

MODEL MEDIATION PROCEDURE

1 What is mediation?

Mediation is a flexible process conducted confidentially in which an impartial person actively assists the parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution.

The principal features of mediation are that it:

- involves an impartial third party to facilitate negotiations;
- is quick to set up and is inexpensive,
- is confidential and without prejudice;
- involves party representatives with sufficient authority to settle;
- is flexible, with no externally set procedure, enabling the process to be designed and managed by the mediator to suit the parties, in consultation with them;
- enables the parties to devise solutions which are not possible in an adjudicative process such as litigation, arbitration or a tribunal, and which may benefit all the parties, particularly if there is the possibility of a continuing relationship between them;
- can be used in two-party and multi-party disputes, whether or not litigation or arbitration has been commenced, and in domestic and cross-border disputes.

Referral of a dispute to a mediator for mediation may be as a result of voluntary referral by the parties themselves; an invitation to consider mediation by a court, tribunal or ombuds, or the provisions of a clause in a commercial or government contract requiring the use of mediation as a step in the parties' agreed dispute resolution process.

If settlement terms cannot be agreed at a mediation, the parties are free to use litigation, arbitration or a tribunal.

The mediation may be conducted by one or two mediators who are referred to as 'the mediator' in this procedure. In some multi-party disputes several mediators can be involved but the processes are beyond the scope of this document.

2 Preparation for the mediation

The mediator when agreed or appointed will make the necessary arrangements for the mediation as required or agreed by the parties, including:

- drafting the agreement to mediate, submitting it for approval by the parties, incorporating any agreed amendments, and preparing the final form for signature;
- facilitating agreement as to the date, venue and start time for the mediation;
- organising exchange of any case summaries and document bundles between the parties and the mediator;
- setting up any pre-mediation meetings agreed by the parties and the mediator;
- ensuring at all times that the Scottish Mediation Network Code of Practice is complied with in respect of the mediation of the dispute, reporting any conflict of interest or other relevant matter, if any, to the parties immediately it emerges;
- attending any pre-mediation meetings on terms and agenda proposed by the mediator and agreed by the parties;
- reading any case summary/document bundle submitted in advance of the mediation by the parties; and
- making contact with the parties before the mediation to assist in preparation for the mediation.

3 The agreement to mediate

The agreement to mediate provides the essential legal basis for the mediation. Its signatories (the parties to the dispute and the mediators) all agree by signing it that the mediation is to be conducted consistent with Eskhill & Co's Terms of Mediation and the Scottish Mediation Network Code of Practice for Mediation.

A draft Agreement to Mediate will be sent for approval to the parties as part of the preparation process for the mediation, and any proposed amendments can then be discussed and inserted, if agreed. The Agreement to Mediate will normally be signed at the beginning of the mediation day by or on behalf of each of the parties and the mediator or may be signed in counterpart and returned by email to the mediator when remote mediation is being used.

In any pre-mediation contact with the parties, the mediator will observe the mediation agreement's terms as to confidentiality, even though the agreement has not yet been signed.

4 The mediation

It is normal for each of the parties to have a private room to retire to privately or for confidential consultations on their own and with the mediator during the mediation. There will normally also be a further room large enough for all parties to meet with the mediator jointly. In remote mediations this arrangement of rooms may be simulated by using virtual rooms.

The mediator will chair and take responsibility for determining the procedure at the mediation, in consultation with the parties. This model procedure is indicative rather than prescriptive and the mediator will tailor the procedure to the circumstances of the particular mediation being carried out.

The likely procedure will comprise:

- preliminary meetings with each of the parties when they arrive at the venue;
- a joint meeting of all attending the mediation, at which each of the parties will normally be invited to make a brief oral presentation;
- a mix of further private meetings and joint meetings (which may involve all or some of each party's team), as proposed by the mediator and agreed by the parties.

Where agreed with the mediator, professional advisers, particularly lawyers, may attend the mediation. Such advisers play an important role in the exchange of information and opinion on fact, evidence and law; in supporting their clients (particularly individuals) in the negotiations; in advising clients on the implications of settlement; and in drawing up the settlement agreement and any consent order. The cost of professional advisers will be met by the party they represent.

No verbatim recording or transcript will be made of the whole mediation by the parties or the mediator. However, they can make their own private notes which will not be disclosable to anyone else, including in any subsequent litigation, arbitration or tribunal proceedings.

Mediations can last beyond a normal working day and it is important that the key people present for each of the parties remain present or at worst available by telephone for so long as the mediation continues. Any time constraints should be reported to the mediator as soon as known, as any unexpected departure can be detrimental to the progress of the mediation and perceived as disrespectful by other parties.

5 Confidentiality in relation to the mediation

The mediation agreement provides that what happens at the mediation is to be treated as confidential by the parties and the mediator, including the fact and terms of settlement. However, in employee mediations where there is an employer interest in the outcome a provision may be made for an agreed report to be made to the employer. Generally, the fact that the mediation is to take place or has taken place is not normally made confidential, as either

or both of the parties may wish to claim credit for agreeing to engage in the process. If it is desired to make the fact that the mediation is taking place confidential, the agreement can be amended.

Apart from where the parties agree in writing to consent to disclosure of what would normally be confidential, there may be rare circumstances in which the confidentiality of the mediation process cannot be preserved, such as where:

- the mediator or any party or their representative is required by law to make disclosure;
- the mediator reasonably considers that there is a serious risk of significant harm to the life or safety of any person if the information in question is not disclosed; or
- the mediator reasonably considers that there is a serious risk of being personally subject to criminal proceedings unless the information in question is disclosed.

Such questions might arise in relation to duties under the Proceeds of Crime Act 2002 and Criminal Finances Act 2017 or related legislation or under any other legislation. Legal representatives (who may themselves be under a comparable duty of disclosure in their own capacity) must take full responsibility for advising their clients of the implications of disclosure in relation to any such matters at a mediation.

6 Conclusion of the Mediation

The mediation may end in a number of ways:

- by settlement of the dispute in whole or part, when all agreed matters must be written down and signed by the parties to be binding;
- by one or more parties leaving the mediation before settlement is achieved;
- by an agreed adjournment for such time and on such terms as the parties and the mediator agree;
- by withdrawal of the mediator in accordance with the Mediation Agreement.

The mediator will facilitate the drawing up of any settlement agreement, though the drafting may be done by legal representatives of the parties. The settlement agreement will (if so intended and drafted) be a contract enforceable by legal action. The mediator's role is one of facilitator and as such s/he is not responsible for any agreements that the parties reach or fail to reach, neither is the mediator responsible for the parties' implementation of their terms of settlement but if differences occur as the parties try to carry out the terms of the agreement, the mediator may be commissioned by them to assist in resolving these differences.

Where the mediation does not end in complete settlement, the Mediator may make contact with the parties thereafter to see whether further progress might be possible. Many disputes which do not settle at the mediation settle later, usually as a result of what occurred or was learned at the mediation.

7 Complaints

Any formal complaint about the mediator should be raised in the first instance with the mediator and if this does not satisfy the complainant it should be raised with a Partner of Eskhill & Co. If this does not satisfy the complainant or is not practical because both Partners have been involved in the mediation the Scottish Mediation Network may be requested to provide the names of three independent mediators. The complaining party will have the option to choose a mediator from the list with a view to meeting both Eskhill & Co and the Party to mediate a satisfactory solution. If the complaint is not resolved it may be referred to the Committee for Excellence of the Scottish Mediation Network.