

Guide to the Effective Use of Mediation in Court Actions

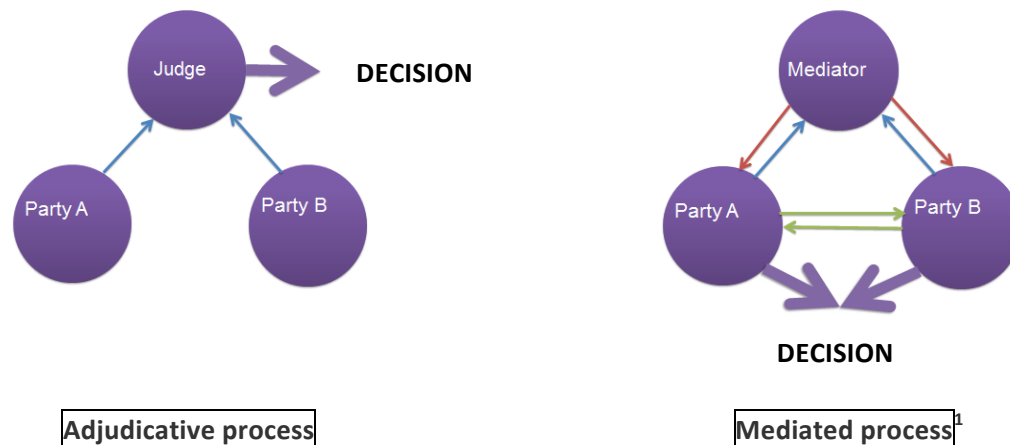
WHAT IS MEDIATION?

'Mediation is a conversation between two or more people that disagree, led by a trained, neutral mediator.' (New York Peace Institute, provider of in-court mediation in New York City).

This definition highlights some key features:

- Conversation – mediation requires the parties to speak directly to each other rather than make their case to a judge
- Disagreement – mediation can be effective in highly entrenched disputes
- Leadership – the mediator is not simply a passive bystander but takes a proactive role in seeking a solution
- Training – mediators must fulfil a training and practice requirement (in Scotland, standards are set by the Scottish Mediation Register)
- Neutral – mediators must act as impartial third parties.

For sheriffs considering referral to mediation it is useful to think of it as a form of *facilitated negotiation*. It is thus the parties who ultimately determine the content of any agreement, at times assisted by legal representatives. The mediator's role is to lead the negotiation, ensuring procedural fairness (i.e. that both parties have the opportunity to state their case) and that any agreements accurately reflect the parties' wishes.

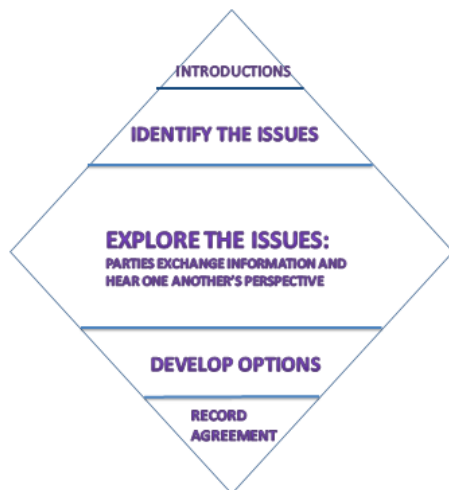


Mediators typically do not take responsibility for the substantive fairness of mediation outcomes; however, when dealing with unrepresented parties, experienced mediators will often provide useful process information (timescales, terminology, etc.) They may also engage in *reality testing*, ensuring that parties have carefully thought through the practical and legal consequences of their proposals.

¹ Large, purple arrows represent the source of decisions; thin, coloured arrows the direction of communication

What actually happens?

Most mediation sessions follow a simple 5-stage process:



Mediation sessions in smaller civil actions typically last between 1 and 3 hours, with all parties together most of the time; larger commercial matters tend to take a full day, with parties and representatives in separate rooms. The outcome is recorded in the form of a settlement agreement, signed by the parties.² Mediation is conducted on a “without prejudice” basis, set out in a standard agreement to mediate.³

MEDIATION WITHIN THE SIMPLE PROCEDURE

Mediation has been in use in Scotland for over thirty years, most prominently associated with family and community disputes. Other jurisdictions have used mediation more widely for civil disputes.⁴ A small claims mediation service has been operating in Edinburgh Sheriff Court since 1998 and in Glasgow Sheriff Court since 2014.

The new Simple Procedure encourages greater use of both negotiation and mediation. The fourth of its five principles states:

“Parties are to be encouraged to settle their disputes by negotiation or alternative dispute resolution, and should be able to do so throughout the progress of a case.”⁵

Under “Sheriff’s Powers”, it adds: *“The sheriff may do anything or give any order considered necessary to encourage negotiation or alternative dispute resolution between the parties.”⁶*

This suggests a proactive role for sheriffs in ensuring that parties have given proper consideration to alternatives such as mediation. The English guidance claims that judicial encouragement is a key factor in the success of mediation schemes.⁷

² The current small claims mediation schemes ask parties to sign a settlement agreement along with a joint minute for dismissal. Once the settlement terms have been fulfilled the joint minute is lodged on behalf of both parties, avoiding the need for further court attendance. A copy of the standard form is attached at appendix 1.

³ A standard Agreement to Mediate is attached at appendix 2

⁴ See, for example, the Court Mediation Service Manual (2009) for England and Wales, available from:

<https://www.judiciary.gov.uk/publications/court-mediation-service-manual/>

⁵ Act of Sederunt (Simple Procedure) 2016, 1.2 (4)

⁶ *Ibid*, 1.8 (2)

⁷ Court Mediation Service Manual (2009), Fn 4 above, p.6

ENSURING THAT PARTIES GIVE PROPER CONSIDERATION TO MEDIATION

A) At First Written Orders

In contrast to previous rules, the sheriff's first step under Simple Procedure is to consider the appropriate disposal of disputed matters in private.⁸ Decisions will be based on the information in the Claim Form and Response Form. Parties may be encouraged to consider mediation in two ways:

- 1) By making a written order referring parties to alternative dispute resolution.⁹
- 2) By arranging a case management discussion at which negotiation and alternative dispute resolution can be discussed directly with the parties.¹⁰

This guidance will not attempt to define all the circumstances in which a sheriff is likely to make a written order referring parties to alternative dispute resolution. It should be noted, however, that mediation is not only suitable for simple, low-conflict matters. Experienced mediators suggest that it is difficult to predict which cases will settle and on occasion complex and intractable disputes achieve satisfactory resolution. Even where mediation is unsuccessful, parties are not prejudiced as they retain all rights and remedies and may have narrowed the issues in dispute.

Mediation can prove particularly useful where monetary compensation alone is unlikely to achieve the most satisfactory resolution: for example, where the claimant wishes goods or premises to be restored to their original condition, or disputed works to be completed. The respondent may be best placed to carry out this work and mediation allows this to be taken into account in the final settlement.

There are some circumstances where referral to mediation may be less desirable. These include cases:

- where a legal precedent is necessary to clarify the law,
- where a party is likely to be placed at risk by face to face discussion with the other,
- where settlement would not be in the public interest.

Reproduced below is the table of indicators and counter-indicators for referral to mediation that has been provided to judges in England and Wales.¹¹

Indicators	Counter Indicators
<ul style="list-style-type: none"> • A result other than that possible through a court ruling is desirable • Speedy solution is desired • 'Legal proceedings fatigue' • Long-term relationship (family, neighbours, business contact, company, long-term contract, etc.) • Common future interest(s) • More litigation or more conflicts than presented in the proceedings • Importance of confidential treatment, with possibility of separate interviews • More parties involved in the conflict than just the parties in the proceedings • A longstanding solution is essential 	<ul style="list-style-type: none"> • Both parties are unwilling • Earlier mediation attempt failed • A precedent is desired • Public decision is desired • Too great a power imbalance • Parties with a cultural background which has no place for mediation • Legal procedure in which only a court ruling can bring about a solution

⁸ Act of Sederunt (Simple Procedure) 2016, 7.5 (1)

⁹ *Ibid*, 7.6 (1) a

¹⁰ *Ibid*, 7.7 (2) b

¹¹ Court Mediation Service Manual (2009), Fn 4 above, p.8

B) At a Case Management Discussion

Where a sheriff opts for a case management discussion, similar considerations apply. Where the sheriff concludes that a matter would benefit from an attempt at mediation, he or she may take one of the following steps:

1) Where the court has a mediation scheme

a) Legal and procedural information

The simple procedure rules state: *“The sheriff must ensure that parties who are not represented, or parties who do not have legal representation, are not unfairly disadvantaged.”*¹² Experience from the existing mediation schemes suggests that many parties have an unrealistic view of their prospects at proof. Sheriffs should therefore continue the good practice under the previous small claims rules of clarifying the details of the case, including the nature of the claim and defence, and highlighting any legal complexities. This sort of ‘reality check’ is helpful and contributes to an informed and realistic discussion at mediation. It can also be valuable to outline the practical implications of a hearing on the evidence: timely lodging of written evidence, citation of witnesses, the requirement for the Claimant to prove their case and, for limited companies, the need for legal representation.

b) Describing mediation

Where a mediation coordinator is present in court parties should be encouraged to speak to this person as soon as possible. Simply asking parties if they have ever heard of mediation or if they would like to attempt it can elicit a negative response. Many are unsure of what is involved. It is better for them to discuss their case with the mediation coordinator. He or she will be able to explain how mediation works and answer any questions the parties may have.

At the same time judicial encouragement is important. One or more of the following phrases may be used to describe mediation:

- *Mediation provides an opportunity to negotiate a resolution that you can both live with*
- *The mediators will ensure that discussions are calm and systematic*
- *Mediators are impartial and will provide both parties with the opportunity to state their case*
- *The majority of mediated cases settle without having to return to court*
- *In mediation you systematically work through the matters in dispute. If you reach a resolution the mediator will draft a binding settlement agreement*
- *If mediation is unsuccessful you will not be prejudiced*

c) Procedural steps

The option to use mediation is entirely voluntary. If either party does not wish to participate, or the mediation coordinator considers the case unsuitable for mediation (for example because of alleged intimidation) he or she will refer the matter back to the sheriff. At this point the sheriff should arrange a hearing.¹³

If both parties agree to mediate the sheriff should order a continuation for a reasonable period to enable mediation to take place and the settlement terms to be fulfilled (four weeks is common). If the mediation has already started on court premises it is not necessary to interrupt the process; the sheriff clerk can pass on details of any continuation to the mediation coordinator and the parties.

¹² Act of Sederunt (Simple Procedure) 2016 1.4 (2)

¹³ *Ibid*, 7.6 (1) 3

Represented parties

The presence of a legal representative is no bar to mediation. Some may be authorised to negotiate on behalf of their clients; other will wish to take their client's instructions. In this case mediation can be arranged at a later date. It is common in larger, commercial actions for legal representatives to be present throughout the process.

2) Where mediators are not present in court

Much of the above applies, in particular the importance of providing information and describing mediation. If the sheriff considers a case suitable for mediation he or she should order a continuation, as above, and ask the parties to contact a mediator through the Scottish Mediation Helpline. The Scottish Mediation Helpline can provide details of mediators in all of Scotland's local authority areas.¹⁴ The number is 0131 556 1221. A longer continuation may be necessary to enable mediation to be arranged and to take place.

AFTER MEDIATION HAS TAKEN PLACE

Where the matter has settled and the terms been fulfilled in good time a joint motion for dismissal will be lodged in court on behalf of the parties by the mediation scheme or mediator. There is therefore no further need for the parties to appear.

Where settlement takes place close to the next court appearance one or both parties should appear and inform the sheriff. Generally the sheriff will order a short continuation to allow settlement terms to be fulfilled. If settlement includes payment by instalments or other terms to be carried out over a longer period it may be more appropriate to pause the action.¹⁵

Where some or all matters have not been resolved the sheriff may use any of the powers set out in the Simple Procedure rules at 1.8, including arranging a hearing or a further case management discussion. It should be made clear to the parties that evidence from the mediation will be inadmissible, with the exception of matters that would be admissible in any event (such as documents and photographs properly lodged with the court).

FURTHER INFORMATION ABOUT MEDIATION IN SCOTLAND

Scottish Mediation Network - <http://www.scottishmediation.org.uk>

Edinburgh Sheriff Court Mediation Service - <http://www.citizensadviceedinburgh.org.uk/mediation-service/>

University of Strathclyde Mediation Clinic –
<https://www.strath.ac.uk/humanities/lawschool/mediationclinic/>

¹⁴ The Scottish Mediation Helpline is funded by the Justice Directorate and is linked to the Scottish Mediation Register quality assurance system – see <http://www.scottishmediation.org.uk/find-a-mediator/>

¹⁵ *Ibid*, 1.8 (9)

Settlement Agreement

THIS AGREEMENT is between:

The Parties agree as follows:

Signed:

(Party) (Date)

(Party) (Date)

(Mediator) (Date)

(Mediator) (Date)

[For completion by the Mediation Coordinator]

Settlement terms fulfilled? YES/NO (Date)



INCIDENTAL APPLICATION TO REQUEST DISMISSAL OF ACTION

Case No.....

Claimant

And

Respondent

This case is scheduled for a case management discussion on (Date)_____. The matter has settled extra-judicially so the parties request that the Sheriff discharge the case management discussion and thereafter dismiss the case with no expenses due to or by either Party.

Please sign and print names below:

(Claimant)

.....

.....

(Respondent)

.....

.....

Date:



INCIDENTAL APPLICATION TO REQUEST THAT AN ACTION BE PAUSED

Case No.....

Claimant

And

Respondent

This case is scheduled for a hearing on (Date)_____.

The matter has settled in mediation. To enable the terms of settlement to be fulfilled the parties request that the Sheriff pause the claim.

Please sign and print names below:

(Claimant)

.....

.....

(Respondent)

.....

.....

Date:



AGREEMENT TO MEDIATE

THIS AGREEMENT is between

- 1) _____ **(Party)**
- 2) _____ **(Party)**
- 3) _____ **(Mediator)**
- 4) _____ **(Mediator)**

The Parties agree as follows:

1. Each Party will attempt in good faith to resolve the dispute using the mediation process and will attend the mediation with full authority to settle the dispute.
2. The mediation session will take place at(venue) on (date).
3. If, at the end of the meeting, the dispute remains unresolved the mediation session can be continued later if that is the wish of all the Parties, including the Mediators.
4. Role of the mediators
5. Mediation is provided by _____ (Mediation Service), who will appoint two mediators. The mediators’ role is to help the people involved in a dispute to communicate and negotiate in good faith with each other.
6. The mediators will not act as legal adviser to either party.
7. The mediators will be responsible for conducting the mediation meeting in accordance with this agreement and the Scottish Mediation Network Code of Practice.
8. Voluntary Participation

Any party, including the mediators, may withdraw from the mediation at any time.



9. Conclusion of the mediation meeting

A mediation meeting will generally aim to conclude within a period of one to one and a half hours. If, however, the parties wish to continue discussions they may do so, subject to the convenience of all parties, including the mediators. By the conclusion of the meeting the parties will either have reached an agreement or not.

10. Settlement

When/if the parties agree on how to resolve the dispute, the mediators will draw up a Settlement Agreement recording the terms of the settlement, for all to sign and date.

11. In the event that the settlement terms involve actions by one party over a period of time, the other party will inform the Mediation Coordinator when all terms have been fulfilled. The Mediation Coordinator will notify the Court that the terms have been fulfilled. The case will then be dismissed.

12. In the event that a party does not fulfil the terms of the settlement agreement, the other party:

- may be released from the settlement terms if they so wish, by giving written notice to that effect to the other party;
- shall inform the Mediation Coordinator that the terms have not been fulfilled.

13. All parties to the dispute reserve their respective legal rights should a settlement not be reached through mediation.

14. Confidentiality

The entire process of mediation, including all communications prior to and during the mediation, is and will be kept confidential. The mediation shall be conducted upon a “without prejudice” basis. Nothing said, nor any document produced, during the process of negotiation (including, without prejudice to that generality, preparation before, or discussions after, the mediation session) shall be founded upon in any proceedings.

Unless otherwise admissible, all documents, submissions and statements made or produced for the purposes of the mediation, whether oral or written, shall be inadmissible as evidence in any court or arbitration or other proceedings. No party may have access to the mediators’ notes or call the mediators as witnesses in any court or other proceedings relating to the subject of the mediation.

Exceptions

The preceding paragraph shall not apply where:

- all parties consent to specific disclosure;
- any of the parties is required by law to make disclosure;
- the mediators reasonably consider that there is serious risk of significant harm to the life or safety of any person if they do not make such disclosure
- the mediators discuss the case in professional supervision with the Mediation Coordinator or other supervisor appointed by him.

A party may disclose information or documents obtained during the mediation to a person not present at the mediation where that party needs to do so in order to obtain professional advice or where the person is within that party's legitimate field of intimacy. A party disclosing information or documents in these circumstances must inform the professional advisor or any such person that the information or documents are confidential.

15. Complaints

If any party to this agreement is dissatisfied with the mediators' conduct of the mediation, he or she agrees to first raise this informally with the Mediation Coordinator. If it cannot be resolved to the party's satisfaction he or she may then write formally to the Director of the Scottish Mediation Network who will deal with it in accordance with the Network's Complaints Policy. No complaints should be directed to the Sheriff Court.

16. Monitoring

By using mediation each party agrees to complete and return the questionnaire surveying the quality of the service provided. All parties will have their confidentiality guaranteed in relation to their responses to the questionnaire.

17. Exclusion of Liability

Except as required by law, neither _____ (Mediation Service) nor any mediator, nor any body with whom the mediator is professionally associated, shall be liable to the parties for any act or omission in connection with the services provided by the Mediation Service in _____ Sheriff Court.

18. Costs

There is no charge for the mediation

Signed:

(Party) (Date)

(Party) (Date)

(Mediator) (Date)

(Mediator) (Date)

