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# Mediation

## What is mediation?

Mediation is a voluntary and confidential process for resolving disputes in which an unbiased third person, the mediator, helps people in dispute to find a mutually acceptable solution without going to court.

Mediation is a non-adversarial procedure at which a neutral, trained professional assists the parties in reaching a settlement of a dispute or difference.

Mediation is quite simply a process of finding a solution that the parties are all comfortable with.

## What are the advantages?

- It is cost effective - typically far less than litigation
- It offers a non-confrontational atmosphere which avoids the more formal and possibly intimidating surroundings of a court
- It offers control to the parties and their advisers, as it is they who ultimately decide how a dispute will be settled
- It is confidential - information revealed during a mediation cannot be used in court proceedings at a later date
- It is easy and quick to arrange - mediation can be set up quickly and convened at short notice, typically within 24 hours
- Mediation focuses on feelings and fairness, whereas courts tend to focus upon legal rights and wrongs, together with duties or responsibilities
- It offers a choice of mediator, acceptable to all parties to suit the particular dispute
- Mediation can act to restore relationships in that it encourages future cooperation between the disputing parties
- Mediation reduces the need for enforcement - a high level of compliance can be achieved because the parties have chosen their own solution; the solution has not been prescribed for them as may be the case with arbitration
- Mediation offers a win-win situation - there are no losers because a solution is mutually agreed by all parties to the dispute.

## What are the disadvantages?

- A party may not wish to compromise or to negotiate
- Mediation can be seen as adding another layer of cost and delay that the parties will have to bear if agreement cannot be reached
- Some parties to the mediation may use the process themselves as a delaying tactic or an opportunity to find out more about the perspective of the other parties to the dispute
- Mediation can be unsuitable if a precedent is required because an area of law is previously untested or unclear

## What kind of disputes can be referred to mediation?

The answer is almost anything.

Lord Justice Dyson, Master of the Rolls at the Court of Appeal in May 2004:

*“ All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR (Alternative Dispute Resolution) ”.*

He also stated that in all his experience he had never dealt with a case that he did not think could be solved by mediation.

Mediation can play a major role in resolving disputes between companies, their partners and suppliers, families, communities, neighbours, employers and employees.



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## Is mediation suitable for workplace disputes?

Disputes frequently arise in the workplace concerning:

- Discrimination - be it of sex, race or age
- Pay and Benefits
- Working hours
- Behavioural issues, for example bullying and harassment

Elephant's Child mediators hold current workplace mediator accreditation.

## What happens during a mediation?

A typical mediation follows a defined process as shown below.

In advance of the mediation session, the parties will:

- agree that mediation is their chosen approach to resolving the dispute
- select their preferred mediator
- provide the mediator with their own position statements, mediation agreements and confidentiality agreements

A venue will then be agreed between the parties. This could be at the mediator's offices, or at a completely neutral venue such as a hotel or conference centre. Wherever the location, the mediator will ensure that it is as informal as is possible and is mutually acceptable to all parties

On the day of the mediation:

- At the opening joint session, or separately to each party, the mediator will explain the process and set out the ground rules for the mediation.

The mediator will:

- ensure that signed mediation agreements and confidentiality checklists have been received from all parties
- explain that the process is confidential and without prejudice
- explain that the process is voluntary and that the parties are free to leave at any time

The mediator will then ask each party to give an opening statement, in the presence of the other parties, briefly setting out what they believe the dispute is about (their position).

The mediator will then suggest a series of confidential private meetings and will move between the meetings and, if appropriate, bring the parties together for a closing joint session.

If agreement has not been reached, the mediator will guide the parties to agreeing the next steps.



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## What happens at the private meetings?

- The mediator conducts a series of private meetings, sometimes called caucuses, with each party during which the Claimant and Respondent arguments and positions are discussed and analysed
- Everything the parties say to a mediator during the private meetings is confidential, although the mediator may seek permission of either party to release certain facts if they are likely to assist in the mediation process
- The parties are free to discuss matters with their legal advisers, should they be present at the mediation, at any time and are free to ask the mediator to vacate the room whilst they do so. The mediator is not a judge and is not a legal adviser to any of the parties

It is important that the parties present at the mediation have a commitment or authority to settle the dispute.

As described above, the mediator may have asked the parties to provide him or her with a short written positioning statement, outlining how the dispute has arisen from their own perspective and the steps taken in attempting to resolve it.

## What is the role of the Mediator?

A key aim of the mediator is to instil hope at all times and to all parties throughout the mediation.

Of course they are there to guide the parties through the mediation process, but first and foremost it is the mediator's role to encourage all parties to look forwards and not backwards, and to believe that they can reach common agreement.

The mediator sometimes carries out 'reality tests' to enable the parties to independently assess their own positions.

Above all it is the role of the mediator to manage the mediation process, to ensure that all parties are listened to by the other parties, to remind the parties why they are participating in mediation and of the benefits of a successful outcome.

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## Will mediation work for me?

Research suggests that 80% of commercial disputes that are referred to mediation reach agreement. The figure is slightly lower for family or civil mediation at 75%.

One current school of thought maintains that there is no such thing as an unsuccessful mediation.

Even those parties that do not reach agreement on the day, may reach agreement weeks or months later as, during mediation, the parties have the opportunity of hearing the other sides' view, sometimes for the very first time, and of acknowledging the other parties' feelings and position. It is this very human part of mediation which may prompt the parties to later settle.

## Mediation Settlement Agreement

If agreement is reached, the parties will be required, under the guidance of the mediator, to sign a Mediation Settlement Agreement. If the dispute is already at the litigation stage, this agreement can be produced to the court by the lawyers of the parties to the dispute in order to put an end to court proceedings.

A mediated agreement can:

- in those disputes which are already in litigation result in a settlement which would not have formed any part of the core judgement, but which will ultimately work for both parties
- add further value by, for example, enabling two companies to continue trading with one another in those cases where it is in the best interests of both parties to do so
- take into account the parties' respective personal, emotional business or commercial needs more so than litigation and open conflict would
- preserve a relationship that can leave both parties with a "win win" agreement or an agreement in which they equally share the pain.

## How long does mediation take?

The simple answer is that it depends on the dispute.

Some mediations can last only a few hours. Others can take a day, sometimes even longer, although the vast majority of mediations are successfully completed in a single day.

Key factors include the complexity of the subject matter and the number of parties involved in the dispute.



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## How much does mediation cost?

Elephant's Child offers two cost models:

- A per hourly charge of £75 ex VAT
- A per day charge of £450 ex VAT (8am - 6pm excluding travel time)

Travel expenses, such as room hire and the cost of the most cost effective transportation of the mediator to the venue are additional.

*Please note that these charges are per mediation, and not per party charges, which is a significant differentiator between Elephant's Child and other mediation service providers.*

## Can you provide examples of mediations?

Elephant's Child are more than happy to provide example case studies to prospective clients.

Such case studies will of course ensure client confidentiality in all respects, but will highlight both the background and the outcome of the dispute.

## Contact Information

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