



A Mediator and Litigator brainstorm over the Mediation Process

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Why do you need a Mediation?

Jonathan Ross

In the old days, we simply had settlement meetings where the lawyers and parties could lock horns and fully engage. Whilst it is true to say that these meetings were not always successful, as they were more confrontational, they did allow for a full and frank discussion of the issues whereas, with Mediation, the parties are often kept apart after a very short plenary session and the issues not fully explored.

Roger Levitt

A Mediation allows each party to express their views fully, frankly and confidentially to the Mediator, with a combination of open meetings when required (and these should be encouraged where possible). This allows flexibility for fully exploring all the issues. The parties can be together or apart as they wish. Often meetings between the Mediator and the advisors and /or experts can be helpful to look at the issues dispassionately.

Why do you need a Mediator?

Jonathan Ross

A Mediator will often not enter the fray. Despite often being selected for their particular expertise, they don't readily deploy it. They fear they will be seen as partisan rather than neutral if they express any view. Many mediators simply act as a go-between rather than test each party's case and question their strategy, or put forward suggestions for the basis of a settlement.

Roger Levitt

An experienced Mediator can be evaluative as well as facilitative, and proactive (rather than just be a messenger). I think participants and their advisors welcome this. A Mediator who is experienced in the area of the dispute, can provide valuable reality testing for each party's case and their strategy.



Why do Mediations take so long?

Jonathan Ross

There is often very little settlement movement until late in the day. Each party has to try to wear the other party out. Would it not be simpler and cheaper to allow less time for the Mediation so the parties focus on sensible offers at an early stage and do not just seek to drag the process out?

Roger Levitt

An experienced Mediator will prepare well beforehand. Not just him / herself, but the participants and their advisors. This may involve pre meetings and should always include phone calls and a full briefing for all so they know what to expect at the Mediation and what to do beforehand to prepare. For Property related disputes this should include a site inspection where possible. With full preparation the participants can come ready to make offers early in the day.

When should parties Mediate?

Jonathan Ross

Often a Mediation takes place quite late in the day when there have already been substantial costs incurred. In fact, the Mediation can be more about the costs than the claim. Do parties really need to wait for proceedings or Disclosure before mediating or can a mediation involve the parties having to disclose their core documentation at an early stage?

Roger Levitt

I am seeing more mediations taking place before proceedings have been issued. I think this is sensible. Core documents can be disclosed early to save time cost stress and inconvenience. Each side's case can be examined and tested at an early stage, hopefully bringing the parties to a settlement before positions become entrenched and costs disproportionate.

What is the role of Counsel at a Mediation?

Jonathan Ross

Some parties like to be represented by Counsel but is this really helpful or necessary? The solicitors should understand the legal issues and know their client and the facts far better. Counsel can be intransigent and too protective of their client being heard or questioned. The best thing about a Mediation for any solicitor is to actually meet the other party and to hear what they have to say directly so they can properly assess the opposing case. Counsel can prevent this happening.

Roger Levitt

It certainly makes the Mediator's job more challenging when parties are represented by Counsel who treat the Mediation as a 'mini trial' So I agree with the above comments, apart from where Counsel is a trained Mediator, or 'Mediation friendly' which I find is becoming more common. In those cases the process is much more collaborative and productive.

How do you deal with experts at a Mediation?

Jonathan Ross

Experts can also be intransigent. They don't want to make concessions unless their client sanctions them to do so. They need to be made to engage directly with each other and to seek to agree issues insofar as possible. This is a real role for a Mediator as the experts can be questioned by a Mediator without their clients present but do Mediators actually meet separately with the experts enough?



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Roger Levitt

I am also coming across more Experts who are Mediation trained or 'Mediation Friendly'. This again makes for a more collaborative and productive process. Ideally I would like to meet with the Experts before the Mediation meeting and agree the issues with them before the Mediation meeting. Certainly, it can be more productive to take Experts away from the parties so they feel less inhibited about making concessions.

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