

National Health Service Mediation Scheme

1. What is mediation?

Mediation is a flexible process conducted confidentially in which a neutral person actively assists the parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution.

The principal features of mediation are that it:

- involves a neutral third party to facilitate negotiations;
- is without prejudice and confidential;
- involves party representatives with sufficient authority to settle;
- is flexible, with no set procedure, enabling the process to be designed and managed by the Mediator to suit the parties, in consultation with them;
- enables the parties to devise solutions which are not possible in an adjudicative process such as litigation and which may benefit all the parties.

2. Preparation for the mediation

Centre for Effective Dispute Resolution (CEDR) will make the necessary arrangements for the mediation as required or agreed by the parties:

- drafting the mediation agreement, submitting it for review by the parties and preparing the final form for signature, incorporating any agreed amendments;
- facilitating agreement as to the date, venue and start time for the mediation;
- organising delivery of case documentation to the mediator;
- arranging for pre-mediation conference calls between the mediator and the parties individually if required.

The parties will:

- agree with CEDR the date, venue and start time for the mediation;
- notify CEDR of the names and roles of all those attending the mediation on their behalf, so that CEDR can inform all Parties and the mediator in advance of the mediation;
- ensure that a lead negotiator with full authority to settle the dispute attends the mediation to sign the mediation agreement;

The mediator will:

- ensure at all times that the *European Code of Conduct for Mediators, 2004* is complied with in respect of the mediation of the dispute, reporting any conflict of interest or other relevant matter, if any, to CEDR and (subject to any question of confidentiality or privilege) the parties immediately it emerges;
- make contact with a representative of each of the parties no less than 14 days before the mediation to assist in preparation for the mediation.

3. Appointing the Mediator

The parties can nominate the mediator from CEDR panel of mediators. Alternatively the parties can request the CEDR to appoint the mediator.

CEDR will only appoint a mediator who, in their view, possesses the relevant skills and experience to mediate the dispute for the parties effectively, and who will comply with the European Code of Conduct for Mediators and the Civil Mediation Council's individual and scheme requirements.

Any appointed mediator will be required to confirm immediately to CEDR if there is any matter which might prevent them from complying with the Code in relation to the mediation of the dispute, such as a conflict of interest. CEDR will then notify the parties of any such matter immediately it is disclosed to them.

4. Fees

The mediator's fees, travel/accommodation expenses and any supplier costs will be paid equally by the parties except in the following cases where the payment will be made by the NHS Resolution:

- Liability is admitted in full or in part; or
- The claimant is unrepresented.

If either party to a mediation fails to attend, or cancels their attendance with less than two working days prior to the date of the mediation, an amount equal to 50% of the fee will be payable. If a party cancels its attendance less than one working day prior to the date of the mediation, or fails to attend, an amount equal to the total fee will be payable.

The Mediation Agreement provides that unless otherwise agreed or ordered mediation fees and the parties' legal costs and expenses shall be costs in the case. Parties and their lawyers should consider what costs arrangements are suitable (whether the case settles, or whether it does not) prior to the mediation.

5. Documentation

The mediator will be provided with a bundle of relevant documents by CEDR. The parties may also provide to the mediator a written statement in advance of the mediation if they wish. It is not mandatory to do so.

All documentation supplied will be treated as confidential by the mediator and CEDR and will not be circulated further without express authority.

One of the advantages of mediation is that its success is not dependent on exhaustive disclosure of documents. Bundles can usually be relatively limited in size, containing only key documents. Case summaries can similarly be quite brief and can be prepared jointly by the parties.

While documents brought into existence for the purpose of the mediation, such as case summaries, are clearly privileged from later production in those or other proceedings, the fact that a document which is otherwise disclosable in proceedings is produced for the first time

during the mediation does not normally confer privileged status on it. The parties must take legal advice on such matters if they arise.

6. The mediation agreement

The agreement to mediate provides the essential legal basis for the mediation. Its signatories (the parties to the dispute, the mediator and CEDR all agree by signing it that the mediation is to be conducted consistent with the *European Code of Conduct for Mediators*.

A draft mediation agreement will be sent for approval to the parties as part of the preparation process for the mediation. The mediation agreement will be signed at the beginning of the mediation day on behalf of each of the parties and the mediator, having been pre-signed on behalf of CEDR. In any pre-mediation contact with the parties, CEDR staff and the mediator will observe its terms as to confidentiality, even though the agreement has not yet been signed.

7. The mediation

It is normal for each of the parties to have a private room for confidential consultations on their own and with the mediator during the mediation. There should also be a further room large enough for all parties to meet with the mediator jointly. Mediations will not take place at the NHS Resolution premises and CEDR will ensure that there is an appropriate venue in advance of the mediation.

The mediator will chair and take responsibility for determining the procedure at the mediation, in consultation with the parties.

The procedure will normally/most commonly comprise:

- preliminary meetings with each of the parties when they arrive at the venue;
- a joint meeting of all attending the mediation, at which each of the parties will normally be invited to make an oral presentation;
- a mix of further private meetings and joint meetings (which may involve all or some of each party's team), as proposed by the mediator and agreed by the parties.

Professional advisers, particularly lawyers, can attend the mediation although legal representation is not essential. Such advisers may play an important role in the exchange of

information and opinion on fact, evidence and law; in supporting their clients (particularly individuals) in the negotiations; in advising clients on the implications of settlement; and in drawing up the settlement agreement and any consent order.

No verbatim recording or transcript should be made of the mediation by the parties or the mediator in any form, but participants can make their own private notes which will be undisclosed to anyone else, including in any subsequent litigation or arbitration.

Mediations under the Scheme are expected to take between 4 and 8 hours but may last beyond a normal working day and it is important that the key people present for each of the parties remain present or at worst be available by telephone for so long as the mediation continues. Any time constraints should be reported to the CEDR or the mediator as soon as known, as any unexpected departure can be detrimental to the progress of the mediation and perceived as disrespectful by other parties.

8. Confidentiality in relation to the mediation

The mediation agreement provides that what happens at the mediation is to be treated as confidential by the parties, the mediator, all individuals attending the mediation and the CEDR including the fact and terms of settlement. However, the fact that the mediation is to take place or has taken place is not normally made confidential, as either or both of the parties may wish to claim credit for agreeing to engage in the process.

Apart from where the parties agree in writing to consent to disclosure of what would normally be confidential, there may be rare circumstances in which the confidentiality of the mediation process cannot be preserved, such as where:

- the mediator or any party or their representative is required by law to make disclosure;
- the mediator reasonably considers that there is a serious risk of significant harm to the life or safety of any person if the information in question is not disclosed; or
- the mediator reasonably considers that there is a serious risk of being personally subject to criminal proceedings unless the information in question is disclosed.

Such questions might arise in relation to duties under the Proceeds of Crime Act 2002 or related legislation or under any other legislation. Legal representatives (who may themselves be under a comparable duty of disclosure in their own capacity) must take full responsibility for advising their clients of the implications of disclosure in relation to any such matters at a mediation.

9. Conclusion of the Mediation

The mediation may end in a number of ways:

- by settlement of the dispute in whole or part, when all agreed matters must be written down and signed by the parties to be binding;
- by one or more parties leaving the mediation before settlement is achieved;
- by an agreed adjournment for such time and on such terms as the parties and the mediator agree;
- by withdrawal of the mediator in accordance with the mandatory and optional circumstances set out in the Code.

The mediator will facilitate the drawing up of any settlement agreement. Once signed the settlement agreement becomes a binding contract which is enforceable by legal action should either party subsequently fail to honour their obligations detailed in the agreement.

Where the mediation does not end in complete settlement, the Mediator may make contact with the parties thereafter to see whether further progress might be possible. Many disputes which do not settle at the mediation settle later, usually as a result of what occurred or was learned at the mediation.

CEDR endeavours to make contact with all the parties, after every mediation, to obtain their feedback on both the process itself and, in particular, the mediator. Any feedback obtained regarding the mediator will be given in full to the mediator as part of the mediator's continuing learning and development. CEDR will also share anonymised feedback with the NHS Resolution as part of their quarterly service reports.

10. Complaints

Any formal complaint about CEDR or any mediator nominated by CEDR should follow the procedure set out on the CEDR website at <https://www.cedr.com/complaints/>

CEDR Contact Details

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