

Mediation Procedure



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CONTINUALLY AT
THE FOREFRONT
OF MEDIATION.

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Link to more information on our website

This document aims to summarise the mediation process from selecting a mediator to the conclusion of the mediation.

If you have any questions or would like any additional information about any of our mediators, please do not hesitate to contact the Independent Mediators office team on **020 7127 9223** or imoffice@independentmediators.co.uk

A Selecting the Mediator

The selection must be agreed between the parties.

You may already know which mediator/s you would like to put forward. If not, you can speak to us for advice and information on each of the mediators. You can then take recommendations that can be discussed with the other parties. It is generally best to suggest two to three names to the other parties so that they do not feel pressured and can see that they have a choice.

Independent Mediators will only nominate a mediator/s who, in our opinion, possesses the relevant skills and experience to mediate the dispute effectively. Any appointment is subject to the parties and the mediator confirming that no conflict of interest exists.

It is Independent Mediators view that costs should be transparent and where possible they should be the same for all the mediators to avoid the choice being an economic one rather than skill based.

All our mediators use the same fee structure.

There is a sliding scale based on the number of parties and the total value of the claim / counterclaim.

When you speak to Independent Mediators, be ready to:

- Describe dispute;
- Give details of attributes parties have agreed mediator requires;
- Reasons why mediation is taking place;
- Time frame;
- Value of dispute;
- Preferred venue for mediation;
- Names of parties and representatives;
- Any other info mediator/Independent Mediators should know.

B Preparing for a Mediation

When the mediator has been agreed Independent Mediators will assist the parties as required, including:

- organising the date and time;
- assisting with venue agreement. The parties may decide they are happy to mediate at one of their premises or at an independent location;
- preparing the Mediation Agreement;
- preparing a list of attendees including firm names and job titles where applicable for circulation to all parties prior to the mediation;
- providing a timetable for provision of position statements and agreed bundle to the mediator;
- setting up pre-mediation calls between each party and the mediator. The mediators prefer to have these calls after they have read in.

The parties will:

- agree a mediator, date, time and venue;
- prepare a written mediation position statement and exchange with the other party in accordance with the timetable provided by Independent Mediators;
- agree a bundle of relevant papers with the other party;
- provide mediation position statements and the bundle to the mediator at least a week, but if possible two weeks, before the mediation;
- mediation position statements should be sent in electronic format as directed by Independent Mediators office team;
- the bundle may be sent electronically or in hard copy again as directed by Independent Mediators office team;
- please advise when sending if position statements have been exchanged yet or not and whether any parts of the papers are confidential between the sending party and the mediator only;
- participate in the mediation in good faith;
- ensure that at least one of its attendees at the mediation has full authority to negotiate, compromise and settle the dispute;
- notify the mediator and the other parties of any limitation on authority to settle or the need for additional approval such as board, etc;
- inform the mediator and each other immediately if there is any change to their attendees;

- pay its share of the mediator's fees in accordance with the terms in the Mediation Agreement;
- where possible it is recommended that you send a draft settlement agreement to the other party before the mediation. Try to agree the key points that should be included in it from both parties' viewpoint to save time at the end of the mediation day.

The mediator will:

- read the position statements and bundle provided to them. If the mediator thinks they may require longer for preparation than estimated they will advise as soon as possible after receipt of papers. They will ask for an agreement to increase prep time or provision of a reading list;
- contact the party representatives to arrange to speak prior to the mediation. The mediators' purpose is to introduce themselves; ensure that all arrangements are in place for the mediation; discuss how the parties wish to deal with any joint meeting at the start of the mediation; answer any questions from parties/lawyers; ask any questions arising from the mediation papers. These discussions are also private and confidential and covered by the mediation agreement.

The mediator is there to help the parties to arrive at settlement, trust the mediator, give them information, discuss issues with them and allow them to help move the process forward.

c Papers for the Mediator

It is not necessary to provide all documents produced in relation to the matter. We ask for a mediation position statement from each party, these are usually exchanged; an agreed bundle and; a costs summary from each party which is exchanged if possible.

The bundle can usually be relatively limited in size. It should be selective and include only the documents which the Mediator requires to familiarise themselves with the issues in the case (guide - max two lever arch files).

As you will see from the Mediation Agreement the mediation process is a completely confidential one. Please do not share any information / documents regarding the mediation / prepared for mediation on any open AI platform.

Include in the mediation position statement:

(limited where possible to a maximum of 10 pages)

- background to the case;
- liability and quantum;
- key issues;
- have any negotiations taken place;
- have there been any admissions or changes since the close of pleadings;
- have any offers been made – without prejudice or Part 36;
- if there is a fundamental aspect to the claim which can only be explained by way of a document then please enclose this with the position statement;
- consider both the legal and commercial issues;
- what does your party wish to achieve at mediation;
- what do you think other parties might wish to achieve?

Include in the bundle:

(guide – max two lever arch files)

- those papers that are relevant to the mediation and will assist the mediator in understanding the issues for mediation;
- latest pleadings, and any relevant witness statements and experts' reports.

Cost summaries should set out:

- your costs incurred (including barristers, experts and other disbursements) up to and including the mediation day; and
- your best estimate of costs likely to be incurred to the end of the trial if the matter does not settle;
- identify if your client is unable to recover any VAT charged.

D Representation at the Mediation

Some points to bear in mind when considering who should attend the mediation:

- who needs to be there?;
- each party needs to be represented by a decision maker, someone with authority to do a deal;
- if that is genuinely not possible, please contact Independent Mediators office team or the mediator to discuss the situation as soon as possible;
- in addition, it is usual for each party's legal advisers to attend;
- include insurers, counsel and experts if you believe they can assist in settlement;
- consider who will attend from the other side and ensure you are matching them i.e. C.E.O. and C.E.O. etc;
- generally, however, try to keep the team as "lean" as you can.

- **Client**

It is essential that the client is represented, not only by those who have knowledge of the dispute, but also the individual/s who have the ultimate responsibility and authority to settle the case and make the financial or strategic decisions to do so.

- **Legal representation**

Professional advisers, particularly lawyers / counsel, can and usually do attend the mediation. Legal advisers play an important role in preparation and exchange of information prior to the day and on the day; supporting clients in the negotiation; advising on the implications of settlement and drawing up the settlement agreement which, when signed, is a legally binding document.

- **Insurers**

In insurance backed matters, can the insurer be there in person or at least available by phone/online.

- **Experts**

Is the case of such complexity that there is not only a need for an experts report but also to have the expert there to advise the client and assist the mediator?

The decisions above could have a bearing on the location you choose for the mediation, and the physical venue when you have considered the travel time and costs for the parties and the number and size of the rooms required.

E The Mediation Agreement

The Mediation Agreement is circulated to all parties on confirmation of a mediation. This provides the legal basis for the mediation. The Mediation Agreement is signed on the morning of the mediation.

From the date the Mediation Agreement is circulated to the parties (regardless of whether signed or not) until the settlement/termination of the Mediation, all communication (in any format) between the Parties, between the Parties and Independent Mediators and between the Parties and the Mediator produced for, arising out of, or in connection with, the Mediation or the settlement of the dispute will be covered by the confidentiality clauses in the Mediation Agreement.

F The Mediation

Rooms

The minimum requirement will be for a room that is large enough to accommodate all those attending the mediation from all parties and the mediator. Plus, a breakout/caucus room for each of the parties that is big enough for those attending to sit comfortably for what could be a long day. Later in the day the room may be used as one of the caucus rooms.

The rooms should have natural light and plenty of refreshments available during the day and evening. Ensure there is no cut off time when you will have to vacate the rooms.

Process on the day

The mediator will determine the process and procedure of the mediation in consultation with the parties. On arrival the parties will be greeted by the mediator and shown to their own caucus room to settle in. The mediator will have a brief introductory chat to get to know the parties' names/faces and will arrange for the mediation agreement to be signed by all attending.

The initial open joint meeting usually happens after the mediator has had these brief introductory meetings with each of the parties in their private rooms. At these introductory meetings the mediator will usually discuss with each of the parties how to conduct the opening meeting - the order in which the parties will speak, who from each party is going to speak and the anticipated length of its opening. The mediator may also ask for a brief idea/outline of what each speaker is going to say and, if felt necessary, discuss with the speaker how that may impact the opening meeting.

The opening joint session

The mediator will open the meeting by making sure everybody knows who everybody is. They will then briefly set out what they see as important for the parties to have in mind during the mediation, including the importance of confidentiality and the need for any binding settlement to be in writing and signed.

Opening joint meetings can be an important part of the mediation process, particularly if the parties use them effectively. They are a rare opportunity to put one's case face-to-face to the other party in a straightforward and persuasive manner.

The mediator will then invite the representative of the claimant to make their brief opening statement. The respondent's representative will then be invited to do the same. The mediator may invite anyone else who would like to speak to do so. Depending on how the session has progressed the mediator may decide to try to get the parties to agree to the issues in dispute at this time. The mediator may also consider it worth trying to pursue some early agreement in the opening session, but this is rare. At this time the mediator will normally invite parties to go to their rooms.

The mediator will then pass between the rooms, normally starting with the claimant. There could be quite lengthy times when the mediator is away from one party.

Caucus sessions

The purpose of these is for the mediator to obtain a detailed understanding of the case and issues as seen by the parties.

The role of the parties before the day is to decide upon the information that they wish to give to the mediator and at what stage of the proceedings.

In the caucus sessions the mediator will progressively reality test the case of the parties and try to ascertain their true negotiating position. It will be apparent that the representatives need to know the case thoroughly, including their side and the other side's likely aims and negotiation points.

The mediator will ask at the end of each session what they are permitted to disclose to the other party, what concessions they can make, what questions they should ask and what concessions they should try to elicit from the other party.

When leaving the party, the mediator will try to give them something to think about or discuss whilst the mediator is with the other party.

Mediators and the parties sometimes find it useful to arrange for either the lawyers only or the parties only to meet. If the experts disagree it can be productive to have an experts only meeting with a view to getting a joint position.

The mediator may even suggest that it would be a good idea to go away and either rethink issues or gather more information and then reconvene at a later date.

The day is likely to comprise of a series of private and joint meetings. There really are no hard rules, it is the parties' process and provided they all agree on a course of action then that is acceptable.

The day can last beyond normal working hours, so it is important that the key people attending for each party are available to remain for the duration. Any time constraints should be made known to the mediator as soon as possible.

G Confidentiality

The Mediation Agreement provides that the parties and the mediator shall keep confidential and regard as privileged, and shall not use, any information of any nature produced for, arising out of, or in connection with, the mediation (whether or not the mediation is terminated) including:

- all communications of whatever nature between the parties and the mediator concerning negotiations for the settlement of the Dispute whether during the mediation or thereafter; and
- what happened and what was said at the mediation and the terms of any settlement (unless the settlement agreement has its own confidentiality terms in which case those terms will prevail); and
- all documents, correspondence or information (in any format) produced for, arising out of, or in connection with, the mediation;
- no formal record, transcript or mechanical, electrical or digital recording of the mediation, including any use of AI assistants or digital note making tools, shall be made;
- each party shall ensure that all those present at the mediation on its behalf or at its invitation and any person in receipt of any confidential information from that party agrees to be bound by the confidentiality clauses of the Mediation Agreement.

There are certain exceptions to this.

For example:

- save as may be necessary to implement or enforce any settlement agreement; or
- required by law whether under the Proceeds of Crime Act 2002 or any Regulations relating thereto or judicial authority or otherwise; or
- disclosed to professional advisors, insurers and reinsurers, if strictly necessary and for bona fide reasons, and on the basis that the recipient is informed of the confidentiality of the information and agrees to maintain that confidentiality;
- all confidential information will be treated as privileged, and shall not be admissible as evidence or be disclosable in any proceedings connected in any way with the subject matter of the dispute, unless such documents or information would have been admissible or disclosable in any event or unless otherwise ordered by court of competent jurisdiction.

H Conclusion of the Mediation

The mediation may end in a number of ways including when:

- an agreement is reached. At that time the mediator will get the parties together if they think sensible, but certainly the lawyers, in order that they may draft a settlement agreement or at least, heads of agreement. When completed the agreement will be signed or agreement reached on who will draft the final agreement and the process to get it signed and if required agreed by the court;
- any party withdraws from the mediation unless:
 - (i) there remain two or more parties participating in the mediation; (ii) the remaining parties agree to continue the mediation without the withdrawing party;
- the parties and the mediator agree that the mediation should terminate either at the end of the mediation day, or later if it continues beyond the mediation day; or
- the mediator decides, and notifies the parties (whether on the mediation day or thereafter) that continuing the mediation is unlikely to result in a settlement or is undesirable or inappropriate for any reason.

If terms of agreement are not reached on the day, there are still other possibilities. Our experience has been that terms can often be agreed in the days or weeks following the mediation day.

Parties may consider:

- re-scheduling a further half-day or day;
- leaving the mediation agreement in place, so that further discussions can take place under its confidential and “without prejudice” terms;
- where appropriate, the mediator will maintain contact to see whether further progress can be made.

I **Note for those attending without legal representation (litigant in person)**

If you need any assistance with regards preparing for mediation, there are notes on our website, but we are always happy to speak to you about the process (please note we cannot offer legal advice) if you feel that would be helpful.

Use of AI tools - As you will have seen from the Mediation Agreement you are asked to sign, the mediation process is a completely confidential one. Please do not share any information / documents regarding the mediation / prepared for mediation on any open AI platform.

The mediator will ask you to sign the Mediation Agreement on the day of the mediation so you should ensure that you have read and understood this in advance of the day.

Please also note that if the mediation results in settlement the settlement agreement drawn up and signed on the day is usually a legally binding document.

We would point out that neither the mediator nor Independent Mediators are able to provide legal advice to you at any point during the mediation process; this includes advising you as regards the Mediation Agreement which you are required to sign; and the effect of any settlement agreement which might be achieved in the mediation.

We would generally recommend that you make arrangements to obtain legal advice on any settlement agreement that is proposed at the mediation prior to signing it.

J Feedback

After each mediation we do seek feedback on the administration service and each mediator.

All feedback is gratefully received and helps us to ensure we continue to provide a high level of service.