CD DIRECT

GUIDE TO MEDIATION

CONFLICT DYNAMICS

TRAINING & DISPUTE RESOLUTION SERVICES

WHAT IS MEDIATION?

Mediation is a voluntary process in which a mutually acceptable third party helps the parties to a dispute to try to reach a settlement. The settlement agreement is enforceable.

Mediation has the following further features:

- It is a confidential process
- The proceedings are conducted on a without prejudice and off the record basis
- It is a flexible and informal process
- Mediation is held in private
- The parties choose the mediator, who may be a specialist in the dispute subject
- The mediator is impartial, neutral and independent
- The mediator controls the process
- The parties define the issues and they may vary them during the mediation process
- The parties determine the outcome, or remedies
- Precedent is of little importance, although mediation happens in the 'shadow of the law'
- There is a formal agreement to mediate
- There is no settlement agreement until it is reduced to writing and signed by the parties
- Parties decide who they wish to have attend the mediation and they may be represented by lawyers
- The parties agree to the time and place of the mediation
- The parties pay for the mediation

Litigation, on the other hand, is a compulsory process by which a judge or magistrate hears the parties' respective cases and then determines the dispute between them. The process is subject to review and appeal.

Use of mediation does not shut off use of mainstream litigation. On the contrary, litigation and mediation remain complementary to each other throughout any unconcluded dispute. Mediation can and often does take place before court proceedings are started. Once proceedings have started, mediation can take place at any time up to trial. If proposals emerging from a post-proceedings mediation prove unacceptable, the alternative is to continue with the litigation. Cases can even be successfully mediated between first instance judgment and appeal. In this way mediation and litigation are both symbiotic and alternative to each other. [1]

[1] Adapted from *The Clinical Disputes Forum's guide to mediating clinical negligence claims* – CEDR, July 2001

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Mediation has many advantages over litigation and other dispute resolution processes. The parties control the outcome of mediation, and the outcome can be varied and creative, addressing a wide range of needs and also deal with the causes of the dispute.

Although there is no guarantee of settlement in mediation, settlement rates in mediation are generally high. In the UK, 86% of all commercial mediations settle on the day of the mediation or shortly thereafter.

Mediation is quick and easy to set up and the typical mediation takes a day, it is not a protracted process.

CASES THAT ARE SUITABLE FOR MEDIATION

- Neither side really wants to litigate
- The case will probably settle out of court anyway-but not before both sides have incurred substantial legal costs
- Both sides believe that they have a good case
- Relationships are important
- The parties want to retain control of the outcome
- There is no great disparity in power
- Speed is important
- Highly complex issues are involved
- An adverse precedent will be a nuisance for both sides
- Confidentiality is important
- Both sides need the opportunity to let off steam

HOW TO GET TO MEDIATION

The mediation process usually starts in one of the following ways:

- by agreement directly between the parties or their representatives
- on the suggestion of an insurer
- on the court's suggestion, sometimes coupled with a stay of proceedings for a fixed period.

For mediation to take place both parties must agree to participate. What if one party wants to mediate and the other party does not? Usually the best question to ask first is, what do you have to lose? If, however, agreement to mediation is not immediately forthcoming from the other party, either party or their representative may approach CD Direct and ask them to discuss mediation further with the reluctant party, and to endeavour to encourage them into mediation voluntarily.

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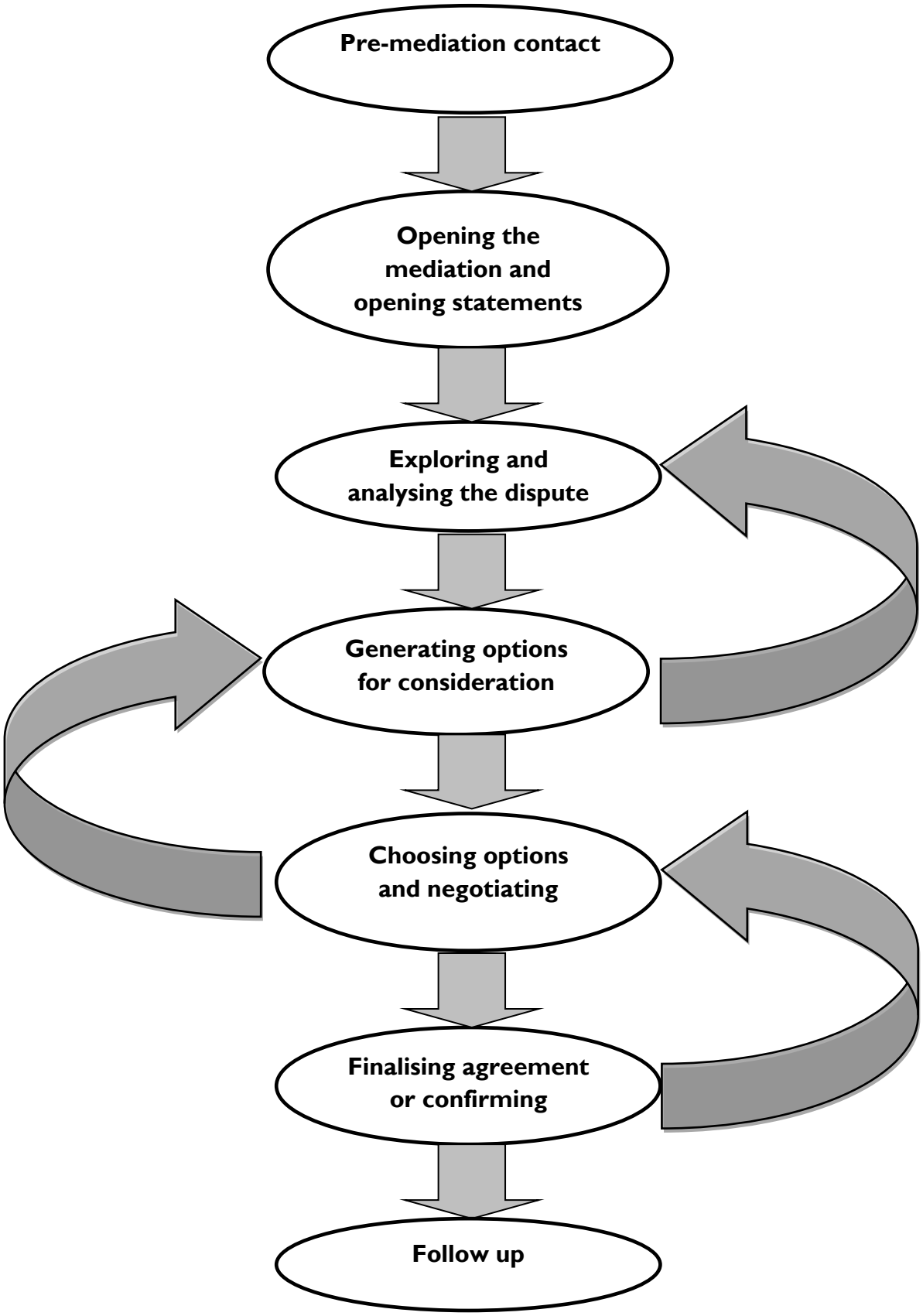
THE STAGES IN THE MEDIATION PROCESS



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WHAT HAPPENS AFTER YOU HAVE DECIDED TO MEDIATE AND A SUITABLE MEDIATOR HAS BEEN APPOINTED?

1. Once parties and their representatives have agreed to mediation and the mediator has been appointed, the mediator will call or meet separately with the parties to hear briefly about the dispute and to discuss with the parties how they could best prepare for the mediation.
2. Preparation will include preparing a Mediation Statement for the mediator and the other party, to be exchanged through the mediator. This Statement is an opportunity for parties to briefly recount how the dispute has arisen, what the key issues are for discussion in the mediation, and what their broad goals are for the mediation.
3. CD Direct will supply the mediator and the parties with a draft *Agreement to Mediate* for them to consider and sign before the mediation day.
4. The mediator will confirm with the parties a date, time and venue for the mediation. The parties will be responsible for sourcing a mutually acceptable venue. The details of the date, time and venue for the mediation will be confirmed in writing by the mediator.
5. On the day of the mediation, each party's team will have a private room as a confidential base for the day, for papers and private discussions.
6. The mediator will meet each party separately to check that the *Agreement to Mediate* has been signed and to ensure that the parties are prepared for the process.
7. The mediator will then welcome all parties to a joint meeting to open the mediation.
8. After reminding the parties that the process is voluntary, informal, private and confidential and explaining the process for the day, the mediator will invite each party to make a brief Opening Statement. The client may speak as well as the lawyer.
9. There may be some discussion of these Statements before the mediator breaks into side meetings with the parties to explore the issues in dispute.
10. The mediator takes responsibility for the order of discussions. Further joint meetings may be convened with everyone there, or sometimes selected members of each party's team, such as lawyers, with or without the mediator.
11. The mediator's role is to help the parties reach an agreed outcome through off the record discussions, both in joint meetings with each other (which the mediator will chair) and in private side meetings with the mediator alone.
12. The mediator does not make any decision on who is right or wrong, but acts as a facilitator of the negotiation and settlement process, instead of adjudicating like a judge or arbitrator. The outcome thus belongs to and is determined by the parties.
13. The mediation of the dispute will terminate when:
    - the parties conclude a settlement agreement;
    - a party gives notice of withdrawal from the mediation, provided that the mediator has been given a reasonable opportunity to mediate; or
    - the mediator gives notice stating that there is no reasonable prospect of a settlement.
14. While the process does not guarantee to produce a binding outcome, if agreement is reached, it will be recorded in writing and have the force of a binding contract in its

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own right, or through being included in a court order staying the proceedings on agreed terms.

15. If the case does not settle in mediation, the parties may resort to any other dispute resolution option with nothing substantive lost through engaging in the process. Very often, the mediation process narrows the issues in a way that makes later settlement possible, or at the very least reduces the length of a trial. Even where a mediation seems to end in hopeless deadlock, the case will often settle within a few days or weeks. Parties go away and reflect on their positions and may well make or adjust or even accept a further offer to reflect their changed perception of their risk. [2]

HOW TO PREPARE FOR YOUR MEDIATION

The mediator will explain how to prepare for the mediation in order to get the best out of the day. In particular, the mediator will ask the parties to each reflect on their dispute and identifying the key issues for mediation. These should not be limited to the narrow definition of the legal dispute, but may include a range of issues that are important to the parties. This range of issues is usually determined by an analysis of the positions and interests of both parties.

The parties' positions are typically set out in a legal claim and defence or counter claim. They may also simply take the form of a set of demands, or the positions last articulated in a negotiation. Although the parties' positions are usually only the 'tip of the iceberg' in the dispute they are nevertheless an important place to start.

A detailed analysis of both parties' interests in the dispute is very important. These interests are not limited to those defined by formal legal pleadings, but include a wide range of personal, legal, business and commercial interests. It is also important to identify the respective and common interests of both parties, as far as possible.

It is necessary to consider the range of possible solutions that might be generated through the mediation process and to think about what offers can be made to the other side that cost little but which the other party might value highly, and vice versa. A party should also consider whether there are issues outside the current dispute that might helpfully be brought into the mediation, such as opportunities for future business. The parties are required to confirm in the *Agreement to Mediate* that they have a mandate, authority to negotiate.

In preparing for the mediation and in particular, for the negotiation stage, a party should think through the general approach that it and the other party will take to the negotiation. This involves considering an opening offer and a 'walk away position'. Opening offers can send crucial signals to the other party and, particularly considering the confidential and 'without prejudice' nature of mediation

Parties should consider, before the mediation, the possible alternatives to a negotiated agreement including:

- proceeding with or defending court action (relying on legal rights);

[2] Adapted from *The Clinical Disputes Forum's guide to mediating clinical negligence claims* – CEDR, July 2001

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- acting unilaterally (relying on the use of power); or
- concluding an agreement with a different party or on different terms.

Where a dispute is destined for trial, asking the following simple questions about legal costs can have salutary consequences:

- What have our legal costs been to date?
- What will our legal costs to trial be?
- What value do we expect from a successful outcome at trial?
- What is our estimate of winning/losing at trial?
- What will the costs consequences be if we lose at trial?
- What will the consequences be if we win at trial?
- What are our hidden costs (such as, for example, management time) of going to trial?

HOW TO FIND A MEDIATOR

The Conflict Dynamics' CD Direct panel of mediators are all accredited and experienced mediators.

CD Direct mediators may be appointed in the following ways:

- you may contact Conflict Dynamics directly by e-mail or telephone and request assistance in the appointment of a mediator.
- where parties contact Conflict Dynamics and request assistance in the appointment of a mediator, the Conflict Dynamics client advisor will provide a case management service from the selection and appointment of the mediator to the invoicing of the client and payment of the mediator.

FOR FURTHER INFORMATION AND TO DISCUSS MEDIATION

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