter Vinden is a practising adjudicator, mediator, expert and conciliator. He is Managing Director of The Vinden Partnership and can be contacted by email at pvinden@vinden.co.uk



North of England, Wales & Scotland:

Tel: 01204 362888 Fax: 01204 362808

Midlands & the South of England:

Tel: 0115 947 5334 Fax: 0115 947 5335

the vinden partnership

www.vinden.co.uk