

Guide to mediation

“The quality of our lives depends not on whether or not we have conflicts, but on how we respond to them” – Thomas Crum, author, and presenter in the fields of conflict resolution.

This guide provides an explanation as to what mediation is and what happens during the process. It looks at the benefits and disadvantages of mediation and clarifies the role of a mediator.

What is mediation?

Mediation is an informal and flexible process of resolving a dispute and one of the methods of Alternative Dispute Resolution (ADR). The key idea is that the parties to the dispute remain in control of the decision on whether or not to settle and on what terms, but with the helpful guidance of the mediator. This distinguishes mediation from arbitration where an arbitrator or judge makes a legally binding decision.

The role of a mediator:

A mediator is not a decision-maker. It is not the mediator's role to tell the parties how they should resolve their dispute or provide advice to the parties. The role of the mediator is to guide and assist the parties in reaching a settlement of their dispute. It is vital for the mediator to remain impartial, which means acting fairly and without bias. Trust is one of the key points of mediation, in that, if the parties trust both the mediator and mediation process, the outcome is likely to be one that is more positive. The mediator aims to work out what will motivate the parties to settle and what will allow them to move past their dispute.

Types of mediation:

The most common types of mediation are:-

- 1) Facilitative – the mediator does not make recommendations or make a decision for the parties, instead they will try to encourage a voluntary solution based upon each parties interests.
- 2) Evaluative - the mediator will assess the issues in dispute and identify the strengths and weaknesses of the case.

Advantages of mediation:

The following benefits can be seen from the use of mediation:-

- Mediation aims to narrow the issues which makes it a lot easier to attempt to resolve the dispute in its entirety;
- It is a voluntary process meaning that there is no one to force the parties to resolve their dispute there and then. The parties are free to decide how they wish to settle their dispute. If they choose mediation, they can still withdraw from it at any time. Mediation can take place at any time before proceedings are issued or as part of the court process;

- Mediation is completely confidential and the parties cannot share the details of the mediation with anyone that was not present;
- The mediator, as a neutral third party, helps the parties to overcome communication problems and work through a deadlock situation that can be created by competitive negotiations. As a result, long-term relationships can be preserved or enhanced;
- Mediation is without prejudice meaning that any offers or admissions made during the course of the mediation cannot be used outside of the mediation. The court cannot be made aware of what has happened or been said;
- The parties do not have anything to lose by participating in the mediation and the process is low-risk. Generally, mediation has a high success rate, but even if it does not result in settlement, it may still help to narrow and clarify the issues;
- Mediation is a time-effective process. It can be arranged within a few days and take from a few hours to a few days to conclude;
- Legal costs may be reduced by using mediation as, in many cases, it is more cost-effective to try and mediate before litigating and incurring significant legal and court fees.

Disadvantages of mediation:

Whilst a great method of ADR, mediation does also come with the following disadvantages:-

- It can add time and cost to the process of resolving the dispute if it does not result in a settlement being reached;
- The process can be difficult if any of the parties are reluctant to cooperate;
- The parties to mediation do not have access to Legal Aid funding.

What types of dispute are suitable for mediation?

Most cases are suitable for mediation if there are reasonable prospects to resolving the dispute via this method. It may be suitable where the need for a confidential resolution is important to the parties or a creative solution is required. It is also beneficial where the parties seek to maintain relationships.

There are exceptions where mediation cannot be used as an alternative method of resolving a dispute. For example, mediation may be unsuitable where allegations of fraud or other disreputable conduct has been made. Other examples include where a point of law needs resolving, cases involving deliberate bad-faith, counterfeiting or where an injunction/court order is required.

Duration:

Mediation does not have a definitive timetable but the majority of mediations are concluded between 1-3 days.

How much does it cost to mediate?

In general, mediation is a less expensive process than arbitration or issuing court proceedings. The cost of mediation will depend on its type, the complexity of the dispute and how many days you are going to mediate for. In addition to the mediator's fees, you may incur fees for a barrister, if you would like to be represented at the mediation.

Bearing the costs of mediation

Typically, both parties will equally share the mediator's fees, expenses and other costs of the mediation.

Is there a 'best' time to mediate?

Mediation can be used at any time; whether before proceedings have been issued or during the court process. However, it is best to try and mediate as soon as possible in order to keep costs to a minimum. It can also be a good opportunity to narrow down the issues at an early stage.

Selecting a mediator

The parties to the dispute are able to choose the mediator that they consider the most appropriate to assist them in settlement of the dispute. Wilson Browne Solicitors have worked with many mediators and can advise during the selection of a suitable mediator for your case.

When selecting a mediator, the following questions should be considered by the parties:-

1. Do you require the mediator to provide a neutral evaluation of the dispute or do you wish a mediator to act as a facilitator by assisting the parties in the negotiation process?
2. Does the mediator have the required experience, training, qualifications and area of expertise?

The Agreement:

The agreement to mediate forms the legal basis for the mediation process. It must be in writing and signed by all parties involved in the dispute. The appointed mediator will provide a draft mediation agreement to the parties to enable them to familiarise themselves with the process and rules.

Who can attend mediation?

Attendees at a mediation depends on the dispute, but often include:-

- The parties and/or their representatives. If the representatives are in attendance without their respective client, they must have the authority to settle the dispute.
- Experts
- Relatives or friends who can be in attendance to support
- Shareholders, investors or directors if there is a dispute between the businesses.

On the day

Although there is no set structure to mediation and no two cases are ever the same, the process often has certain steps that will commonly be used by mediators. The structure as a whole should be discussed and agreed between the mediator and parties beforehand. If the parties are legally represented, the mediator will usually have such discussions with them in advance of the mediation to identify any key issues and to ensure all formalities have been complied with.

Most commonly, mediation will take a similar format as the following:-

1. Mediator's opening statement: the mediator will introduce everyone, reiterate the ground rules and explain the procedure as it is going to happen
2. Parties' opening statements: each party will be invited to present its position
3. Mediator's joint discussion: depending on the circumstances and if appropriate, the mediator may have a joint discussion with the parties
4. Private Sessions: each party will then be placed in their own individual room. The mediator will pass between the rooms and engage in private discussions with each party to assist the process.
5. Further private and joint sessions: whether further joint sessions are required will depend on the progress of the mediation and the parties' agreement to participate in them. It will also depend on whether progress is being made or whether it is not looking likely that a settlement is going to be achieved.
6. Closing joint session: if and when a settlement is reached, the mediator may invite the parties and their legal representatives back into the same room. The mediator will outline the settlement reached and it will be left for the representatives to carry out the formalities. If a settlement cannot be agreed, the mediator will assist the parties in deciding whether or not it will be beneficial to continue to mediate, or if miles apart and there does not appear to be any progress made, to end the process. Any joint session will depend on the nature of the dispute and whether this will be appropriate.

Termination

One of the fundamental benefits of mediation is that it is a voluntary process and that any party can terminate at any point. The mediator can also terminate the mediation at any time if he/she believes that the process will not resolve the dispute, to save wasting further time and resources.

Venue

The parties can agree a suitable location for the mediation and often this can be held at the parties representative's offices. Wilson Browne Solicitors provide suitable venues for your mediation.

Remote (online) mediation

In recent times, many mediations have taken place effectively online and can be very beneficial if parties are not local to one another. However, despite the cost and time saving benefits of conducting a mediation remotely, the following disadvantages should be considered prior to making this decision:-

- all parties should have the appropriate technology and knowledge of using it in order to be able to participate in the mediation effectively;
- risks to confidentiality
- lack of regulation and guidelines
- less fluid discussions, difficulty interpreting body language and possible technological issues on the day.