

Shire Mediation

A Typical Civil or Commercial Mediation

By Bob Shire

Introduction:

Mediation saves people much of the cost, stress and time involved in extended legal action. However I believe there are two aspects that really set Mediation apart from the other ways of settling disputes.

Firstly it is a wonderfully civilised process based on getting disputing parties together face-to-face (or at least in the same location) in a non-threatening and orderly environment.

Secondly it is a beautifully simple and flexible process. Mediation can manage a wide range of disputes, at any stage in the resolution time-line (from shortly after the dispute arises to the very steps of the Court), with any number of participants, with or without legal advisers present. A mediation can be held over several days but usually it takes one day or half a day depending on the complexity of the issues. Occasionally it takes just an hour or two to settle a dispute in mediation. Also the mediation does not have to be held face-to-face. I have conducted mediations over the phone and I know of mediators who have successfully completed mediations using email alone.

I trained with the Centre for Effective Dispute Resolution (CEDR), one of Europe's foremost mediation training and provision organisations, and this gave me a solid base of mediation skill and technique. But once the training was complete and I was launched into mediating in the real world I learnt to adapt what I had learnt to suit my style, my personality and background.

As the expression goes there are a lot of ways to skin a cat and every mediator has a slightly (or substantially) different approach. What I am writing here is based on CEDR's training but has been adapted by me over the years.

Pre Mediation Contact:

Once I have been formally appointed as mediator, which of course is preconditioned by the agreement of all parties to the dispute, I like to make early contact with the parties (and/or their legal advisers if they have them) to establish a rapport and to clear up any questions or issues they have with the mediation.

At the point I get involved, legal proceedings usually have already commenced, solicitors appointed and statements of claim and defense lodged with the Court (generally a County Court). So the main facts of the dispute and positions of the parties are quite well established and this certainly facilitates a successful mediation process.

My initial contact is also made to finalise the date, time and venue for the mediation, to send the parties a draft of the Mediation Agreement (see below) and to brief them on the information I need ahead of the mediation day to familiarise myself with the dispute.

Mediation Agreement: This is a formal agreement which needs to be signed by the parties before the mediation can commence. It details the participants, confirms the timing, venue and mediation fee and it lays out the basic ground rules for the mediation in terms of the voluntary nature of mediation, the impartial role of the mediator, confidentiality, the need for authority to settle and a number of other clauses governing the conduct of the mediation.

Information required ahead of the day: The information I ask to be delivered a week to 10 days before the mediation day is a brief Position Statement from each party along with essential supporting documents (such as Statements of Claim and Defence).

Position Statement: This is simply an overview of the facts of the case and the issues and interests of each party, to enable me to understand the essence of the dispute. It is not intended to be an all encompassing document and I ask that it be kept as short as possible (ideally no more than 4 pages). This statement can also form the basis of the opening remarks that I will ask each party to deliver at the opening joint meeting which generally launches the mediation process on the day (see later).

In my experience it is helpful if the parties can agree between them the so-called “bundle” of information to be supplied for the mediation and also if they can exchange position statements in advance. I also tell the parties they are at liberty to supply additional information to me on a confidential basis.

The mediation venue: Generally 3 rooms are required in the typical civil or commercial mediation - one room for each of the parties to meet in private and a larger room for joint meetings in which I base myself for the duration of the mediation. Ideally the venue should be neutral but to save money generally the parties are happy to use the facilities of one of the parties or their solicitors.

Assistant Mediators: Sometimes I work with an Assistant Mediator, who, at no cost to the parties, participates in the mediation under my guidance, provides general assistance and insights into how things are going, often getting actively involved in the mediation process itself.

On the Day of the Mediation:

The Mediation Agreement is signed, the mediator’s fee paid (required in advance of the mediation), and the information received. The day for the mediation arrives. I like to arrive at the venue of the mediation at least half an hour before the scheduled start time so I can familiarise myself with the accomodation and be there to meet the parties as they arrive.

As long as the parties arrive on time (not always the case of course) my own early arrival also helps me set the pace. Personally I like to move matters along. In my experience parties generally favour a tightly managed process with the mediator setting a reasonable pace. This is particularly important in the shorter time-limited mediations which form the backbone of my mediation work.

Joint opening meeting: The formalities out of the way the mediation itself starts, generally with a joint opening meeting attended by the parties and their advisers. However this not always is the case. Occasionally the antagonism between the parties at this stage in the

dispute is so great they will not be in the same room together, in which case the mediator has to start with private sessions (see below).

I get the joint meeting underway with round-the-table introductions and a brief summary of my role (as a facilitator not judge or arbitrator) and, reiterating what the parties have signed up to in the Mediation Agreement, the ground rules for the day. I then invite each party to summarise their position as briefly as possible. Generally this opening session lasts about 45 minutes but I have known mediations in which it lasts for the entire mediation and the parties settle in this joint discussion.

Private meetings: However settlement of the dispute in the joint meeting is a rare occurrence so, at a point where I feel the joint meeting is not taking us any further forward, I start a series of private meetings with each party in their own rooms, moving between the rooms facilitating exchange of information and a negotiation of possible resolution options. At these meetings I emphasise to the parties that what is discussed remains confidential unless the party concerned gives me explicit permission to divulge information to the other party.

Most commonly the eventual settlement to the dispute is reached in these private meetings but the mediation process is totally flexible and I have conducted mediations with multiple joint meetings and private meetings involving just the parties' solicitors and sometime with the parties without their advisers present.

Settlement:

Hopefully this process results in settlement and once this has been achieved a formal settlement agreement is drawn up. If both parties have attended the mediation without legal advisers then the mediator has to draft this agreement. Usually there is at least one solicitor present however, in which case he/she is asked to fulfil this task. As often or not this takes the form of a "Tomlin Order"¹ which stays the legal proceedings and summarises the agreed terms of the settlement.

The agreement is then reviewed by the parties, signed and the mediation is concluded.

It is not uncommon for a 4 or 8 hour mediation to settle a dispute which has been going on for years, a period in which minimal communication has taken place between the parties (any communication happening through solicitors) with mounting legal costs and the prospect of potentially crippling court action, particularly for losing parties who are likely to pick up the legal costs of the opposition as well as their own.

Settlement rates:

Much play is made of the percentage rates of mediation settlement as the measure of mediators' performance. The official statistic is that two thirds of mediations settle on the day. I challenge that this as a fair way to sum up how well mediation or individual mediators perform. By getting parties together in the positive environment of a mediation, communication is triggered which quite often leads to a pre-court settlement regardless of the outcome on the day itself.

Whatever is the view of individual practitioners it is a fact that mediation works. In my view it is a marvellous way to resolve disputes and every mediation gives me great satisfaction that I truly am doing the parties a service.

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¹ A **Tomlin Order** is a court order by which a court action is stayed (i.e. suspended), on the terms which have been agreed by the parties and which are included in a schedule to the order. As such, it is a form of consent order. The order permits either party to apply to court to enforce the terms of the order, avoiding the need to start fresh proceedings. The terms of the schedule do not form part of the court order, so may remain confidential, and can include matters outside the jurisdiction of the court or the scope of the case in hand.