

Catalyst Mediation

Advocacy In Mediation

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A) What is mediation?

The short description: *A process to enhance the prospects of achieving a more satisfactory negotiation.*

Or, more particularly: *“A private dispute resolution process which is without prejudice and in which a neutral third party (mediator) assists the parties to reach a negotiated settlement which can be binding where appropriate.”*

To analyse that sentence, mediation:

- is done in *private*. The mediation agreement will provide for confidentiality;
- is a *dispute resolution process* with a good track record – the statistics show that at least 75% of mediations result in an agreement which is satisfactory to the parties;
- is *without prejudice* – as most negotiations. If it fails, the court or tribunal option is still available;
- requires a *neutral third party*. This is the fundamental distinction between mediation and ordinary negotiations between the parties.
- *assists the parties*. The parties are free to take their own free-will decisions. *No solution is imposed* by a third party;
- is a *negotiated settlement*, assisted by the mediator. “Assisted negotiation” describes it well.
- is *not binding* unless and *until a formal agreement* is made at the end of the mediation;

B) Why consider mediation?

Solicitors are, rightly, proud of their tradition of fearlessly looking after the interests of their clients. In doing this, sometimes their search for ways to assert strict legal entitlement can cloud the identification and the exploration of ways to meet their clients’ true interests.

What can it provide your clients?

When negotiation has apparently reached deadlock, mediation can provide clients:

- with a real, early, opportunity to avoid the uncertainties of litigation.
- the chance to examine alternatives and fully evaluate where litigation might lead,
- the time to reflect on what they really want to achieve and whether it is worth the cost, effort, delay and upset litigation might bring.

How might mediation affect your practice?

Mediation may be considered as a threat to solicitors’ income. It is becoming apparent that the greater threat is to ignore mediation, which can form part of a well balanced and valuable service to clients. The truth is:

- that clients are, normally, clients of the firm as a whole, and the firm’s interest is to satisfy the client’s overall best interests.
- happy clients are known to be not only good paying clients but also fruitful introducers of new business.
- if you are busy, mediation is relatively quick and can increase turnover of cases.
- As your input before and during a mediation can be crucial, there is every reason why you should be well remunerated for your time.

Therefore mediation could provide your practice with the opportunity to:

- re-visit ways of safeguarding and pursuing your clients' priorities, aims and interests;

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- review the options you make available to clients and to become engaged in a process which widens these options;
- market a track record in being advisers to successfully mediated settlements;
- market the practice as one which makes available as wide a spectrum of options as possible to resolve clients' disputes;
- embrace a relatively new culture which, added to our existing system, will put the small jurisdiction of Scotland amongst the world leaders in providing multiple, efficient and cost-effective dispute resolution options available to its citizens and those who do business here.

C) What is your role in the mediation process?

As this suggests, mediation does not leave legal rights and solicitors at the door. Far from it. There are many ways in which you can provide valuable assistance and advice to your client in a mediation.

Deciding when to consider mediation.

Before there is any hint of conflict,

You have an early role in advising clients of the various possible dispute resolution clauses, which may be included in commercial contracts. These commonly include reference to arbitration or an expert and now, increasingly, to mediation.

The use of mediation clauses will set the scene for the client and provide them with an internal way of coming to a resolution of any contract problems that may emerge. Although we offer assistance in this area with caution, our experience in commercial processes may enable us to contribute something to your ability to produce a well crafted and relevant hierarchical contractual dispute resolution procedure for your clients.

Our web site at <http://www.catalystmediation.co.uk/risk/default.asp> will supply more information about our services in this regard.

On the emergence of a conflict

Mediation provides a fresh option for you to suggest to your clients.

Awareness of the three pillars of dispute resolution -

- Negotiation,
- Mediation and
- Adjudication (including litigation and arbitration)

And informed comment on mediation can send a powerful message to your clients.

Mediation is also opening up a new market. Some clients are intimidated by the court process for reasons of cost, delay and uncertainty and would rather fund your assistance in a mediation.

In the course of a conflict,

Disputes can be referred to mediation at any stage - including the mediation of elements of a litigation while the litigation is in progress. This is an additional weapon in the dispute resolver's armoury.

It also supplies an opportunity where the client has not listened to some of your reservations about his case, to have their expectations confirmed or otherwise at an early stage by the reality-check which is provided by a mediation.

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In some cases, while certain issues underlying the dispute may require a decision by a court or tribunal, many others can be resolved through a mediation prior to formal proceedings. The result can be that the details of the case to be put to the court or tribunal have been agreed by both sides, creating the opportunity for a faster, less expensive and more focussed formal process.

Informing your client of the possible advantages

These are some of the most relevant advantages that are worth raising:

Why 80% of mediations succeed where negotiations have failed. The main reason is the presence of a trained, independent facilitator, whose task is to assist the parties to focus on their future interests while leaving the outcome entirely in their – and your – hands.

Mediation provides speedy resolution of conflicts. Mediations rarely take more than one full day. The time taken to prepare for the mediation is determined by the parties, together with their advisers.

The costs of mediation are readily ascertained. The cost of organising a mediation and providing a choice of suitable mediators, will be clear in advance of any commitment.

The parties retain control over the procedure and also over the outcome. In mediations, the parties, advised by you and in discussion with us and the Mediator, determine what the process and time-scales will be. Once agreed this is enshrined into a signed document, the Agreement to Mediate, which codifies the process and the terms under which the mediation will be conducted.

It saves management time and, thus, avoids opportunity cost. The speed of resolution rapidly relieves clients or their managers of the retrospective, tiresome and often worrying process of reviewing what happened in the past in order to fight a long court case, and allows them to concentrate on current and future business.

It is voluntary and “without prejudice”. The process is a facilitated negotiation and, so, proceeds as any other “without prejudice” negotiations, which either party can leave at any time.

It enables confidentiality - avoiding publicity at a court hearing. The whole process, as well as the outcome, is conducted in complete privacy and confidentiality.

It provides a reality check for the parties. Where a court case has been raised or is in contemplation, often the enthusiasm to make a point can cause the parties to overlook tough realities, such as the validity of a contract or the reliability of a witness – which will be crucial in a proof. A mediator is likely, in private, to give the parties the opportunity to review their true strengths and weaknesses. Sometimes it is easier for a client (and the adviser) to hear the chill reality from an independent person rather than his adviser!

It creates the possibility of creative and forward-looking solutions. The parties are free to look at solutions that are outside the scope of a court case and avoid the need to focus on the past and strictly legal remedies. With the help of the Mediator they can think creatively and consider solutions which can influence future dealings positively.

The parties decide, so the outcome is based as much on their interests as their rights. The parties are free to think of what resolution terms are truly in their interests as well as considering what their strict rights may be.

It enables the possibility of continuing satisfactory business relationships. Rarely do parties do further business after a court case is over. This is not the experience following mediations – where, often, a future relationship is encouraged by a solution that embraces that possibility.

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It is satisfying to all parties. There will be no outcome if the parties do not agree to it. It provides the client with a “day in court” in which they participate rather than are represented by counsel. It is voluntary - they are free to walk away at any time before the final agreement is signed. This leads to outcomes that are seen by each party to be the best they can practically achieve in the circumstances. After the parties themselves have reached agreement, a document is signed and the settlement is binding.

Understanding some of the arguments against mediation

If the clients' legal case is strong, they may emerge with an apparently worse result if they go to mediation rather than to court. However strong their case, many clients, properly advised by you as to their legal rights, may decide that the broader, interest based solutions available through mediation would be preferable to the more limited rights based outcomes available through the court.

There is a need to disclose your client's hand. There is no need to disclose any information to the other side that you do not wish to disclose. In a court action, most of the relevant information is likely to be discovered in any event. All information disclosed to the Mediator in the course of the mediation is confidential unless otherwise specifically agreed.

Pressure to settle is created by the mediation atmosphere. You or your client may have heard that this happens, but this pressure can be easily resisted if your client – with your advice- is not happy with the solutions being suggested. It is no part of the mediator's role to “gain an agreement at any cost” as this is likely to lead to a settlement that is not adhered to and is specifically against the Catalyst Mediation Code of Practice.

Going to mediation displays weakness or is some kind of an admission of liability. The reality is that it is more a sign of a party's business professionalism, a recognition that whatever their position, being able to control the outcome is most important. The solicitors on the list on our web page have declared that they will view any suggestion of mediation on its merits and not view it as a sign of strength or weakness.

It is just another delaying tactic. If it is perceived to be a delaying tactic, it is a pretty poor one, as it takes a relatively short time to organise and hold a mediation.

There are no real cost savings. It is true that good preparation and assessment of the strength of a case are required for a mediation. However The Court of Session Commercial Court Rules are also demanding in this regard (Practice Note (No 6 of 2004) as are the new Sheriff Court Rules (see the Article on these Rules by John McCormick JLSS February 2001 p 24). Where the client's cost savings by mediating can be considerable is after the preparation, when compared to the management and external costs of seeing through a potentially long, drawn out case.

There is less work for the solicitor. As highlighted in this guide, there is considerable scope for solicitors to make a well-remunerated contribution, by assisting their clients in the preparation stage and then in advising them during the mediation.

If this happens too often, the courts will be diminished as dispute resolvers to the detriment of a civilised community. Your clients will have little sympathy with this approach if they feel that an opportunity to settle their case quickly and effectively has been missed because the body of law in the country would be enhanced by a lengthy, complex court case at their expense.

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Knowing when mediation is not appropriate

It is fair to say that most commercial cases are suitable for mediation. Nonetheless it should be recognised that mediation is not appropriate where:

- there is a desire on the part of the clients to establish legal precedent;
- you have advised the clients that they need a summary decree, such as an interim interdict;
- the clients wish to enforce an award;
- you believe that there is a fundamental need to compel and examine witnesses;
- the clients wish to make a public statement on the importance of an industry practice;
- there exists economic power which your clients wish to exercise ; or
- there is no genuine interest in settlement.

Approaching the Other Party

A substantial and growing number of solicitors in Scotland are open minded to mediation, considering that it may be helpful in assisting clients to achieve a settlement which recognises their interests and meets their needs. These solicitors will treat a suggestion that a case may be appropriate for mediation on its merits and not as a sign of strength or weakness.

You will find a list of solicitors who agree with this approach on the Catalyst Mediation website at www.catalystmediation.co.uk/mediation/default.asp?p=24 . If you wish to be added to this list please email Jeremy@catalystmediation.co.uk .

Alternatively we will approach the other side if you prefer, as it is sometimes helpful for an outside agency to make the first move.

Setting up a mediation.

The simple first step is to telephone or email us. Our details are below and on our web page. You will be taken through the process carefully and knowledgeably. An approach which turns to nothing will incur no charge.

Preparing or approving the Agreement to Mediate

The terms of these uncomplicated agreements are becoming quite routine. Nonetheless, in our experience, clients will welcome your involvement in settling the preliminary documents. We, as mediation organisers supply agreements which have stood the test of time and can be adopted by you for your clients if you wish.

Preparing the pre-mediation documents and submissions.

It will be as important to ensure that you organise all the relevant information and points prior to a mediation as for a court hearing (although there is no formality about their presentation). It is well accepted that an essential pre-requisite of a satisfactory mediation is the availability of sufficient legal and factual information to each party to enable it to make a realistic analysis and assessment of its case. Your role in assembling and advising on this package will be important.

Advising during the process

Mediation seeks to be encourage more collaborative negotiations within an atmosphere that is less confrontational and for solicitors trained in litigation, advising clients in this setting this can be difficult to become comfortable with.

It may help to remember that the mediator is not there to advise or judge any aspect of the negotiations and so will not challenge the duty you owe your clients of undivided loyalty.

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On the same basis they will also recognise that your clients look to you to protect their legal rights and the mediator will not seek to interfere with this.

For example, most commonly in private meetings, the mediator will actively create opportunities for you to give your clients guidance on the legal and non-legal options available to them and the likely sequence and cost of going to or continuing with other alternatives such as arbitration, litigation or tribunal.

As another example, consider a situation where a barrier occurs to settlement, often because the good advice you have given to your clients has not got through. In this instance the mediator will encourage your client to consider with you the benefits of taking a principled rather than a positional negotiation stance, where you will be able to assess with your client the benefits of a negotiated agreement and the outcomes if one is not achieved.

Some Tips on advising in a mediation

These tips come from litigators who have either become mediators or who are familiar with the process:

Before the mediation:

- work out your client's real needs and objectives. Sometimes, these are not clear so "active listening" will help.
- consider with your client as many of the options for outcome as you can, with costs, time scales and implications.
- Work out what you, or your client – or both – wish to say to help your cause in the opening statement at the beginning of the mediation. Consider including these points:
 - i) a factual summary of the case
 - ii) a short statement outlining type of work/business of your party
 - iii) a chronology of events if relevant
 - iv) the people involved, if relevant
 - v) an outline of the legal issues
 - vi) an outline of the factual issues
 - vii) identify common ground and difference
 - viii) chronology of negotiation history up to last offer
 - ix) court/arbitration timetable should dispute remain unresolved
 - x) a list of key documents
- Encourage and motivate the client to be as participatory as possible, without pushing them beyond their comfort level.
- Think about the different roles you will be taking on at the mediation - whether as advocate, adviser or member of your client's team. This will involve listening to your client and the other side and negotiating not confrontationally, but confidently and effectively.
- Mediation is designed to achieve a settlement. To this end, work out what crucial facts will matter – what paperwork you wish to have to hand - what the real issues in the case are - what concerns does your client have - what proposals you might make.
- Consider how best to present your client's case. Remembering that the process is a collaborative one, not adversarial. Think about what will make most impact on the other party, bearing in mind that he

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can walk out at any time. Work out what might they may not know or understand and what you or your clients need to know or understand. Have a list of the questions you wish to ask.

- Ensure that your client's representative is authorised to come to a settlement or that you have direct access to someone who can.

During the mediation:

- Remember that grandstanding and posturing rarely help to achieve a good outcome
- Make sure that your ego does not interfere with achieving the real interests and needs of your client
- Come with a positive attitude – or at least an open mind. Use positive language.
- Work hard on joint problem solving – winning does not mean the other party losing.
- Be clear, with your client about your BATNA (Best Alternative To a Negotiated Agreement) and WATNA (Worst Alternative To a Negotiated Agreement)
- Reflect on the power of an acknowledgement, an expression of regret, or even an apology
- Try to be creative in your thinking about solving the problem

Drawing up or approving the Settlement Agreement.

As with the Agreement to Mediate, there are now some fairly well worn and accepted standard provisions for incorporating in a Settlement Agreement. The mediation organisers may supply examples of these in advance. These must, of course, be checked and the fundamentals and sometimes quite complicated details of what is agreed in the mediation must be committed to writing. This can take some time to settle and involves detailed drafting by the solicitors. The mediator is likely to provide help in the form of reminding you as to the course of the negotiations and what he recollects the parties did and did not agree.

Conclusion

Mediation is one method of creating a solution for your clients that has a successful track record, is widely encouraged by the courts and equally widely appreciated by clients.

Taking a long term view, it may even enhance the business the client places with your practice.