



# The Team at 9 Gough Square



## ◆ Andrew Baillie QC

Andrew is a CEDR accredited Mediator. He sits as a Recorder and has experience of a wide variety of litigation. He has direct experience of both commerce and the voluntary sector having for many years assisted such organisations in a personal capacity. A leading Criminal Silk, he has a particular interest in financial and business regulation, and is highly experienced in the use of IT to manage documentation in litigation.



## ◆ Giles Eyre

Giles Eyre is a barrister specialising in clinical negligence and personal injury work where an experience of mediation is essential. He is a CEDR qualified mediator and contributes to legal seminars on mediation. He regularly gives seminars to medical experts on medico-legal issues and on report writing skills. For many years Giles was a head of chambers and a part-time chairman of the Appeals service adjudicating on Social Security and Disability Appeals. In 2004 he was appointed a Recorder.



## ◆ Grahame Aldous

Grahame is a CEDR accredited Mediator with successful experience of a number of mediations in practice. He is a member of the Executive Committee of the Professional Negligence Bar Association, a member of the Personal Injury Bar Association Legal Practice Committee, and Vice-Chairman of the Bar Council Equality and Diversity Committee. He was one of the Counsel nominated by both Claimant and Defendant solicitors under the "NHS Resolve" scheme. He sits as a Recorder and as a Chairman of the LSC Clinical Negligence Funding Review Panel.



## ◆ Christopher Wilson

Christopher is a CEDR accredited Mediator with successful experience of mediation in practice. He is particularly experienced in large-scale commercial disputes submitted to arbitration, and the use of IT to manage documents used in the process. He sits as a Recorder and is an editor of Sweet & Maxwell's Landlord and Tenant Law Reports.



## How solicitors can help their client in Mediations

The role of a lawyer representing a party at a Mediation is to:

- ◆ sort out the terms of the Mediation Agreement and set up the process
- ◆ prepare any written case summary
- ◆ present any opening comments, unless it is agreed that this should be done by the parties
- ◆ provide support and advice to the client about the process of Mediation and the claim
- ◆ help the client test the claim and any response to the claim
- ◆ help the client assess the litigation risks
- ◆ help the client with information about costs
- ◆ help explain the client's case to the Mediator
- ◆ help devise a negotiation strategy and to implement it
- ◆ help draft any settlement
- ◆ help sustain the client through what can be a long, emotional and tiring day!



# immediate solutions

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## Mediation FAQs

The question most often asked is what can a mediation do that a without prejudice meeting cannot?

- An independent mediator can help facilitate discussions between parties without anyone feeling that they are appearing weak by discussing the case
- The mediator can ask awkward questions in private; the sort of question that the judge asks half an hour into the opening
- The mediator can speed up the process of concessions and offers being made, particularly where there are multi parties
- The mediator can help look outside the litigation framework and can sometimes help the parties lift their noses from the litigation tarmac
- The mediation can allow parties to have their say, and their day, which sometimes opens the door to a settlement

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## Mediation in practice: - a briefing note

**"Most cases are suitable for mediation"**  
- Halsey v Milton Keynes General NHS Trust [2004]

### WHAT IS MEDIATION

Mediation means using an independent person, the Mediator, to facilitate the process of resolving a dispute. The Mediator does not act as a judge to determine the dispute nor make rulings, but assists the parties to explore the strengths and weaknesses of their cases and tries to find if there is a point at which the parties' needs and expectations can be brought together to form a settlement. In some cases a Mediator will not be necessary and the parties will be able to reach agreement without independent help, but where that has not happened then experience shows that mediation does work.

Mediation provides a quick, confidential and cost effective way of resolving disputes without trial, where the parties remain in control of the process and where issues can be addressed that are outside the narrow scope of litigation. Thus matters such as apologies or undertakings as to future treatment or care provision can feature in Mediation in a way that litigation cannot handle. These are matters that may be peripheral in the litigation process but can be of fundamental importance to a party, and if addressed, can assist the process of settlement.

### WHEN TO USE MEDIATION

Mediation can be used to settle any kind of dispute. Litigation does not even have to have been started. The more complex a dispute the more appropriate it is for Mediation, as Mediation can be a way of cutting through the web of issues to find an acceptable outcome that reflects the litigation risks. It can provide litigants with a feeling of closure, without risk of appeal, but also a feeling that they have "had their day" and "their say" without the cost, and risks, of trial.



# Mediation in Practice

## continued...

### AGREEING A FORMAT

Before a Mediation starts the parties enter into a Mediation agreement. The agreement confirms that the parties have authority to settle their claims and that they will keep the discussions private and confidential, the whole process being without prejudice to any court proceedings unless and until agreement is reached, just like a without prejudice meeting between the parties.

A normal Mediation will last a day. Some court sponsored schemes provide "Short Form" Mediations that last 2 hours and are targeted at resolving smaller disputes by bringing the parties together before they meet at the door of the court for trial. A Short Form Mediation does not permit the parties to explore issues in depth in the way that can be achieved in a whole day Mediation. Given the cost that parties will incur to prepare for a Mediation, it can often be a better investment to pay for a commercially provided Mediator to devote more time to the dispute. The LSC recognise the benefit of Mediation and are willing to provide funding.

### HOW TO SET UP A MEDIATION

To set up a Mediation the parties can go to one of the organisations offering Mediators, such as CEDR, ADR Group, or In Place of Strife. Alternatively the parties can go direct to a Mediator. 9 Gough Square now has 4 of its practising Barristers who are also CEDR accredited Mediators. They can be booked by a call to the clerks, just as if they were being booked as Counsel for a court hearing. A suite of rooms is needed for the Mediation (normally it helps to have at least 3 rooms). Either of the parties can make an arrangement to host the Mediation, or if that is a problem, then arrangements can also be made with the Mediator to find a convenient location. Modern facilities for mediations are available in Fleet Street, Chancery Lane and in our own chambers at 9 Gough Square.

The Mediator will need to be provided with some background information about the dispute. Normally the equivalent of a CMC bundle will suffice. The parties need to agree the Mediator's fees before the Mediation. The fee will normally be a fixed fee to include the day set aside for the Mediation and any reasonable pre-reading and liaison with the parties. An hourly rate may be agreed for any additional work. Ordinarily either one party agrees to pay the Mediator's fees or they are divided equally between the parties and then can be the subject of costs recovery as costs in the case as appropriate (just like the costs of a without prejudice meeting).

Even if a dispute does not settle within the time set for the Mediation, the Mediator will normally follow up the dispute in the ensuing days to see if any outstanding matters can be agreed and a resolution reached to end the dispute. Experience indicates that many cases settle soon after the mediation.

### ON THE DAY

On the day of a Mediation the Mediator will usually meet the parties separately and finalise the agreement and any questions about the process that have not been



## "I did not believe that we could settle this case, we were so far apart on the schedules"

This unsolicited quote came from an experienced Claimant's solicitor after a successful Mediation in a Personal Injury case. Settlement was achieved after 2 and a half hours of Mediation held at the stage when otherwise a Case Management Conference would have been held. The Mediation ended with a signed consent order. The order provided for a Court Judgment for an agreed sum in damages, plus an order for costs to be assessed if not agreed. The Defendant was represented by solicitor and Counsel. The Claimant attended with his solicitor. The solicitor's time in settling the case at Mediation was chargeable in the litigation and any agreement was voluntary. All parties left satisfied, having experienced risk free, cost effective case management under their own control but aided by the Mediator.

sorted out in advance. The parties will often have been asked to provide brief written summaries of the case and of their positions to help the Mediator and also to help focus discussions. The Mediator will normally then start with a joint session in which each party will be invited to make a brief opening statement of their position for 5 or 10 minutes. The Mediator will then hold private discussions with each party separately to explore each party's position before engaging in some shuttle diplomacy to explore the room for settlement. That process may go on until agreement is reached or the attempt is abandoned, but if the Mediator thinks it appropriate, the parties may be brought back together to address issues with each other, or the lawyers, or the clients, or the funders may be put together for discussions as the Mediator thinks might assist.

It helps to have at the Mediation a current schedule of costs to date and of prospective costs to trial. This is for the purpose of assessing litigation risks and in case there is an opportunity to negotiate a costs inclusive deal. Sometimes the Mediator will have asked for this information in advance. If not then the Mediator will ask for it on the day. It is worth being ready with the information. If agreement is reached at the Mediation then it will be set out in writing. The parties will be encouraged to draft the agreement themselves (it is "their" agreement after all) but the Mediator will assist in the process.

### REFUSAL TO MEDIATE: ADVERSE COSTS ORDERS

The Court of Appeal's decision in **Dunnett v Railtrack plc** in 2002 prompted a number of Mediations for fear that an adverse costs order would be made against even a successful party if Mediation was refused. The argument appeared even stronger in relation to public bodies on whose behalf the Lord Chancellor gave an "ADR Pledge" in March 2001; that ADR would be considered and used by public bodies in suitable cases. In **Halsey v Milton Keynes General NHS Trust** in May 2004, however, the Court of Appeal confirmed that a successful party would only normally be deprived of its costs for refusing Mediation where the refusal was unreasonable. The burden was on the unsuccessful party to show that the successful party had been acting unreasonably in refusing ADR and the factors that could be relevant to the issue of unreasonableness in this context were:

- ◆ The nature of the dispute;
- ◆ The merits of the case;
- ◆ The extent to which other settlement methods had been attempted;
- ◆ Whether the costs of ADR would be disproportionately high;
- ◆ Whether any delay in holding ADR would be prejudicial;
- ◆ Whether ADR had a reasonable prospect of success.

