ADVICE TO PARTIES PARTICIPATING IN MEDIATION

This is prepared as a brief guide to all of those participating in mediation whether it's the parties or their representatives

The 'right time' to mediate

There has been some debate as to when is the best time to use mediation. In one sense the earlier you use it the greater the costs saving. In the other you should mediate with sufficient knowledge of each other's cases to maximise the opportunities for a settlement. The following judge's comment is a useful guide:

"It is a common difficulty in cases of this sort, trying to work out when the best time might be to attempt ADR or mediation. Mediation is often suggested by the claiming party at an early stage. But the responding party, who is likely to be the party writing the cheque, will often want proper information relating to the claim in order to be able to assess the commercial risk that the claim represents before embarking on a sensible mediation. A premature mediation simply wastes time and can sometime lead to a hardening of the positions on both sides which makes any subsequent attempt of settlement doomed to fail. Conversely, a delay in any mediation until after full particulars and documents have been exchanged can mean that the costs which have now been incurred to get to that point themselves become the principal obstacle to a successful mediation. The trick in many cases is to identify the happy medium: the point when the detail of the claim and the response are known to both sides, but before the costs that have been incurred in reaching that stage are so great that a settlement is no longer possible" Per HH Judge Coulson QC (Nigel Witham Ltd v Smith & Anor (No. 2) [2008] EWHC 12 (TCC) (04 January 2008)

The Agreement to mediate

Using mediation requires both or all parties to agree to use it. This is unlike litigation or arbitration. The consent to use it is a continuing consent right up to the end of the mediation. The agreement tells you that everything within the mediation is **confidential** to include not only the documents, but also what's said in the mediation. The mediator cannot be ever called as a witness to say what happened in the mediation. It is **voluntary** and no-one can compel a party to either attend or remain in the mediation. It is also usually **facilitative** in that the mediator isn't normally asked to give his or her opinion unlike a judge. There are other variations such as conciliation if the parties require a rather more evaluative approach. The agreement also contains details of the mediators fees, which can be a lump sum agreed for a fixed period and an hourly rate for additional time spent either over and above preparation time allowed within the fixed fee or if the mediation overruns its time limit.

Preparing for a mediation

The purpose of mediation is for the mediator to assist the parties to resolve their differences amicably and he is not going to want the same degree of documentation and preparation as if you are going into court. He needs a summary of each sides arguments and the key documents only. Some send copies of the court papers and that might cut down the preparation time. But often these are not as easy to digest as they could be and brief summaries of the issues, perhaps with supporting schedules are more usual. The state of play as regards disclosure, any expert evidence and any offers made

helps, with an indication of the costs to date and the likely cost to the conclusion if it does not settle.

Choice of venue

I normally work on the basis of one larger room to fit everyone and then one smaller room for each of the parties. That means that on a two party dispute I require a minimum of two rooms. Choosing where to mediate might be important in many disputes. Avoid excessive noise, interruptions and rooms next to each other. A neutral venue might be beneficial (see www.yrdc.org.uk).

The start of the mediation The mediator wants everyone involved to know exactly what mediation is, and some time is taken explaining how the mediation will be run. There will probably be brief private meetings with all the parties followed by a joint meeting with everyone around one table. That meeting can be as long as is necessary. The mediator will check both that the mediation agreement is signed and that the parties all have authority to reach a settlement if they so wish.

Parties' submissions

The parties can make brief submissions perhaps saying how they or their clients feel and what they expect out of the mediation. It's a chance to let off a little steam but summarise the merits of each sides' arguments. Both representatives and parties are encouraged to sound positive and co-operative about coming to mediation. Litigation tactics have no place to play in making submissions. If the dialogue is helpful the mediator will let it continue. If not then the mediator will make sure it is short.

Private meetings

These can take quite a while with the mediator shuttling from one room to the other. He begins with an information gathering stage, some entirely private so that he cannot pass it on, and some which he can. He encourages the parties to put forward different options so that issues may begin to become narrower as differing settlement possibilities emerge. He may call everyone back into one room, or he may not. If the mediation is not moving in the right direction and has got to some sort of impasse he can set a limit on the amount of time to continue; he can reframe issues and set the parties to task or he can end the mediation session.

Settlement phase

If the parties agree, then a settlement agreement is drafted with or without his help. It is often suggested that one of mediation's disadvantages is that it is not binding. Whilst the mediation itself is a private and confidential process the resulting agreement is certainly binding and enforceable.

After it's ended

If it settles, and most mediations do settle, then the Agreement reached should hopefully set out what is to follow. Even the best drafted agreements may lead to certain differences or misunderstandings in the future. The mediator will usually be pleased to help in any way in the future.

I hope you find these brief notes helpful. There is a whole lot more information that's available either by asking me or by logging onto www.anthonyglaister.co.uk or the links section of the ANM website which you will find on www.northernmediators.co.uk. Mediation has truly become not just an Alternative to traditional ways of resolving disputes, but a really appropriate way to resolve so many of our difficult situations which many of us find we get ourselves in from time to time. Litigation and arbitration should only be used as a last resort.

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