THE CLINICAL DISPUTE FORUM’S
USERS’ GUIDE TO MEDIATION

A. INTRODUCTION

What is mediation?

1. Mediation is a process for settling disputes.

2. Mediation is a formal meeting at which both parties attempt to reach an agreed outcome. Mediation is usually conducted by discussions “off the record” both in meetings with all parties (which the mediator will chair) and in private and confidential meetings between individual parties and the mediator alone. A mediation normally takes one day. The mediator does not act like a Judge or arbitrator and makes no decision on who is right or wrong, but acts as a facilitator to help the parties reach settlement.

3. The process only produces a binding outcome if all parties sign up to a written agreement to conclude the claim at the end of the day. Any such agreement reached will be binding and will usually be embodied in a Court Order where proceedings have commenced. A party is free to leave a mediation if they wish or the mediation may end up with no settlement. If settlement is not achieved through mediation any comments made by the parties during the course of the mediation are not binding on them and cannot be used or referred to in Court proceedings.

4. Mediation can take place at any suitable neutral suite of rooms, such as a solicitor’s office, or hotel.

   Why might you choose to mediate?

5. With the vast majority of cases settling before trial, why might you choose to embark on mediation?

   - As a key person involved in the claim it gives you a guaranteed opportunity to be involved in the negotiation process; to discuss the issues face to face with the other people involved.

   - For a Claimant it enables you to meet and be heard by the Defendant team who will come with authority to settle, if persuaded that it is right to do so. Claimants can express such things as how they feel about what happened, and their wishes for the future in a human and non-technical way.

   - Defendants too (including, where desired, the clinician under challenge) are able to talk directly to the Claimant, explaining what happened, how things have changed and any appropriate regret, though without necessarily having to concede liability or offer compensation. For clinicians, mediation can offer a satisfying closure to what is often a considerable burden for them of facing an accusation of professional negligence. All of this takes place in an entirely safe environment: informal, private and off the record.

   - The presence of an independent mediator, who has responsibility for running the mediation process and deciding the order of events, allows the parties to concentrate on the issues.

   - Mediation is flexible, in terms of when and where it can be held; who participates in it; and what outcomes can be achieved.
When should you consider mediation?

6. For mediation to be successful, both sides in a claim need to have enough information available to them (remembering that more information may be made available during the course of the mediation) to form a view as to whether settlement is appropriate.

7. Mediation should be considered at any stage during the litigation process, but, in particular, at the following stages:-

- Following completion of what is known as the pre action protocol process: after there has been disclosure of records, a letter setting out why the claimant believes there to have been negligent treatment, and a letter from the defendant responding to the allegations made; but before the issue of formal proceedings. Expert evidence will usually have been obtained.

- Once the legal proceedings have been issued, and the Court has ordered the first and any subsequent Case Management Conference;

- Whenever settlement negotiations between the parties have been commenced but have broken down;

- Before the final build up to trial in an attempt to avoid an expensive protracted hearing.

In each case, a proper review of what your real needs are should be undertaken, and a proper analysis of the costs and benefits of mediation conducted, compared with those of various other processes available. Mediation may not be the most cost-effective and in a lot of cases, other methods of attempting settlement are more appropriate.

How do you go about it?

Preparation

8. Discuss with your solicitor what is the most appropriate process for resolving your dispute; obtaining further advice if required from one of the companies which provide a mediation service.

9. If you feel that mediation is the best means of attempting to resolve your dispute, then your solicitor will need to agree the process with the other side. Again, further advice and/or persuasion will be available from one of the mediation providers.

10. Agree the use of a particular mediator. Companies who provide mediation facilities have data to help them suggest to you suitably trained and experienced candidates, and both sides are often offered three possible mediators and then agree a mutual choice;

11. Make sure that your solicitor is aware of any document you would like included in the bundle of documents used at the mediation.

12. Discuss how the actual mediation will operate with your solicitor. Think about what contribution you personally will make at any joint meeting and prepare your own contribution. You might want to say a few words about how you feel about events giving rise to the claim and any limitation that your injuries have placed upon you for the future. If you are a clinician, you may want to express regret (with or without admitting any liability over what has occurred). Consider what your ‘bottom line’ will be in terms of settlement. Bear in mind that you need to leave room for a possible change of mind, depending on what information is presented by the other side during the course of the mediation.

Who attends a mediation?
13. The solicitors acting for both sides will advise each other of the people they propose should attend
the mediation on behalf of their client. The following people might well be considered:-

(i) If you are an adult claimant you will attend and if possible your life partner, parent or
close friend to give support and perspective at a personal level. If the Claimant is a child
or patient, their litigation friend in support will attend;

(ii) A lawyer or lawyers for each party;

(iii) An appropriate representative for the Defendant NHS Hospital Trust, medical defence
organisation or private hospital insurer: these may include the clinician under challenge, a
Risk Manager or other management representatives or a representative from the
National Health Service Litigation Authority. In private medicine claims, the insurer and
equivalent hospital or GP practice office-holders will usually attend. It is important that
someone is present with authority to settle up to any possible outcome, even if the
Defendants hope that settlement will be substantially less than the worst case figure.

(iv) Experts do not normally attend mediations even when there is fundamental disagreement
between them. There will be the exceptional case where the most efficient way of
exploring settlement is to assemble the experts as well as everyone else at the
mediation.

What happens at the mediation?

14. The format of mediation is flexible. Each party will have a private room as a confidential base for the
day, in which to keep their papers and conduct private discussions. The mediator visits each team in
their rooms to prepare for an opening joint meeting, at which each side is invited to make a brief oral
presentation to the other side. The mediator commences the joint meeting by reminding the parties
that the process is voluntary, informal and private and confidential. Discussions that take place at the
mediation are for use as part of the mediation process alone and are not to be used in any later
proceedings if the mediation is unsuccessful. Mediation will usually provide you with the first
opportunity to explain your case directly to the other party which can be very powerful and useful.
You may ask your lawyer to speak as well, or on your behalf.

15. The parties will usually then move back to their separate room and the mediator will move between
the rooms to help explore the issues in dispute and encourage both parties to consider what scope
there is to move towards settlement. The mediator takes responsibility for the order of discussion.

16. While there can be no guarantee that the process will produce a binding outcome, if agreement is
reached, it will be recorded in writing and the decision will then be final and binding on the parties.

What if a case does not settle at mediation?

17. The parties then resume the litigation process. Even if cases do not settle through mediation, the
process can be useful in narrowing issues in a way that makes later settlement quite possible or at
the very least reduces the length of the trial.

Who pays?

18. The Legal Services Commission (LSC) is prepared to fund mediation fees and expenses, subject to
such costs being reasonable and proportionate given the nature and value of the claim involved. The
LSC guidelines require you and your solicitor to consider mediation at various stages in the litigation
process. The National Health Service Litigation Authority has adopted a positive policy of
encouraging the use of mediation, and may be prepared to fund mediation in cases which seem
ready for its use.
19. If the outcome of mediation is that money or benefits are conferred on a Claimant, it is usual that the Claimant’s reasonable costs are paid in addition including those costs of the mediation. Agreement on the principle and amount of costs payable is usually negotiated as part of the settlement agreement at the mediation. It is open to both parties to agree in advance that one party should fund the mediation costs and expenses for both parties.

20. It is important that you ensure that your solicitor deals with the issue of costs of the mediation either at the mediation or beforehand.

Who provides mediation services?

20. The following companies provide Mediation services:

**CEDR (Centre for Effective Dispute Resolution)**
Exchange Tower
1 Harbour Exchange Square
LONDON E14 9GB

tel 020 7536 6000
dax 020 7536 6001
e-mail mediate@cedr.co.uk
website www.cedr.co.uk

**ADR Group**
Grove House
Grove Road
BRISTOL BS6 6UN

tel 0117 946 7180
dax 0117 946 7181
e-mail info@adrgroup.co.uk
website www.adrgroup.co.uk

The Clinical Disputes Forum does not itself provide mediation services or advice about mediation in detail. For any further details from the Clinical Disputes Forum, contact the Administrator, Margaret Dangoor at 3 Clydesdale Gardens, Richmond, Surrey TW10 5EG.