



briefing

dispute management - july 2008

resolving disputes through mediation

It is an unfortunate fact that anyone involved in business, whether in the medical profession or otherwise, is also likely to experience being involved in a dispute at some stage in their professional career

Hopefully, the majority of us will be able to resolve the dispute quickly and without the need for recourse to a more formal dispute resolution procedure. However it is clear that this is not always the case and the results from a recent study carried out by the Centre for Effective Dispute Resolution (CEDR) has shown that the efforts of the courts and the legal profession to encourage parties to mediate disputes is starting to have a real effect.

What is Mediation?

Mediation is a form of dispute resolution that encourages parties to find their own resolution to the dispute, rather than imposing a decision on the parties. The mediator is independent and has no power to force the parties to resolve the matter or to impose a decision on the parties – the Mediator's role is to facilitate negotiations and encourage the parties to reach an agreement.

Mediation can take any format the parties and the mediator agree. However, generally, the Mediator will ask the parties to set out their positions in a written statement prior to the mediation actually taking place. The purpose of this document is to inform the mediator of the issues in dispute and what remedies the party is seeking. Whilst the position statement is something which is usually shared with the other parties to the dispute, it is important to remember that documents can also be submitted to the mediator in confidence if there are matters that the Mediator will need to take into account which the other parties do not and should not know about.

Generally, the day of the mediation will start by giving the parties the opportunity to put forward their position in an opening statement with the other party present. How the rest of the mediation then takes place varies greatly according to the stance taking by the parties and how well negotiations are progressing face to face. If progress towards settlement stalls, the parties will be able to retreat to separate rooms, where they can speak to the mediator in confidence and he can then move from room to room between the parties attempting to establish common ground in a less confrontational manner.

What are the Benefits of Mediation?

Mediation tends to focus on the desired outcome of each of the parties as opposed to the issues in dispute between them. The ability of the mediator to go from room to room and be privy to the parties confidential discussions means that the mediator can very quickly judge where the parties' expectations in terms of desired outcomes may be similar and where the real areas of debate remain.

The mediator can also consider possible remedies that it may not be open for a court to order. For example, in a claim for clinical negligence, whilst this may appear on paper to be a claim where only monetary recompense is sought, it may be that the injured party will be more amenable to settlement if a simple apology is included.

Mediation also has the great benefit that if the parties wish any settlement reached can be confidential as opposed to a court judgment which is a public document. Unless the parties agree otherwise anything that is said at a mediation is without prejudice meaning that it cannot be referred to in the court proceeding if the mediation fails. This means that parties are more willing to make concessions. Mediation is private, confidential and until agreement, without prejudice, and the mediator works with the parties to solve the issues in what is in effect a structured form of assisted negotiation.

Mediation is therefore able to address many of the fundamental issues that litigation finds so hard to resolve easily:

It gives the parties a personal involvement in the settlement and closure of disputes;
it enables the parties to address their interests and needs rather than their strict "legal positions";
it enables the parties themselves to meet and be heard by each other personally;
it enables a mediator to work as a neutral facilitator with the parties so that the issues are confronted and disposed of.

The benefit of mediation is not only evident in terms of cost savings, but also in the fact that around 75% of cases settle on the day with nearly another 13% settling shortly thereafter, giving an aggregate settlement rate of some 88%.

The Rise in the Popularity of Mediation

Whilst mediation is certainly not a new idea, having been around for over 20 years, and having been used by the court system in relation to family disputes for the last 10 years, it is only over the last 5 years that it appears to have achieved a general recognition and acceptance in relation to commercial disputes.

The key findings on the overall economic impact of commercial mediation published by CEDR (Centre for Effective Dispute Resolution) as part of their bi-annual audit indicated that by achieving earlier resolution of cases than would otherwise have been the case in litigation, the commercial mediation profession will save business in excess of £1 billion this year in wasted management time, damaged relationships, lost productivity and legal fees. By way of comparison, the audit results suggest that the aggregate value of the mediation profession in terms of total fee income is around £8.2 million which shows the value for money that can be achieved through the mediation process.

The audit goes on to acknowledge that whilst the value of cases mediated can be significantly influenced by the impact of a few major cases, when the effect of such cases is excluded, the value of cases mediated each year is approximately £4.1 billion.

The courts have made it clear that in the vast majority of cases they expect the parties to have tried mediation and can penalise parties who refuse to do so unless they have good reason. The figures from the CEDR audit seem to show that the ongoing efforts to raise the profile of mediation and to encourage parties to mediate more often are succeeding.

The number of mediations performed in the last 12 months (some 3,700) represents an increase of 33% in two years since 2005. In addition, the percentage of mediations coming from fixed fee and time limited

mediation schemes which have been implemented by most courts throughout the country now represent a major component part of the market.

The figures do therefore seem to bear out the anecdotal evidence that mediation is a quicker and more cost effective method of resolving a dispute than pursuing a more formal avenue such as litigation.

Key Points

Mediation offers an opportunity for parties to a dispute to meet and find out more about each others positions
Mediation is often a quicker and more cost effective way of resolving a dispute

The courts actively encourage parties to attempt settlement through mediation

Mediation is able to consider and take advantage of settlement terms which a court would not be able to order



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