A HITCHHIKER'S GUIDE TO MEDIATION

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Search the web for long enough and you will be sure to find many scholarly articles and books on the subject of mediation. So why produce another one? Well, firstly, I wouldn't describe this article as scholarly. Secondly, too many articles I have read, whilst being laudable academic pieces of work, are not targeted at the user. This article is, I hope, targeted at users of the process rather than academics and lawyers. I hope it will encourage parties to try mediation, prepare well and hopefully have some success in the process. I struggled to find the right title. I hope it doesn't put people off reading it and that it proves to be of assistance.

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[1] WHY TRY?

British industry employs a significant number of people in dispute resolution. Why would that be? Is it because there are large amounts of money to be earned from parties who can be persuaded to try their luck in the casino worlds of litigation, arbitration or adjudication?

Try asking anybody you know who has been involved in a dispute about his or her experiences. They are likely to tell you four things. One, it cost a fortune. Two, if he or she had known how painful the experience would be they would not have bothered. Three, he or she wants to avoid a repeat of the experience in the future. Four, when legal costs are taken into account, "winning" may not actually mean that you are financially better off. But who says you are going to win in any event?

So is Mediation an answer to this problem? I say it can be and I am not on my own. Even the judiciary is in on the act.

Litigation in this country is governed by "Pre-Action Protocols" or rules of engagement to you and me. Within these rules, which came into force as long ago as April 2006, is the following stark warning.

"The Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still being actively explored. Parties are warned that if the protocol is not followed (including this paragraph) then the Court must have regard to such conduct when determining costs".

What this statement is doing is to warn Parties that if they do not try mediation, painful cost orders may be imposed by the Court at the end of a trial. In other words, the courts are sending a clear message that parties would be better advised to try something other than litigation to resolve their differences. That something else is mediation.

Statistics indicate that 80-90% of mediations are successful. Not bad odds when compared with the casino approach.

Let's face the facts. How many lawyers do you know that can guarantee the outcome of a reference to a legal tribunal? Not many I suspect. I won't. If thirty years' experience of dispute resolution has taught me one thing, it is that there can only be one "winner". There are so many variables that can have a bearing on the outcome of a reference to legal proceedings that I will never do more than speculate on a range of possible outcomes and warn clients that adjudicators, arbitrators and yes, even judges get things wrong from time to time. We have a Court of Appeal and The House of Lords in this country, some would say, to allow parties to spend even more of their money on dispute resolution advisers.

At least in mediation it is the Parties that decide the outcome, on terms they are happy with.

So stop gambling and try mediation!

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[2] AN OVERVIEW

The process of Mediation is one of the most common forms of Alternative Dispute Resolution, or ADR. The 'Alternative' referred to is the alternative to a trial or an arbitral hearing and the process leading up to a trial.

Some may be unaware of exactly what is meant by 'a Mediation'. The following is a simple guide to a process which is a lot less harrowing and expensive than a trial.

Mediation can take place at any time but is better done when all the relevant facts are out in the open. Nobody is going to feel comfortable discussing settlement terms when they are uncertain about some important aspects of the case.

When both sides have their respective positions clear in their own minds, it might be sensible to consider Mediation.

A cost/benefit analysis might show how Mediation would compare with a trial and how both might compare with settling through solicitors. A trial should be the last resort of a litigant so it is unlikely that the cost/benefit projection will show this as a fruitful route to follow.

Trying to settle by negotiation can take a lot of time and can be nerve-racking and works best only when both Parties have decided that dialogue and negotiation through a trusted third party is a sensible way forward. It can take some time for this synchronisation to take place.

By opting for Mediation, the Parties agree to meet with a readiness to try to find a mutually agreed settlement.

The Mediator is sent all the relevant papers by one or both/ all of the Parties' solicitors, so that he/she can understand the background to the dispute. The Mediator sees the case summaries of the respective legal teams and might make some initial approaches to the Parties (or their lawyers, before the Mediation) so as to clear up any misunderstandings, obvious queries or inconsistencies.

The Mediator should take the opportunity of enquiring as to the Parties' experience of Mediation, to gauge the amount of help that might be necessary to overcome any anxiety.

Before the Mediation, each side decides who shall be present and who shall lead the negotiations. The leader might be one of the Party members or might be a lawyer. The team must include someone with the necessary authority to settle the dispute at the Mediation.

Before the meeting, the Mediator will agree the format of the Mediation with both/all Parties so that each knows who is going to be present and who has authority to settle.

On the day of the Mediation, the Parties meet at the appointed venue in their own rooms and the Mediator introduces himself. The room is a private one and available to the Party for the duration of the Mediation.

To commence the Mediation, it is customary for the Mediator

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to call the Parties together in a third room. The Mediator will then emphasise the two senses in which the Mediation is confidential. It is confidential as between the Mediator and each of the Parties and also confidential as regards the outside world. (At some point later in the Mediation, the Mediator might ask that the confidential views or information of one Party be divulged to the other, so as to make progress in the Mediation. Only with the tacit approval of the Party will the Mediator so divulge this 'confidential' information.)

The Mediator will ask the Parties to confirm their respective powers to settle the dispute. The Mediator will emphasise that all discussion is without prejudice - meaning that nothing said is binding on the Parties until they want it to be, when it is then committed to writing. Up until that time, any offer made can be withdrawn or varied.

The Parties are then invited to state their cases briefly - opening statements - and many believe it preferable that this should be done by the Parties themselves rather than their legal representatives, as the effect on the opposition can be greater.

Some discussion might continue after the opening statements but it is usual for the Mediator to break up the joint meeting and hold private meetings - caucuses - with each Party in turn.

The Mediator uses his skills to steer the Parties towards settlement during the course of the allotted period. The time available might be agreed in advance or be open-ended.

At any time that a Party chooses, it can leave the Mediation. The Mediator will do all in his/her power to prevent this, but this option is always available in any Mediation process.

When the Parties have agreed a settlement (and, surprisingly, between 70% and 80% of all Mediations do reach a settlement), an agreement is drawn up, usually by the legal representatives, for the Parties' signature. The agreement may call for certain actions to be taken, such as payment of an amount from one Party to another, but it should settle the matter once and for all without further ado and not least remove the uncertainty of taking the matter to a trial, perhaps winning the case, but then possibly having to fight the whole matter again if the opposing Party were to lodge an Appeal.

The mediator is usually paid in advance by both Parties and his fee will either be in the form of a lump sum or on an hourly rate depending on the size and complexity of the dispute.

[3] PREPARING FOR MEDIATION

If you have been involved in a dispute in the last few years that has ended up in the Courts, the chances are that you will have heard all about mediation.

If you have already had a mediation experience and the experience was a positive one, then I will forgive you for not reading this section. If the experience was a negative one, then the chances are that your preparations for the mediation may not have been all that they should have been!

Although it may be an obvious place to start, it is absolutely vital for any party attending a mediation to know both its own case and its opponent's case inside out. Which facts are in dispute? Which are agreed? Which facts are critical and which are irrelevant? What remedy do you desire but more importantly what do you need? Sounds pretty simple, does it not? So why then do I mediate so many cases where the parties have clearly spent the months leading up to the mediation talking at each other as opposed to talking to each other and preparing properly!

It may be an extremely difficult thing to do, but seconding yourself [in mind only] on to your opponent's team as part of your preparation can do wonders in terms of helping you predict where the potential blockages are likely to be in your negotiations. This process will give you time to think about available options to navigate around problems with your opposite number if you are to achieve a negotiated settlement in the mediation.

Now for some mediator jargon...

The next logical step can be frightening but is, again, absolutely necessary. It involves assuming that the mediation will fail and establishing what are your 'BATNA' and 'WATNA'. Your Best Alternative To a Negotiated Agreement and Worst Alternative To a Negotiated Agreement need to be thought about in advance of the mediation. Establishing your 'BATNA' and 'WATNA' will allow you to contrast what you desire to achieve from the mediation with the best and worst alternatives if the mediation fails. Nobody likes to think about failure but refusing to think about 'BATNA' and 'WATNA' could mean that you are approaching the mediation with potentially over-optimistic aspirations.

There is a difference between what you need to obtain from a mediation and what you ideally would desire. For example, whilst you may be claiming £250,000 in the mediation, which is your desire, you may at the same time know that unless you obtain a minimum payment of £100,000 in the mediation you may be faced with the bank recalling its loan facilities.

Finally, remember there are options to settle disputes in mediation that simply are not available in court or arbitration. With this in mind, it is a good idea in advance of the mediation to think about what other things can be offered or received in the negotiation stage, e.g. future work, free issue materials, cost plus contracts, extended warranties, future discount etc. It is important to remember that something to which you attach little value may be highly valued by your opponent.

One more thing. You need to plan and decide who will be in your team for the mediation. "Coalface" people are often anchored in the past. They remember the problems and the arguments and often have no involvement with the opposing party going forward and do not always make the best attendees at a mediation. Clearly, you need someone in your team that has authority to settle the dispute and that person needs to be objective, realistic, flexible and with authority to negotiate the best possible shaped solution on behalf of your team.

[4] THE POSITION STATEMENT

I have seen hundreds of different Position Statements in my many years of practice as a Mediator. Some have been good, some bad and some downright ugly. So how do you go about preparing a good Mediation Statement? What are the ground rules?

The first thing I need to say is that the position statement is not a mere formality. It should analyse the dispute and communicate your objectives to the mediator. It is also an opportunity to make constructive points to the other party. It should not be a pleading. The parties will already know the legal arguments, and the mediator can read the pleadings for himself.

The statement should set out all the issues that are important to your client, explaining the case as if you were talking to a non-lawyer. Remember, your mediator may not be a lawyer. A good way to start is to set out the background briefly and then explain how the dispute arose. It is always a good idea to describe how far through the litigation process you are, and to clarify if any settlement offers have been made.

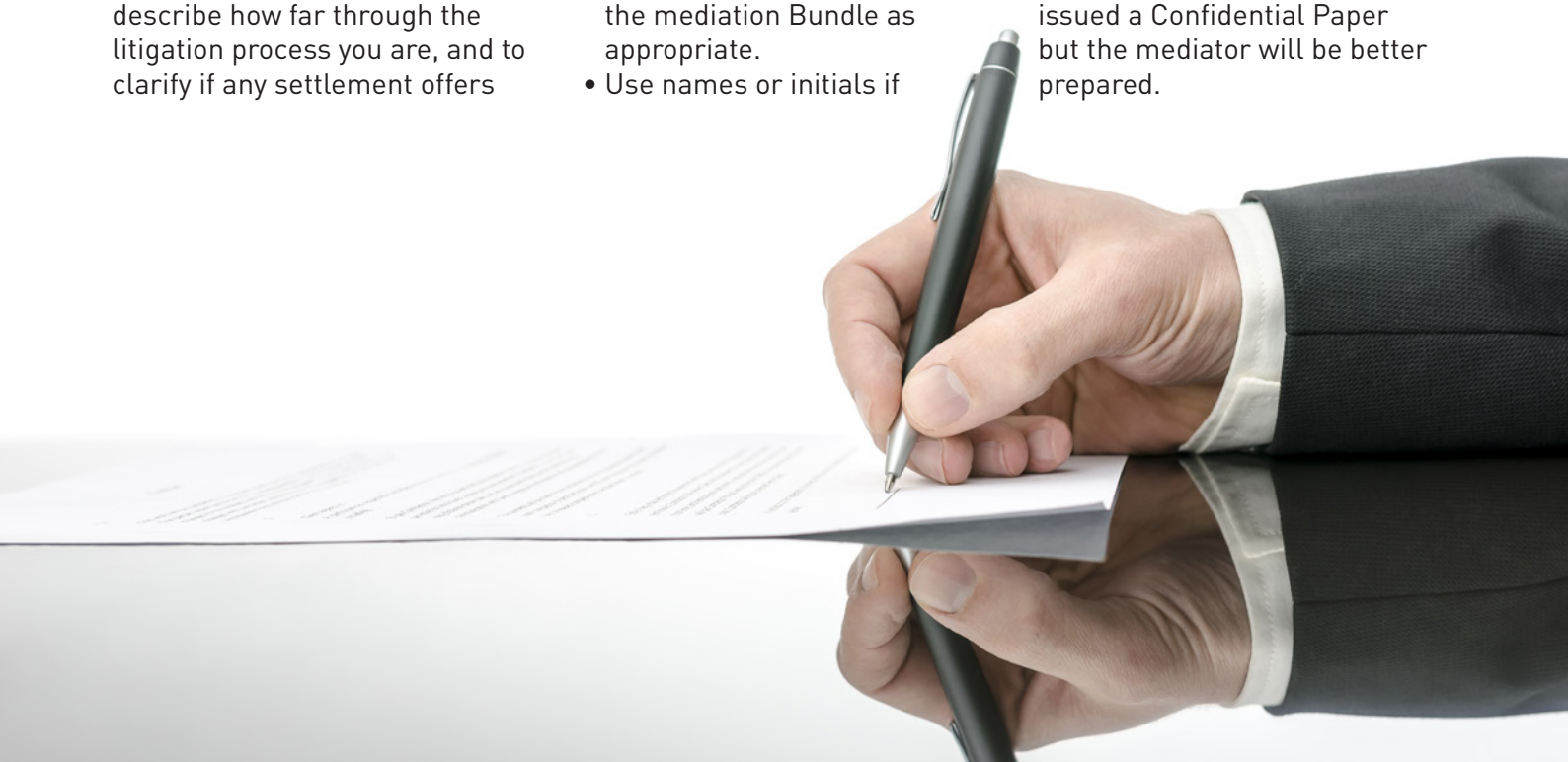
Keep in mind that mediators can sometimes provide remedies which are simply not available from a court. So if you want an apology or acknowledgment of some sort, or anything that a court cannot order – ask for these. The mediator will know these are important and will work around them.

Perhaps an ongoing relationship is an important issue. Could there be business in future if the right deal is struck? Conversely, is a clean break the preferred option?

Keep the acronym KISS in mind, Keep It Simple Stupid, and stick to these basic rules:

- Make the statement concise – no more than half a dozen pages should suffice.
- Include a chronology if appropriate.
- Include case law only if is truly relevant.
- Refer to page numbers in the mediation Bundle as appropriate.
- Use names or initials if possible, rather than e.g. "The Claimant" or "The Part 20 Defendant". Names are much easier to follow.
- Exchange statements with the other party in advance of the mediation day.
- Make sure the mediator has copies of both statements and the Bundle as far in advance of the mediation day as possible.

Finally, it is sometimes a good idea to prepare a Confidential Paper for the "eyes only" of the mediator. This might contain an objective analysis of the strengths and weaknesses of your case, and the other party's case. It may also include concessions your client might be willing to make, and state whether they are dependent upon concessions from the other party. If you recognise that your legal position is less than strong, acknowledge this to prevent the mediator spending time on that aspect on the day. The other party will not know that you have issued a Confidential Paper but the mediator will be better prepared.



[5] THE POWER OF THE OPENING STATEMENT

They say that you can't teach an old dog new tricks but recently I have witnessed, first hand, how a well-researched, well planned and delivered opening statement can set the tone of the mediation and have a surprising and even damaging impact on an opponent at the very start of the mediation.

The vast majority of mediations start with the mediator sitting with the parties in a joint session, explaining his or her role, what mediation is all about, the ground rules and so on. Invariably, the mediator will then invite the parties to make an opening statement. Many parties pay little attention to the importance of the opening address, wrongly believing that the mediator will be doing all the hard work later on in the mediation and nothing of importance can come out of the opening statements. How wrong can they be?

It is your job to convince your opponent of the strength of your case, not the Mediator's. What better opportunity can there be to do this than in the opening statement?

So who should deliver the opening statement?

Yes, I know that you may have one or more expensive solicitors with you and/or counsel present. Even so, it should not automatically fall to the lawyers to deliver the opening statement. Remember it is your dispute, not your lawyers'. What will your opponent expect? What will have the greatest impact on your opponent? The answers to these questions will dictate who should deliver the opening statement.

It goes without saying that the selected person must be willing and able to make the opening. The default position should not be a lawyer. It's your dispute so keep this firmly in your mind. What is best for you and what will be most effective?

How should you deliver your opening?

Resist the urge to "go through the motions" and get your opening out of the way. This is your opportunity to make an impact on your opponents at a key point - at the outset. It never ceases to amaze me how many parties are willing to discard the chance to make that all-important first impression.

Now for some body language tips. Maintaining eye contact with your opponent will convey determination and sincerity. Avoid the temptation to read from a pre-prepared text. Be passionate without resorting to shouting. Your whole body language should convey "we are here to do business but we are no push-overs".

Now it is time to think about content. What should you say in your opening address?

Clearly every mediation is different and careful thought needs to be given to what you are going to say, depending on the individual facts of each case. But here are a few simple guidelines on content to follow.

Simply reading the position statement provided previously is not a good idea. It needs to be original, at least in part.

Refer to key points in your opponent's position statement to show that you have considered and understand your opponent's case.

Avoid making personal attacks and insulting your opponent. Although you might feel better afterwards, is this really going to help you get a deal done?

Are you at the mediation because you recognise that both parties will incur unavoidable costs if settlement is not achieved? If you believe this, saying so will do you no harm.

Preparing thoroughly for a mediation will improve your chances of getting a settlement immeasurably. Delivering a good opening statement on the day of the mediation is a key part of the preparation process. I might be an old dog, but I am willing to learn new tricks. Are you?

[6] THE MEDIATION BUNDLE

The first thing to say is that the mediation bundle is NOT a trial bundle. The second is that the bundle should be concise, containing only the information the mediator needs to understand in advance or that is likely to be referred to on the day.

The mediation bundle should be book style, starting with the earliest items, so that it may be read front to back, NOT like a correspondence file, which is reversed. Try to put email exchanges in order starting with the earliest and don't include the back sheets of pleadings and duplicates of documents.

A chronology of events can be very helpful to your appointed mediator but swamping him with copies of judgements won't be. Indeed, case law should really only be included if it is relevant, appropriate and helpful.
An index may not be essential but it could be helpful to allow the Mediator to navigate his or her way around the document.

Paginate the bundle and refer to page numbers in your Position Statement as appropriate before copying the bundle!

Some mediators prefer to receive the bundle electronically but I'm not keen on this because I like to handle a document and insert post-it notes on key documents and extracts that I think are important. So check what your mediator's preference is.

If your mediator wants to receive the document electronically, check email maximum sending and receiving sizes to avoid delivery failure.

Now for a plea - if at all possible the bundle should be limited to an absolute maximum of one lever arch file.

There is absolutely no point in rowing with the other parties about what should be in the bundle. If they want a document in, put it in. If there is more than trivial disagreement each party may send their own documents to the mediator but this will increase preparation time and inevitably produce duplicated documents and increase costs, as an excessive bundle

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of documents will cause the mediator's fee to rise.

Delivery of the Bundle to the Mediator

Remember, not everyone works in the same way, or even works out of a staffed office. Help yourself and the mediator by doing your best to comply with his or her requests and instructions. I always request that the bundle is delivered at least a week in advance of the mediation. This gives the mediator a chance to prepare when he or she has the time to do so.

Please do not assume that the bundle's arrival "before the mediation" will be sufficient. Mediators are likely to have other work and cannot necessarily fully prepare if your bundle is late and the mediation will be more efficient if you allow the mediator to prepare fully.

Check where the bundle is to be delivered and make sure whoever is responsible for sending the bundle knows this!

Please don't request a signature upon delivery unless it is absolutely essential. The mediator may miss the delivery, particularly if it is at a time later than agreed and the mediator will be inconvenienced if he or she has to collect it from the delivery depot or await redelivery. It may be too late for the bundle to be read by the mediator if delivery is delayed.

Beware of the tendency for lever arch files to be damaged in transit. There is little more annoying than having to replace the folder because the mechanism has bent, so use appropriate protective packaging.

OK, so now you are good to go. If you haven't already done so, now is the time to start preparing your Position Statement and the all-important Opening Statement

Good luck!

Peter Vinden is a practising Arbitrator, Adjudicator, Mediator and Expert. He is Managing Director of The Vinden Partnership and can be contacted by email at **pvinden@vinden.co.uk**. For similar articles please visit **www.vinden.co.uk**

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