



## Frequently Asked Questions

Below you will find responses to questions we are frequently asked regarding mediation, Alternative Dispute Resolution and the training services we offer.

What is mediation?

Mediation is an alternative process to the court processes. In Mediation the parties to a dispute appoint a neutral person, the mediator, to assist them in finding solutions to the issues in dispute. The mediator facilitates the process and the parties determine the outcome of the process.

What is the advantage of having a mediator?

The key advantage is the gateway provide to interest-based negotiation by the presence of a neutral person in the negotiating frame – one who can handle the process and enable the parties to negotiate based more on their needs than on the positions that have taken.

In most cultures, people tend to negotiate from positions. Positional negotiation usually involves extreme opening positions, a compromise somewhere between the parties opening positions, a process of gradual and usually mutual concessions clouded by “tactics” – exaggerations, disguised and undisguised threats, overstatements and often lies and trickery. Positional negotiation fails if insufficient concessions are made. Positional negotiation is quite easy, and does not stretch the players’ negotiating abilities.

Interest-based negotiation happens when the parties focus on their needs and interests more than on their positions, enabling them to achieve more creative options for mutual gain. It is a more collaborative, less combative experience aimed at maximizing the value on the negotiating table – often by bringing to the table value that may not necessarily be there initially.

The presence of a skilled neutral mediator changes the negotiating dynamic in a critical way. The mediator can help the parties to keep the negotiation focused and framed positively, and to consider their positions and interests more objectively and realistically. This calls for wide-ranging and exceptional skills on the mediator’s part, and the parties need to be able to trust the mediator. From the parties’ perspective, a faster and higher quality outcome can usually be expected from the engagement of a competent, suitable mediator in most negotiations.

How do I get the other side to agree to use a mediator?

Propose it, but do it in a way that avoids conveying a sense of weakness. This can be done by explaining why it makes sense for the other side as well as you. The most common shared reasons for engaging in dispute resolution mediation are:

- it maximises the chances – if there are any – of reaching an agreement
- it keeps everyone’s costs to the minimum (see Q5)
- it prevents issues escalating out of control
- it is your prerogative to propose mediation prior to engaging in litigation
- if litigation has started, it is your policy to try and negotiate outcomes if possible.



If there is no dispute, then the weakness issue is less pronounced, or is not a factor at all. The most common shared reasons for engaging in deal mediation are:

- a mediator will help keep the negotiation collaborative and creative
- the mediator will take the process hassle out of the agenda
- although there is a cost factor, it is minor compared to the benefits attainable.

Are mediators bound by a professional code of conduct?

They certainly should be. Many mediators are associated with one or more provider institutions and adopt their Code of Conduct. You should always ask to see a copy of the code and be sure you are comfortable with it.

How do I check out a mediator's credentials?

Ask for their Profile, resumé or CV. The key things you should be looking to satisfy yourself about are the mediator's competency, and her/his suitability as a mediator in your situation. If the mediator is accredited with an international body ask for their accreditation.

On competency, key questions to ask are:

- How experienced is the mediator?
- Which professional certifications does the mediator have?

On suitability, you need to consider:

- Will everyone be able to respect and trust this person as the mediator?
- If the issue is technical or specialised has the mediator handled similar situations?
- Are the mediator's costs appropriate for your case?

Make a shortlist of several mediators and discuss the shortlist with the other side. Try to agree on a priority.

Is mediation costly?

- All costs are relative to the payback and alternatives. Except where minor situations are being considered for mediation, usually mediation is the least costly of the alternatives, often far less costly than going to court. Many mediations, even those where the stakes are very high, are completed in 2 days, and often in one. In situations which are ongoing – for example the negotiation of a deal or where the purpose of the mediation is to repair relationships rather than settle a specific dispute, it may take longer. But parties can discontinue a mediation at any time, so it is possible to set a budget, agree it with the mediator, and when the budget limit is reached a decision can be taken whether to end the process or continue it with a revised budget.

Mediation is said to be voluntary – but what does that imply?

It means that although you should try to use mediation positively and in good faith, if you really think it is not getting anywhere you can ask for it to be terminated. The other side can do the same. So it is not obligatory to reach an outcome agreed by all parties, and you should not feel pressurised to compromise against your better judgement

Must I mediate if the other side proposes it?

Not unless the parties have been ordered by a court to attempt mediation, or unless they are under a contractual requirement to do so. Even then, provided they approach the mediation in good faith and with a genuine intent to make it successful, they can decide to discontinue the mediation.



How should I prepare for a mediation?

If you are legally represented, and wish your counsel or lawyer to be present at the mediation, you will be guided by counsel. Whether legal counsel will be present or not, mediation is a collaborative solution generating attempt rather than an opportunity to score points against the other side.

That is not to say that all parties should not have the opportunity to state their case, argue their positions and vent their feelings – these can be important and cathartic. The key thing to remember is to come to the mediation after preparing well and deciding what you need as a bare minimum. And don't treat the mediator as an opponent or a tool to represent you – you need to trust the mediator, knowing that anything you say in confidence will be kept in confidence unless or until you allow the mediator to disclose it.

What do I have to lose?

Nothing, with the exception of a little time and a modest shared cost.

How long will a mediation take?

Most mediations take under 2 days. See Q5.

Who should participate in a mediation?

That depends on the circumstances and your preferences. Mediation is assisted negotiation and you are your own negotiator. If you are accompanied by counsel or your lawyer, make sure they come to the mediation as a collaborative solution provider first, as your adviser second, and as your advocate third – depending on how the mediation goes.

Why use a mediator to negotiate a deal when there is no dispute?

The settlement of a dispute is just a deal. Although mediation has traditionally been used for resolving disputes because it is particularly helpful in managing the hostilities between parties that typically characterise disputes, mediation has far wider values in terms of enabling negotiators to do their job on a collaborative rather than confrontational or positional basis.

When should I mediate?

As a generality, the earlier the better. If there is a dispute, tensions tend to escalate over time, making settlement harder to achieve the longer a negotiation is delayed. Where there is no dispute, agreements can be harder to achieve once parties become entrenched in their positions and would lose face, or suffer other consequences, to reverse claims and statements made earlier. Avoiding problems is generally easier to achieve than resolving them after they have arisen. Having said that, there are situations where facts need to crystallise before a useful negotiation can take place. As the Greek poet Hesiod wrote in *Works and Days* in 660BC – Timing is in all things the most important factor.

Should I insert a mediation clause into a contract?

Without hesitation, yes. This makes it much easier for the parties to mediate early, before litigating, and avoids any weakness perception in proposing mediation. Mediation Mechanics can provide guidance on ADR clauses.



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*Where Conflict Becomes Opportunity*

How confidential is a mediation?

Except in extreme cases (such as criminal illegalities or specific requirements of law and legal process) information disclosed to mediators must be kept confidential by mediators and their Codes of Conduct bind them to that commitment.

Why are some people very reluctant to mediate?

The most likely reason is lack of familiarity, and a preference to stick with their comfort zone of doing things the way they have been done before. Some lawyers are reluctant to advise their clients to engage in mediation for a variety of reasons. Overcoming these blockages requires some persistence.