

## What to Expect in a Mediation

### Practical Advice for Lawyers and other ADR users

#### Before the mediation

The parties are expected to exchange case summaries and supporting documents with each other and the mediator at least one week before the mediation.

These documents should be:

- Delivered to CEDR at least seven and preferably 14 days before the mediation.
- Length should vary from 4-10 pages for straightforward matters to 20-25 pages in a more complex matter.
- Papers should aim to educate the mediator and persuade the other party to negotiate.
- Papers should *not* be a trial advocacy brief, nor bundles of pleadings, witness statements or footnotes supporting a brief submission.
- Additional core documentation can be given if it adds to the mediation submission rather than replaces it.

#### A submission should cover:

- Factual summary
- Short statement outlining type of work/business of your party
- Chronology of events, if relevant
- Dramatis personae, if relevant
- Outline of the legal issues
- Outline of the factual issues
- Identification of common ground and difference
- Chronology of negotiation history up to last offer
- Court/arbitration timetable, should dispute remain unresolved
- Glossary of technical terms, if relevant
- Schedule of key documents, indexed and paginated

The mediator will almost certainly introduce him/herself to each party or their legal representative before the day, usually by telephone.



The mediator may ask questions about the documents received and will check that each party will be represented by someone with the requisite authority to settle.

The mediator will reinforce that their role is not to propose or impose any solution, but to make negotiations easier. The mediator may also ask the parties to begin thinking about their commercial interests in the dispute, rather than the purely legal arguments.

## At the mediation

There will be a room large enough to seat all participants in the mediation and this will be used for joint meetings. In addition, each party will have their own room and this will be used for private meetings with the mediator.

It is CEDR's policy for an observer mediator to attend each mediation where possible and when agreed by all parties. Every observer mediator is a CEDR-accredited mediator and can provide valuable assistance to the mediator and parties.

## Beginning the mediation

The mediator will often begin with informal introductions in the parties' private rooms. Then, ordinarily, the mediation will begin with a joint meeting.

At this initial joint meeting, the mediator will establish ground rules for the day, reaffirming the strict confidentiality of the mediation and asking each party to respect the rights of the other side(s) to be heard.

The mediator will ask each party to make an opening statement. This is a summary of the key issues making up their case, not a summary of the documentation. It will often be the first time each party will have heard the other's point of view first-hand. The opening presentation can be made either by the lawyer or party representative, but we recommend the business principals become involved from an early stage.

## Private meetings

Following the joint meeting, the mediator is likely to invite the parties to go to their private rooms where the mediator will spend time talking with them in confidence. During this time the mediator will ask the parties about their expectations and will ask them about the strengths and weaknesses of their case (reality testing).



It is important to remember that nothing will be repeated to the other party unless the mediator is given express permission to do so.

You should be prepared for long periods of waiting, while the mediator is talking to the other party. Sometimes the mediator will set a task, such as re-assessing risk analyses or testing alternative solutions in the light of developments that have emerged during the day.

Sometimes parties become concerned that the mediator is spending 'too long' with the other party. Don't worry – this is natural. It can be a sign of progress. Parties can also feel that progress is very slow during the early stages of the mediation session. This is also natural and the mediation will gather momentum as parties come closer to an agreement.

## Joint meetings

The mediator may decide that progress would be made by bringing the parties together again. At other times the mediator may suggest bringing together just the lead negotiators or lawyers or experts to change the dynamics of the mediation and bring speedier progress.

## Settlement

A settlement is reached when the parties come to an agreed solution. The lawyers present will draw up an agreement which, when signed, becomes binding. It's therefore essential that each party is represented by someone with full authority to settle the dispute.

## Non-settlement

Disputes which do not settle on the day of mediation can often settle shortly afterwards via fruitful face-to-face negotiations as a result of the negotiations during the course of the day and the momentum gathered. In the event of non-settlement, it's likely that the mediator will ask the parties' permission to contact them within the following week or two. Further progress can usually be made once the parties have had time to reflect on the issues that have emerged during the mediation.

Where parties cannot reach a settlement, they can leave the mediation and pursue arbitration, litigation or any other dispute resolution procedure. Nothing said or done in the mediation can be referred to outside the scope of the mediation.



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## After the mediation

The mediator will contact the parties to check that there are no loose ends. CEDR will also be in contact for feedback on the mediator's performance and the service provided.