Jon Lang Mediation

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Client Guide to Mediation

Getting the best out of mediation

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Mediation Basics

The What, Why and Who of Mediation

"Mediation is a process suited to nearly any dispute, whatever the circumstances"

What is Mediation?

A negotiation assisted by a neutral third party (the mediator) in a confidential and without prejudice environment. The process is about as 'off the record' as the law allows parties to be when they are trying to find a way through their differences.

Why Mediation?

Most mediations result in settlement.

It is a far less expensive and much speedier dispute resolution process than litigation or arbitration. In fact, because the process usually lasts no longer than a day, it is sometimes more cost effective than unassisted negotiation.

The Mediator

The mediator is a resolution focused third party professional.

The mediator's aim is to give the parties the best chance of settling their dispute more quickly, less expensively and with a greater range of settlement options than would likely be the case through other forms of dispute resolution including, often, unassisted negotiation.

The mediator steers the parties towards settlement, helping overcome whatever barriers there might be along the way.

Who Pays

Each party usually pays its own costs of the mediation, including the costs of the mediator and its own advisors. Most mediation agreements provide for how these costs will eventually be dealt with in the event that no settlement can be reached. However, most mediations result in settlement and all settlement agreements should deal with costs.

"Businesses are increasingly using mediation as an alternative to both litigation and arbitration, and also protracted and complex negotiation."

Mediation Basics

The Where and When of Mediation

"Mediation provides the perfect environment for creative and collaborative problem solving."

Where?

Mediation usually takes place in a party's solicitor's office or at a neutral venue. But it can take place anywhere. For instance, where it is possible and thought helpful to view the subject matter of the dispute, it might be appropriate to hold the mediation at a party's facility or site.

Wherever the mediation takes place, there should be a room provided for each party's attendees, with one additional room available which is large enough to accommodate everyone attending the mediation. This larger room will be used for the opening meeting (which everyone attends) and often subsequent joint meetings (usually attended by fewer participants). If an additional smaller room can be made available for such subsequent joint meetings, more suitable for the reduced numbers often attending, so much the better. This can be particularly important towards the end of a mediation when parties are negotiating in earnest, a smaller room usually being more conducive to meaningful dialogue.

When?

Mediation should take place when the case is understood well enough to enable each side to:

- effectively communicate the strengths of their position to the other party or parties;
- analyse and deal with the weaknesses in their own case;
- form a view as to what might represent an optimal settlement; and
- understand the alternatives to settlement in terms of costs and reputational exposure, likely call on management resources, and possible outcomes.

"Mediation is perfect for disputes where negotiations have failed and/or where, because of deadlock, mistrust or intransigence, it has been difficult for negotiations to get off the ground in the first place."

Key Features

Whilst every mediation develops a life of its own,
there are certain key features that are common across the board

"Mediations are usually concluded in a day, although sometimes two days are allowed if the dispute is particularly complex or several parties are involved."

No imposed solution: whilst the mediator is resolution focused and will do all that he can to help the parties find a settlement, he cannot impose a solution.

No third party decision maker: as there is no judge or arbitrator to decide issues in the case, or impose a solution, responsibility for resolution remains with the parties. Whilst this is seen as one of the great benefits of mediation, particularly in terms of the greater range of settlement options open to the parties, it also provides one of the greatest challenges - the parties, who will often feel equally as strongly about their respective (and often diametrically opposed) positions, will need to work with one another to arrive at a position that meets everyone's respective interests.

Meaningful dialogue: the mediator helps generate a dialogue so as to enable each party to fully understand the positions of those on the other side of the fence and the interests or needs underpinning those positions. This usually reveals the main factors driving the dispute and opens the door to a wider range of settlement options.

Flexibility: mediation is a very flexible process which can be designed to suit the parties and the dispute. Typically, a mediation will be characterised by a series of meetings, beginning with short meetings between the mediator and each party separately, followed by what is commonly referred to as the opening session, at which all participants are present. There then follows numerous meetings in varying formats and permutations, for instance, the mediator with each party separately, or joint meetings between the mediator and all parties together, (or some combination of parties if a multi-party dispute). Often, at joint meetings following the opening session, there will be limited attendees from each side. Indeed, it is not unusual in the latter stages of the mediation, for only the lead negotiators for each side to meet together. But there is no rule book - the only guiding principle is to do what is likely to work!

Often, with larger or more complex mediations, pre-mediation meetings prior to the day of mediation will be organised. Pre-mediation meetings with each of the parties separately, will typically focus on the factual background to the case. Joint pre-mediation meetings tend to focus more on process e.g. order of presentations during the opening session, room arrangements etc.

"The mediator is able to help the parties design the most appropriate process."

The Client's Role

Clients can be front and centre of the mediation process

At a trial, the client sits at the back of the court behind layers of lawyers and has little opportunity of contributing to the formal proceedings, except when giving evidence. In contrast, given the resolution focused nature of the mediation process, which takes into account commercial (as well as legal) considerations, clients are heavily involved every step of the way.

In conjunction with their legal team, clients should be ready to, amongst other things:

- **discuss, develop and help deliver points** likely to persuade the other side to re-visit the merits of their case;
- **identify the commercial imperatives** or personal factors fueling the dispute or underpinning positions taken by the other side;
- **craft proposals** to be made to their opponents (directly or through the mediator) together with accompanying dialogue 'selling' such proposals;
- **evaluate new arguments** or new information provided;
- **design a range of settlement frameworks** and identify the essential elements of any resolution;
- **evaluate offers** made by the other side as objectively as possible.

"Mediation provides the perfect environment in which to find out what is really driving the other side i.e. their true interests, rarely articulated but often crucial to the resolution of a dispute"

"The client's role in the mediation process can be much more hands on."

Key Stages

Key stages of the the mediation process

"Often parties in dispute do not want a full judicial analysis of their case. What they really want is to fulfil their commercial objectives, and mediation usually delivers!"

The mediation process can be divided into five stages - preparation, the opening session, exploration, negotiation and settlement.

In what follows, emphasis has been placed on the opening session and negotiation, both crucial stages in the process for a number of reasons. In the case of the opening session, each party has an opportunity of sowing the seeds of doubt in the minds of their opponents (that their case may be a little weaker than first thought) and also of setting the agenda, and tone or 'mood music' for the day. And in the case of the negotiation stage, each party has the opportunity of securing an optimal settlement, an opportunity that can all too easily be lost if mistakes are made.

A basic schematic can be found on the next page summarising the various stages of the mediation process, with the pages that follow providing a degree of amplification for each stage.

KEY MESSAGES

Agree and develop key messages that need to be imparted to the other side.

POINTS FROM THE OTHER SIDE

Consider likely arguments that will be made by the other side and the most effective response.

MEDIATION STATEMENTS

Exchanged between the parties usually 5 to 10 days prior to the day of mediation. A confidential brief for the mediator can also be prepared if thought helpful.

DOCUMENTS

It is usual to prepare a bundle of the documents referred to in the mediation statement or which are otherwise relevant.

THE TEAM

Decide on your attendees for the mediation.

PRE - OPENING SESSION

Parties settle into their respective rooms, meet the mediator, raise any concerns and deal with any housekeeping matters e.g. signing the mediation agreement.

THE OPENING SESSION

Introductions will be made followed by initial comments by the mediator. Opening comments are made by the parties, usually followed by a more free-wheeling discussion. Parties retire to their rooms and debrief in private.

EXPLORATION PHASE

The mediator will meet with each side, separately, on a number of occasions. Early on, discussions tend to be merits based, becoming more forward looking and resolution focused as the day progresses. Further joint meetings usually take place, but typically with a smaller number attending from each side.

NEGOTIATION PHASE

OFFER

A party makes an offer, direct or through the mediator. If the latter, it is important to ensure that the mediator is comfortable, not just with the precise terms of the proposal, but the 'messaging' around it.

COUNTER OFFER

Once offers and counter offers begin to be made, it is important to monitor whether the 'direction of travel' is likely to lead you to a place that is preferable to the alternatives to settlement e.g. litigation.

SETTLEMENT

Lawyers will usually deal with the drafting of the settlement agreement.

Preparation

Clients and their lawyers should meet in good time before the day of mediation to discuss strategy

Typical ingredients of a Mediation Statement

Description of parties

Background to dispute

Brief summary of issues that would need to be decided by a court/arbitral panel

Agreed issues

Explanation of quantum points

Clarification of any misunderstandings

Description of any proceedings

References to key documents

Progress of any settlement dialogue

Costs

Attendees

The following are a few suggested agenda items for the meeting:

- **Key messages**: agree on and develop key messages that need to be imparted to the other side, and discuss how and by whom that might be done. Some points are best made by lawyers, but many are best made by the parties themselves. Think about who is likely to best be able to deliver particular points in a way that will ensure they are readily understood and taken on board by the other side. Reading from scripts is best avoided, but dummy runs in advance of the mediation, critiqued by members of the team, usually make for a first class presentation. Make the key messages as impactful as possible!

- **Points from the other side**: prepare for points that are likely to be made by the other side. Often, appointing a 'devil's advocate' aides preparation. The devil's advocate's job is to ask all the questions that, putting himself in the shoes of the other side, he would want to ask. The more difficult, less obvious the questions, the more effective the exercise!

- **Mediation statements**: it is usual for mediation statements to be exchanged between parties in advance of the mediation. Mediation statements are typically between 6 and 12 pages in length and set out the current position of the party on whose behalf it is prepared. Discuss what should be included and whether any confidential brief should be prepared, in addition, for the mediator's eyes only.

- **Documents:** it is also usual for a bundle of the documents referred to in the mediation statement, or which are otherwise relevant to the mediation, to be prepared. Typically, the bundle will be agreed by all parties.

- **The team**: decide on attendees at the mediation.

On the Day

Meeting the mediator prior to the Opening Session

Tips for the Day

Appreciate the challenge: all sides want to settle and have come together to do just that. But each party is likely to hold, or at least articulate, diametrically opposed views on the strengths and weaknesses of their respective positions. You need to be persuasive! Make the other party (or parties) want to listen to you by using appropriate dialogue, tone, body language etc. It is important to establish rapport with your opponents, however counter-intuitive that might be.

Remember, there is no judge or arbitrator to make a decision against your opponents: the only way the dispute can be resolved is to find a solution that all parties think is sensible. That will mean working with your opponents directly, with the help of the mediator, or indirectly, through the mediator.

Settle into your room.

Ensure you have WiFi access, if needed, and that any other needs are met e.g. tea, coffee, flip charts etc.

Meet the mediator and deal with any housekeeping or other issues that need to be addressed at the outset e.g. immovable deadlines (albeit best avoided), facilities for the use of IT during the opening session, when and how to convey new or recently available information, or particularly difficult messages.

Unless already dealt with, the mediation agreement will need to be signed by everyone attending the mediation (a draft usually having been circulated prior to the mediation). The mediator will provide signed copies of the mediation agreement during the course of the day.

"Mediators are trained in overcoming deadlock, in working with parties individually and collectively to build traction and an intensity of focus on resolution, such that most disputes that are taken to mediation end up settling."

The Opening Session

Basics

Tips for the Day

You need something from the other side: you want them to say 'Yes' to a deal you are also prepared to say 'Yes' to. Unless they have properly listened to you, the chances of persuading them to do so are remote. Upsetting them is likely to diminish rather than enhance the chances of them properly listening to you and, ultimately, reduce the chances of achieving a settlement.

Think measured diplomacy: be quietly confident rather than arrogant. Use logic and reason rather than bluster and bluff. Use questions, conundrums and anything else that will lead your opponents to focus on what you think they should be focusing on. Telling them that they are destined to fail, completely misunderstand the case or are just plain stupid, will only encourage a like response and guarantee polarisation and intransigence!

Style of delivery is something that parties should consider before the opening session when the tone or 'mood music' of the mediation, as well as the 'direction of travel', is often established.

Most cases, however large or small, complex or simple, usually have a handful of points that will make a difference to the way those on the other side of the fence will see the strengths and weaknesses of the respective positions.

In meetings prior to the day of mediation, these points will have been identified and the key messages around them rehearsed. Discussions will also have taken place as to who is best to deliver these key messages so as to ensure they have maximum impact.

Lawyers for each side will be evaluating the credibility (as a witness) of anyone present that is likely to be giving evidence, absent a settlement. This could be a significant factor when assessing the alternatives to settlement e.g. a trial and the associated risks. So be conscious of impressions made by team members!

Think about division of labour and dovetailing comments from various members of the team so that the audience (the other side) are kept interested and engaged.

"The best way to get those who have opposing views to your own to listen to you, is to build some degree of rapport. So think about the words you use, tone and body language."

Tips for the Day

Don't shy away from robust dialogue: but avoid letting the other side cross-examine you! There is a fine line between a healthy exchange of information by way of Q & A, and full-on interrogation. The problem with the latter, apart from being inappropriate at mediation, is that it is sometimes difficult not to look defensive, unsure or vague when the questioner is skilled in the art of cross-examination. This could wrongly embolden your opponents. You need to play this by ear, having discussed your level of tolerance for a 'knock-about' discussion with your legal team prior to the mediation day, and agreeing how you will call a halt to inappropriate questioning (if need be) without looking defensive. But don't be too quick to back away from direct engagement. Some of the strongest openings end with an offer to answer any questions the other side would like to ask! However you approach the opening session, be sure to anticipate the questions, points, conundrums likely to be raised by your opponents.

The Opening Session

Procedure

Don't be too quick to call a halt to the opening session. It is not always the most relaxed stage of the mediation, but parties can go a lot further and quicker when together rather than apart. Moreover, the mediator can gain a much better understanding of the key issues for the day, the personalities involved and how they interact.

The mediator will invite all parties into the joint meeting room, welcome everyone, suggest that participants introduce themselves (going around the table) and then outline the ground rules of the day, essentially confidentiality and privilege.

Once the mediator has completed his introductory comments, the 'floor' will be handed to whoever is to start. This would normally be the party who is, or would be, claimant. However, the order of play should be discussed prior to the opening session in case parties have differing views as to who should start (and, in multi-party cases, follow). This is particularly important where there are claims and counterclaims and it is simply a matter of timing that has determined who is claimant and who is defendant.

The party starting will deliver their key messages. There should be no interruptions from the other side. The mediator will step in if there are.

Once each side has completed their opening comments, there will usually emerge a more free-wheeling discussion as points are debated, developed, argued, critiqued etc.

At some point, it will be appropriate to bring the opening session to an end. The mediator will suggest that the parties return to their own rooms, debrief and give some thought as to what it would be helpful to do next. The mediator will thereafter visit each party in turn.

"Each side should be given a clear run, without interruption, at delivering the points they want their opponents to focus on."

The Exploration Phase

Drilling down and discovering the key that unlocks the dispute

Once the opening session has drawn to a close, the parties will retire to their own rooms and debrief in private. The mediator will then visit each party in turn to discuss their thoughts, observations and any concerns.

The mediator will have his own ideas for moving the process forward, including further topics for discussion and will contribute these at appropriate points. However, he will be more interested in the parties' suggestions as to how the next hour or so should be spent. Each side will have its own views and the mediator's task will be to forge agreement as to the way forward.

Usually time is spent immediately after the opening session exploring many of the issues raised during it. Indeed, the mediator will have developed a rough agenda of issues he thinks it is important to explore further from the earlier exchanges between the parties.

In the early stages of the exploration phase, the discussions (either joint or with the mediator alone) tend to be 'merits' based i.e. focused on the dispute, its cause and the rights and wrongs of the various positions taken by the parties.

As the day moves on, however, the mediator will encourage a more forward looking and resolution focused dialogue. Exactly how and when this happens varies from mediation to mediation, but the day will begin to develop a life and rhythm of its own, moulded by the wishes of the parties and efforts of the mediator.

It is always important to remember that no one has a monopoly on good ideas and the mediator will welcome suggestions as to the way forward from any quarter! So, if it is thought that something might help, suggest it!

"Given that time is the common enemy at mediation, at some point the mediator will suggest that it may be appropriate to test the water by making a proposal."

Shuttling

There is often an element of 'shuttling' between rooms as information, explanations and clarifications (and subsequently offers) are passed by the mediator across the divide.

Always think about the effect messages are likely to have on the receiving party.

The Negotiation Phase

Testing the water!

Discussion about the merits, what did or did not happen, who is or is not responsible, must eventually give way to finding a solution.

Usually, the transition from a merits based discussion to a more forward looking and resolution focused discussion takes place around lunch time. Not surprisingly, a working lunch is the order of the day!

To move the negotiation forward, someone of course needs to make an offer. Rarely are there real (as opposed to perceived) disadvantages to going first. Often there are advantages in making the first proposal in terms of anchoring expectations, setting out preferred frameworks for settlement or even testing whether concessions can be secured (e.g. we could offer A, B and C, but only if you can give us X, Y and Z).

Decide who should deliver any offer i.e. party to party, or through the mediator. If the latter, ensure the mediator understands exactly what it is you are proposing and that any supporting dialogue which is to accompany the offer to help 'sell' it, is taken on board. In other words, ensure the mediator is comfortable, not just with the precise terms of the proposal, but the 'messaging' around it.

"Many disputes fail to settle because of the manner in which settlement proposals are presented. A mediator's job is to ensure that offers are presented in a way that maximises their chances of being accepted (or at least of not being dismissed out of hand)."

Offers

It should always be remembered that any offer has a greater chance of being accepted if it can be presented as a good deal for the recipient, rather than the party making the offer.

It is part of the mediator's role, not just to pass offers from one side to the other (with any agreed dialogue underpinning it), but also to do his best to ensure that the offer is presented in the best possible light.

The Negotiation Phase

Overcoming deadlock and securing a settlement

Mediators earn their fee by bringing in settlements in difficult situations and use a number of techniques to do so.

Once the offers and counter-offers start to flow, constantly monitor whether the direction of travel is likely to lead you to a place that is preferable, on taking all things into consideration (including the merits of your case, the value in achieving certainty and finality, the saving of resources – time and money, etc) to litigating the dispute.

If stuck in the mud, you might speak to the mediator about:

- *a brainstorming session and option generation generally;*
- *best and final offers;*
- *a mediator's proposal;*
- *"walks around the block".*

Most mediations result in settlement, between 80 to 90% in fact. Once the settlement agreement is signed (about which more on the next page), the parties say goodbye, leave the venue and wake up in the morning without the pain of worrying about the next step in the dispute, continuing bills from their lawyers and the uncertainty inherent in the litigation process, whatever the strength of case.

"There may well be barriers to vault and deadlock to overcome in achieving an optimal settlement, but mediators are experienced at working with and overcoming deadlock, so do not let a bumpy road ahead (in the form of what appears, at first blush, to be insurmountable problems, complete intransigence on the part of the other side or otherwise) deter you from seeking a deal that makes sense."

If a settlement has not been reached however, it is important that parties understand, before the mediation closes, exactly why. It is also useful to have a clear idea of the bottom line of the other side and a full appreciation of what will happen next.

Hopefully, even though no settlement has been reached, some degree of rapport will have been built up between the parties.

The mediator may well suggest that lines of communication be kept open along side whatever other steps the parties might take. The mediator will also often suggest that there be moratorium for a few weeks with no-one 'pressing any buttons', while the parties reflect on the day and progress made. In fact, the mediator is likely (whatever might or might not be agreed between the parties regarding further communication) to pick up the phone himself a day or so after the mediation to see if negotiations can be resumed.

A healthy proportion of disputes that do not settle on the day of mediation, settle within a week or so afterwards.

Best & Final Offers

One approach is for each party to provide to the mediator its offer, having agreed they will only be 'exchanged' (between the parties) if within a certain tolerance of one another, eg £50,000. The parties should also agree what is to happen if the offers overlap - a high class problem, but it can happen!

Mediator's Proposal

The mediator will usually want to 'protect' a party that says 'Yes' (from being seen to be prepared to move) in the event that the other party says 'No'. This can be done by telling the party declining to settle on the basis of the proposal made by the mediator, simply that there can be no deal because they have said 'No' but, importantly, not revealing what the other party has said.

Settlement

Settlement considerations generally

Lawyers will handle the drafting of the settlement agreement once a resolution has been reached, although it is preferable to have an initial draft prepared in advance. Putting to one side the tempting of fate, this often has a number of advantages:

- it saves time - drafting can take a while and there is nothing worse than starting to draft an agreement from scratch after the end of a long day of negotiation;
- there will be an opportunity, before any deal is arrived at, to see what an optimal settlement looks like on paper and to discuss any 'legalese' it is thought prudent to include;
- pre-mediation drafting is likely to flush out points that might best be considered sooner rather than later and, if appropriate, discussed between the parties as negotiations proceed, rather than left to the end e.g. tax implications of particular settlement structures, remedies in the event of default (of settlement obligations), etc.

In a small minority of cases settlements are just too complex to document on the day. In such situations, a short delay is inevitable before a final agreement can be signed. But these are rare cases and it is usually best to sign the definitive agreement on the day of mediation.

Draft Settlement Agreements

If there is something concrete to look at soon after parties have shaken hands on a deal, there is less chance of the drafting being left over to the next day – a risky move given the possibility for 'deals in principle' to unravel.

Draft settlement agreements, if available on a lap top, can be edited in real-time (in private) to reflect the current state of negotiations.

FINAL WORD

This guide is intended as a brief overview of the mediation day and how to get the best from the process. Further information on many of the topics covered, and on mediation generally, is available on Jon's website at www.jonlang.com.

Mediation Notes

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