

A GUIDE TO THE MEDIATION PROCESS

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There are many different types of mediators and mediation services in Scotland today and this chapter explains what to expect from a mediator from a 'user's perspective'. Other chapters will describe how mediation works in particular mediation fields and while there may be variations in the style and delivery of mediation, the core skills are the same.

Mediation services

An individual mediator or a mediation organisation will typically:

- Provide information about mediation that is easy to understand
- Answer questions you may have about mediation
- Allow you time to consider mediation as an option and an opportunity to help resolve difficult situations

If you decide to try mediation, an appointment will be made to discuss the situation, and to see if mediation is appropriate.

Some mediation services—like neighbour or family—are sometimes free to the user and others are fee based. Fees will usually be agreed at the outset so the participants know what to expect. It is generally considered unethical for a mediator's fee to be dependent on the outcome of the mediation.

There are many styles of mediation and ways of working in the different fields described in this book. What mediators have in common is a belief in mediation as a means of bringing people together. Mediators help the people involved improve understanding of events and give them the opportunity to re-start communication based on a better understanding so that the people involved can find a better way to reach agreement on what needs to happen in the future.

The mediation process starts with information about what's on offer and allows time to consider mediation as an option. An initial meeting with a mediator (or in some services, a case manager, intake worker or a pair of mediators) will be arranged to clarify the issues to be resolved, what has prevented resolution so far and what might be an acceptable solution for each party. Some situations may be resolved by a series of meetings between the mediator and the parties involved (without all parties meeting together) and this is known as shuttle mediation. Shuttle mediation may also pave the way for a meeting involving all parties face-to-face.

The principles of mediation

Mediation works on the following principles:

1. *Mediation is voluntary.* It is your choice, an option to be considered. You should not feel pressured into trying mediation. It is also voluntary for the others involved in the problem. A mediator can approach other people and invite them to participate in mediation but if they decide not to mediate, that is their choice. Mediation requires the cooperation and participation of all the parties involved and if key people do not wish to take part, mediation is not an option.
2. *Mediators are impartial.* In many cases people define a problem as what someone else is doing and expect the mediator to make that person stop doing it or make them do something different. Mediators are not enforcers—they do not have any power to make people do anything. It is a mediator's job to be impartial; they do not take sides, give opinions or give advice.
3. *Mediation is a confidential service.* This means that information is not shared without permission of all parties involved, so if you chose to use mediation you can speak freely to the mediator and will be asked what information you want to share. The obvious exception is an obligation to report to appropriate agencies any serious risk of harm.

What can you expect a mediator to do?

Even if you have not been directly involved in mediation before, you might have a general idea about what mediators do from the word itself: mediation, like “median” and “medial”, is about someone or something in the middle. A mediator helps people talk about what happened to cause difficulties and what needs to happen to improve the current situation.

When communication is difficult or has broken down altogether, people are often reluctant to try talking again to the others involved if previous attempts were unsuccessful or rebuffed. It is natural to be wary. One of the first jobs a mediator has to do is to gain the trust of the parties. Participants need to trust the mediator and the mediation process before they can consider re-engaging with the people they currently distrust.

Mediation is not just for parties in dispute; it is useful when there is a difference of opinion, a stand-off, a clash of expectations, a misunderstanding, and/or hurt feelings preventing people from working out a simple, straightforward solution.

During mediation sessions

At first it may appear that a mediator is not doing a lot; this is because the most basic mediation skill is “active listening”. This means really listening and trying to understand what is being said while paying attention to underlying meanings and importance to the speaker of what is being said. This approach requires the complete attention of the mediator.

Basic mediation skills used during all mediation sessions include the mediator’s ability to:

- Make people feel as comfortable as possible in the circumstances
- Show an active interest in what is being said
- Reflect what is happening: what the mediator is seeing, hearing and feeling

- Check the understanding of what has been said or the speaker's understanding of what has been said
- Ask and invite useful questions
- Give a balanced summary of what has been said
- Highlight common ground or positive points raised by the speaker
- Acknowledge the effect on the speaker of what is happening
- Highlight what is important to the speaker

And particularly at the initial meetings with each of the parties a mediator will:

- Explore what the participants hopes to achieve through mediation
- Explore how that can happen and what happens next
- Close with an agreed plan of action, arrangements for another meeting and an indication of expected outcomes

In each mediation session, the mediator is busy listening, checking out and reflecting what has been said to help everyone involved get a fuller understanding of what is happening.

Mediator questions

Some background information is required to understand a situation from the speaker's perspective, so first contact with each party involved may include such questions as:

- What brings you here?
- What's been happening?
- What effect is this having on you/your family/your health, etc?
- What would you like to happen?
- What else do you need?
- What is stopping this from happening?
- What is the worst thing about this situation?
- What would need to happen for you to be able to do...?
- What do you hope to achieve through mediation?

Mediators tend to use a gentle enquiring approach. There may be other questions about what is or is not negotiable, which is more or less important depending on the type of mediation and the style of mediation being used.

A mediator may also explore or clarify responses to these questions, asking what makes the speaker say X or Y; a mediator may check the basis of statements since generalisations or assumptions and beliefs need to be examined given their potential to be misleading.

At a first meeting a mediator will often ask "what's happening?" and the response is usually something like "he/she/they are the problem. *They* did this, this and this. That's why I/we did that, that and that". People tend to justify their actions rather than talk about how they feel about what has happened. To them, the solution to the current problem is obvious: the other person must stop doing this, this and this and/or needs to change their ways. The message is clear that the other person is in the wrong and therefore she or he must change. This is equally likely to be the response to the same question by the other parties involved.

Preparing to meet

People are frequently reluctant to admit failure, mistakes or wrongdoing and they often forget or play down their contribution to the situation. It is easier to blame the other person and therefore more difficult to contemplate meeting them, especially if the situation has been difficult for a period of time. To help make a meeting between the parties directly involved in a difficult situation possible, a mediator will help them prepare by asking what would make a meeting possible and what would make it easier. The mediator can then help the people involved to come up with strategies to help make a meeting possible.

A set of guidelines for behaviour in the upcoming mediation session can be agreed beforehand to address participants' concerns. Typical "rules" might include that everyone agrees that it is important only one person speaks at

a time so they each can be heard, and that everyone agrees to speak respectfully to each other in the meeting even if feelings run high.

The ability to agree to ground rules gives participants confidence in the mediation process and makes them feel safer as it shows a willingness to cooperate and address common issues and concerns. It is a useful opportunity to begin to build bridges. An agreement to “speak respectfully” to each other would be discussed first so that everyone is clear about what that means; what precisely is or is not acceptable.

Practical arrangements should also be agreed beforehand such as time limits for meetings and a suitable venue. Time will also be spent in outlining the issues to be discussed, the range of options available and the practical outcomes desired.

The parties involved in mediation will have agreed who needs to be at a mediation session and the arrangements should be confirmed by letter stating the time, place and venue, giving directions if required and the expected duration of the meeting. The needs of the parties may have been prioritised prior to the joint mediation session.

In cases where feelings are running high, mediators will often spend time with the parties during the initial meetings looking at how they can work productively together at a joint meeting. Going over what has not worked previously may help people focus on what needs to be different at a mediation session.

In many cases it is not what actually happened that is the cause of bad feeling, but how people responded to what happened. If this is recognised, discussion can focus on what needs to be different and how this can best be managed and a meeting between the people directly involved in the dispute or disagreement is more likely to go well. In complicated cases, more than one meeting may be required but in many mediation cases, one is sufficient.

At the meeting

Mediators have different styles of mediation and may not all work in exactly the same way, but what follows commonly happens.

Mediators greet the parties and show them to the meeting room. After a short welcome and introductions, the mediator will ask the parties to agree to the specifics required to make the meeting go well or remind people of previously agreed ground rules. The mediator's tone is positive and respectful and can acknowledge to all parties that mediation is not an easy thing for people to be involved in.

Most meetings start with an opportunity for each party to say why they are at the mediation. The mediator may say a few words about his or her role and the parties are invited to agree that only one person speaks at a time so that each can be heard. The parties are then given the opportunity say why they have come to the meeting and what issues are to be resolved. The mediator manages the meeting, ensuring that everyone has the opportunity to be heard and that contributions are balanced, fair and respectful.

Mediator skills

During the meeting the following skills will be used by the mediator:

- Active listening: acknowledging what is said by all participants.
- Open questions: asking the speaker questions that require more than a yes/no answer or short reply((often called what, who, when, what, where and how questions).
- Summarising: providing balanced (and non-blaming) summaries of what has been said, what has happened or been achieved.
- Identifying underlying issues: asking question to explore underlying meaning to help people say what they really mean and make sure important issues are revealed and dealt with at the meeting.
- Building on positives: acknowledging, encouraging and highlighting positive statements or moves.

- Challenging constructively: acknowledging what is happening, questioning its relevance and asking for an alternative if appropriate.
- Identifying shifts in mood and feelings: enquiring how people feel about what has been said, what they have heard and what has happened in order to gauge reactions.
- Identifying opportunity for building consensus on ways forward: acknowledging and highlighting possibilities and options.
- Summarising and checking out potential agreement to ensure they are realistic and are practical.

Mediator approaches

Throughout the meeting, mediators watch and listen carefully. They direct attention to what is happening and keep the meeting going by letting people talk, acknowledging and highlighting useful contributions, and encouraging the parties to keep focused on positive outcomes.

As the mediation session is building towards a satisfactory conclusion for the parties, the mediator will help examine the practicalities: who will do what, when, and how. The mediator will ask if anything else needs to be done to make sure this happens as well as to encourage the parties to look at what happens if problems arise later. A key question is: "How do you want to deal with any problems that might arise in future?"

The outcomes of mediation

It is important that people sort out problems as they arise and in a positive way. The mediation process is designed to hand the problem back to those who own it and help them to learn how to manage conflict situations.

Mediation provides the opportunity for parties to talk about what happened, to explain what happened and to hear what happened from a different perspective. The process and the manner in which key issues and concerns are expressed allow participants the opportunity to be generous: to acknowledge their own behaviour which contributed to misunderstandings or bad feeling or to express a wish to be on good terms.

The legal system decides rights. Mediators do not judge the rights or wrongs of a situation. Mediation is an alternative to a win/lose judgment; a mediator does not normally give an opinion on the merits of a case. A mediator focuses on how to satisfy the participants' needs and reach a resolution they can all live with. This is in stark contrast to a win/lose situation where the winner is happy but the loser may not accept losing and may not comply with conditions or arrangements "imposed" on them.

Most people can work out a practical solution quite easily unless they are feeling hurt, upset, or angry. Strong emotions demand immediate attention in a mediation session. Calm, rational problem-solving has to wait until those emotions have been acknowledged, discussed and given their place as part of the problem or the difficulties to be resolved. If the problem is less emotive or a mixture of feelings and differences over artefacts such as commodities, boundaries or resources, a mediator will use their skills to help work out:

- What is important
- What is most important
- What are people willing to consider, to give up, to trade
- What options or alternatives might be possible or acceptable
- What people have in common such as interests, needs or concerns
- What they have to gain or lose by using mediation

A mediator will often acknowledge the feelings expressed and stress the need for a practical alternative to the emotional, destructive conflict. The people involved in mediation are asked for ways to resolve the situation. They are also offered the opportunity to tell the other people how they feel. If one person decides to speak directly to the other person involved in the meeting, it is the mediator's job to help make this possible.

Agreements are checked and re-checked until they are acceptable to everyone and recorded if required. All agreements are voluntary and it is usual to build in a review period to see how the parties manage in the short to medium term.

Before closing the meeting, mediators will often thank people for their hard work and explain the next steps like evaluating the mediation meeting which may involve a subsequent phone call or questionnaire.

Mediator training

Mediation training focuses on how to mediate, with practice exercises in the particular field a mediator is interested in, i.e. commercial, family, or environmental mediation. Mediators are drawn from many fields and bring their own particular skills and talents with them. If the reader can answer “yes” to the following questions then you are likely to enjoy training and working in mediation.

- Do you enjoy meeting people who are different from you and who may hold very different views?
- Are you interested in how other people perceive you?
- Do you enjoy working cooperatively rather than competitively?
- Are you interested in what motivates other people?
- Do you enjoy opportunities to discover more about yourself?

Mediation has existed for thousands of years, but has only become a “job” relatively recently. Mediators’ styles or ways of working are influenced by their training and by the organisation or context in which they work. But what all mediators share is their use of a process that brings people together to share information in a safe environment and their trust that people will usually be able to come up with solutions and resolve issues for themselves.