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MEDIATION GUIDE

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This note provides an overview of the mediation process. It explains what mediation is, what happens at a mediation and the role of the mediator. It also looks at the benefits of mediation and common misconceptions.

WHAT IS MEDIATION?

Mediation is a flexible, voluntary and confidential form of settling a dispute without the need to go to court. Mediation occurs when the parties (and their lawyers) meet together with a neutral third person (the mediator) who assists those involved to work towards a negotiated settlement of their dispute, with the parties retaining control of the decision on whether or not to settle and on what terms.

There are different styles of mediation but the most common is facilitative mediation in which, unlike a judge, the mediator will not decide the case on its merits, but will speak with both parties and work to facilitate agreement between all involved.

On the day of the mediation, the mediator will greet the parties on arrival and show each party to its own private room. The mediator will then provide an overview of the process, his or her role and the procedure. There is then usually an opening session with either just the lawyers in attendance, or if you prefer, a face to face meeting with all persons attending. If personal relationships have broken down, then it is usually not appropriate to have a full meeting and the lawyers can attend the opening session instead. The opening sessions allows each party to have an opportunity to make an opening statement, giving its perspective on the dispute and highlighting points of particular concern. After the opening session, the mediator meets privately with each party (in separate rooms) to discuss the issues confidentially. This allows each party to be frank with the mediator and have a realistic look at their case in private, without fear that any weaknesses discussed will be communicated to other parties. Offers will then be exchanged and if a settlement is reached this will be documented at the mediation or shortly thereafter, usually in the form of a settlement agreement. Alternatively, the parties may use the discussions at the mediation as a springboard for further settlement talks after the mediation.

The mediation is confidential and without prejudice. This means that anything said during the mediation cannot be told to the judge if the mediation does not settle. The confidentiality of the process can avoid issues being made public that the parties want to keep private, as might happen in court proceedings.

Mediation does not always result in a settlement but it generally has a high success rate. Mediators who responded to the seventh mediation audit carried out by the (CEDR) in May 2016 reported that just over 67% of their cases settled on the day, with another 19% settling shortly thereafter. Where mediation is not successful in resolving the dispute, it may at least help to narrow or clarify the issues. In addition, there may be more than one attempt at mediation in the life of a dispute.

THE MEDIATOR'S ROLE

Although the parties will be responsible for decision-making in the mediation, and will control the outcome, the mediator will control the procedure and ensure that it is structured in a way that is fair to all parties.

The mediator plays a crucial role in facilitating agreement between the parties. In particular, the mediator will:

- Remain impartial throughout. The mediator's neutrality provides him with credibility in the process.
- Not advise any of the parties. It is not the mediator's role to tell the parties what their rights are, or how they should resolve the dispute, and he/she does not have authority to impose any binding decision on the parties. There will only be a binding outcome to the mediation if the parties reach agreement. Self-determination is a fundamental principle of mediation. The process relies on the ability of the parties to reach a voluntary agreement. A party may withdraw from mediation at any time.
- Act as a facilitator to assist the parties with their negotiations, with the aim of ensuring the negotiations are as effective as possible.
- Act as an intermediary between the parties by conveying offers, information, questions and concessions

between the parties subject to their permission. This allows parties to negotiate through the medium of the mediator. This can be more effective than face-to-face negotiation.

- Be tough with the parties and test their cases and the position they are taking by playing “devil’s advocate”. However, he or she should not pressurise the parties into settling the dispute.
- Keep all information relating to and arising out of the mediation confidential.
- Ensure that all parties understand and agree to the terms of any settlement reached. However, it will be the parties’ responsibility to formalise and document the settlement.

The parties can agree on the appointment of a mediator or, if they cannot agree, they can ask a third party (such as a mediation service provider) to select a suitable mediator.

The parties are free to select the person they consider most appropriate to mediate, depending on the nature of the dispute. The mediator may be a lawyer or someone with technical expertise or experience in a particular sector.

BENEFITS OF MEDIATION

Some of the potential benefits of mediation include:

- Communication problems between the parties can be overcome. The mediator is a neutral third party who can act as an intermediary between the different personalities and negotiating styles of the parties.
- The mediator can help the parties work through a deadlock situation that can be created by competitive or positional negotiation.
- Relationships can be preserved or enhanced by mediation.
- Confidentiality and privilege are cornerstones of the mediation process. Agreements to mediate usually provide specific protection for confidentiality and privilege. The private nature of mediation also ensures that family disputes are kept private.
- The parties have complete choice over the selection of the mediator and can therefore choose the mediator who is most appropriate for the dispute. Conversely, the parties cannot choose a judge if the matter goes to full trial.
- The legal costs can be reduced through mediation.
- Mediation can produce outcomes that might not be possible via determination by the court. The limited scope of legal remedies in court may be inappropriate to resolve the wide range issues that might arise.
- The process is entirely flexible and can be tailored to meet the parties’ needs and all issues.
- The parties have active participation in the mediation process and control the outcome.
- Mediation is voluntary. The parties can withdraw from, or terminate, the mediation at any time. The mediator has no binding powers.
- Mediation can provide a speedier resolution. It can be arranged quickly, often within a few weeks once the parties have provided sufficient information about the dispute.
- A mediation can take from a few hours to an entire day. Court cases can take longer.
- The mediation process is low-risk; there is “nothing to lose” by attempting a mediation.
- Mediation has a high success rate and produces durable results. The statistics vary, but range from 65% to 85%, representing cases that settle at mediation, and some mediators advertise success rates in excess of 90%. The outcome is likely to be more pleasant than any solution that a court imposes, as you have responsibility for creating it.
- Even if a mediation does not result in settlement, the parties are likely to have benefited from the process

by:

- having the opportunity to listen to each other's points of view;
- narrowing the issues in dispute; and
- testing with the mediator the strengths and weaknesses of the case, and the strategies adopted or considered, in the run up to trial.

WHY IS MEDIATION RECOMMENDED IN YOUR CASE?

The following reasons make your case suitable for mediation:

- The vast majority of cases similar to yours settle at mediation. It therefore carries a strong prospect of success that matters will be resolved.
- The cost of litigation will be a significant proportion of the amount at stake. Mediation can help avoid these costs.
- The need for private and confidential resolution is important.
- Emotions in these type of cases can run particularly high between the parties. Mediation is designed to work with these emotions.
- A creative solution (which a court cannot achieve) may be desired.
- A speedy solution is required.
- The trial of your case is likely to be lengthy and complex.
- It is likely to help clarify or narrow the issues.
- The risk of loss may be great if the case goes to trial.

CONFIDENTIALITY

Mediation is confidential. This means neither party can disclose any information arising out of, or in connection with, the mediation without the express consent of the other party. Mediation is also without prejudice to the court case. The without prejudice rule will prevent statements made in a genuine attempt to settle an existing dispute, whether made in writing or orally, from being put before the court as evidence of admissions against the interest of the party. This privilege applies to negotiations conducted through mediation.

MEDIATION AND COSTS

The mediator will charge a fee for attending the mediation. The mediator's fee will be agreed with you before the mediation and it is common practice that the parties will agree to split the fee equally between them.

Who should bear the costs of the lawyer's attending the mediation and the costs of the case to date is always a matter for agreement between the parties. It is common for this to be discussed with the other side during the mediation process.

COMMON MISCONCEPTIONS

Parties can be reluctant to mediate for various reasons. The following are some common misconceptions:

- **Mediating is a sign of weakness.** Mediation is, in fact, usually a sign of strength; the strength of knowing what we and you want to achieve, and pursuing that objective through a negotiated outcome. The key to

negotiating from a position of strength is the ability to identify what you and the opponent really wants and needs to achieve.

- **Lawyers and clients can negotiate directly so mediation is unnecessary.** There can be barriers to effective communication when negotiations are direct. The intervention of a neutral third party can change the dynamics and help to overcome these barriers. The mediator can use several techniques to manage the negotiating process, free up communications, encourage a problem-solving approach or brainstorming of options, and overcome deadlock. Parties tend to be unwilling to disclose information about their view of the case to an opposing party during direct negotiations. The mediation will include private and confidential discussions between the mediator and each party, during which the parties are more likely to be willing to disclose what they really hope to achieve. This can free up negotiations.
- **Direct negotiations have failed so mediation will not succeed.** Direct negotiations may become positional, with each party assuming entrenched and unrealistic positions and becoming increasingly defensive. A mediator can focus each party on a problem-solving approach, directing energy away from threats, attacks, or challenges to the credibility or good faith of a party in the dispute, towards a focus on the issues to be resolved and the potential implications of a failure to settle the problem. The mediator can also help the parties to avoid common negotiation traps. One such trap in direct negotiations is that a lawyer or client may be dismissive of an opponent's suggestions or offers simply because they have been proposed by "the other side". The mediator allows the parties to explore, in private, a range of options and suggestions. In difficult cases, the mediator may even suggest ideas and options as if they were his own, to overcome a party's reluctance to consider proposals from an opponent.
- **The mediator is just a messenger.** A mediator's task is considerably more sophisticated. It includes coaching, developing strategies and reality testing. The mediator is an active participant in the mediation process, and will use a range of techniques to engage people in the process and encourage them to consider a range of settlement options. These techniques include:
  - skilful questioning;
  - acknowledging;
  - summarising;
  - re-framing; and
  - coaching the parties on negotiation techniques.
- **You cannot mediate until full evidence is provided.** In practice, this is not required. Mediation simply requires knowledge of enough information (about the facts and the relevant law) for the lawyer to be able to advise the client on the following:
  - the strengths and weaknesses of the case;
  - the alternatives to settlement; and
  - any options for settlement of the dispute.

  The earlier that mediation takes place and an agreement is reached, the lower the costs will be. The mediation process can help to identify what evidence is essential, rather than the parties simply carrying out full disclosure, or a "search for the smoking gun". The key to mediation is establishing what the parties must achieve. That will have an impact on the information required.
- **Mediation will be a waste of time and money if the case does not settle at mediation.** Even a failed mediation can help to narrow the issues and increase the likelihood that the case will settle without the need for trial. The parties will certainly have a better understanding of each other's positions and perspectives, and the potential barriers to settlement. A failed mediation can also generate options and opportunities that can be discussed after the mediation. In practice, a large proportion of cases that do not settle during a mediation settle shortly afterwards.