



# Mediation: what it is and why it works

Mediation is one of several strategies that may be used in alternative dispute resolution (ADR). Its purpose is to bring together the parties in dispute, under the guidance of a mediator, to hear each other's case and formulate a lasting agreement.

Mediation is an effective way to resolve disputes because it is:

1. Quick
2. Flexible
3. Voluntary
4. Confidential
5. Relatively inexpensive
6. Can preserve valuable relationships, and
7. Gives the parties in dispute full and equal control.

## The role of the mediator

The mediator is an independent third party. Their role is to help the parties in dispute get to the root of their disagreement, work out their options to resolve it and agree on a lasting resolution.

Throughout the process, the mediator will make sure both parties get a chance to state their case. They are entirely impartial and will never take sides, offer advice or make a judgement.

## Why mediation

In many cases today, judges expect that the parties will have tried ADR before coming to court. They may refer a case to ADR before they will hear it or impose a costs sanction on parties

## The benefits of mediation

Mediation has many benefits over going to court.

### 1 Quick

Mediation is much quicker than going to court. The whole process can often be completed in weeks rather than the months, or more likely years, it will take to resolve a dispute through the courts.

Because an agreement is reached so quickly, the parties are free to leave the dispute behind them, move forward with positivity and plan for the future.

### 2 Flexible

There is no limit to the resolutions available under mediation. As long as both parties agree to it, the final resolution can be anything and is often inspired by the experience and creativity of the mediator.

By contrast, the court has very limited options and one party will always be considered to have lost the case.

### 3 Voluntary

Mediation cannot take place unless both parties agree to participate. Therefore, because people are taking part by choice, there is already an element of commitment to the process and belief that it will succeed.

### 4 Confidential

Mediation is entirely confidential and without prejudice. It cannot be reported in the press, so there

is no risk that any publicity will cause lasting reputational or financial damage. And none of the discussions or written communications can be disclosed to anyone outside of the mediation hearing.

Furthermore, if the mediation does not lead to an agreement, nothing said or presented during the process can be used against either party in a later court claim or tribunal.

### 5 Relatively inexpensive

Compared to the legal fees and potential costs involved in going to court, mediation is an inexpensive option. And because it is quick, confidential and can preserve valuable relationships, it also has other, added value.

### 6 Can preserve valuable relationships

Because mediation is confidential, voluntary and flexible, it can help the parties preserve valuable personal or commercial relationships. Unlike in court, there are no winners or losers, and the final resolution will be one both parties are happy to sign up to.

### 7 Gives the parties in dispute full and equal control

Because mediation is voluntary, both parties must participate equally and agree to the outcome. Unlike in court, there is no judge making the final decision and no legal team informing the process, perhaps without their client's full understanding, agreement or knowledge.

## What our own expert mediator has to say

Moot director Mark Linnell has been mediating disputes since 2005. In September 2021, he was ranked as a band 2 mediator by The Legal 500 – often referred to as the gold standard in legal ranking. This, and Mark's other rankings, put him among the most respected mediators in the country.

Here Mark answers some commonly asked questions about mediation and gives us his view on why it is such an effective way to resolve disputes.

**How often is mediation part of a dispute resolution strategy?**

Almost every time. Lawyers know sanctions can be very severe if they go to court without trying to settle via ADR.

**Are there particular circumstances where mediation is most effective?**

This question is hard to answer because the circumstances of every dispute and the people involved are always different. Some people prepare for mediation better and want to take full responsibility for their outcomes in a dispute. However, others are happy to hand the decision to a judge because they believe the law is on their side, they have not broken any laws and are seeking total exoneration.

In real terms, mediation is most effective when both sides know they will have to work hard to get a deal done. In every mediation, it's the people who make the difference, so it doesn't matter if it's a hugely complex case, with lots of money at stake, or if there are differing cultures.

**Are there ever circumstances where mediation won't work?**

When the egos of the people involved are mismatched, it will affect the mediation and make it less likely to succeed. Mediation is also not suitable for criminal or immigration cases where the choices between the parties are limited to, for example, guilty or not guilty.

**Does mediation always follow the same process?**

No, it should never do this. For mediation to have the best chance of success, it should always be guided by the nature of the dispute and the people involved.

However, some mediators still follow a rigid process and because they are so predictable, unsurprisingly the lawyers like this approach. When I first started mediating, we were taught to hold a joint meeting with everyone in the same room. However, this is a potentially volatile and therefore destructive approach that could put the mediator on the back foot from the start.

**What can the parties do to help ensure a successful mediation?**

Prepare, prepare and prepare. We suggest you war game beforehand with a Moot so that you're clear about what you want to achieve and what you are prepared to concede before the mediation starts. And remember, success doesn't always mean settling.

**What skills and experience do the best mediators have?**

Energy, curiosity, humility, deference, respectfulness, a sense of humour, presence, courage and communication.

**What have you learned from your years of experience as a mediator?**

Never try to predict the outcome.

**Why do you think mediation is so effective?**

There is nowhere else to go.

**How does mediation differ from negotiation or arbitration?**

Mediation uses a third party who removes large parts of risk by neutralising the emotions. It is all held in the strictest confidence and delivers a result that is the best available at the time of the mediation, even if this is not settling. Even not settling is cost effective and value for money because you'll come away with a deeper understanding of both your position and the other party's, and the possible solutions available to you. This can make any subsequent legal process quicker and less costly.

Negotiation is not confidential and contains all the emotions face to face. And the arbitrator, who is usually an expert in the field, decides - the parties don't.