

Settling out of court

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Liz Repper considers how best to prepare to enter mediation, and how this differs from preparing for court

Why are many choosing mediation as a way to resolve disputes? Reasons may include:

- saving the costs of taking a case to trial, including (if limitation is not an issue) the new court issue fees that mean it now costs ?10,000 to issue a claim of ?200,000, rather than ?1,515
- [avoiding costs sanctions](#) being imposed because of an unreasonable failure to engage in alternative dispute resolution (ADR) (see p12)
- [complying with a stay for mediation](#) and direction that parties must take all reasonable steps to conduct that mediation, whatever they might say about their willingness to engage in the process.

Preparation

So, how do you prepare? The temptation, of course, is to do what is done when preparing for court; submit a position statement that reads like a skeleton argument, prepare a speech that sounds like an opening and draft cross examination for those you view as your opponent. Before doing so however, remember:

- most mediators are appointed as facilitators, not decision makers, and so it is for the parties to persuade each other of their cases, rather than the mediator
- what each party wants to see and hear in order to be persuaded may be worlds apart from what a judge requires because, whatever the merits of the case, each party will have personal interests and solutions
- mediation is a voluntary process and so, unlike court, parties can simply walk away if what they are hearing is not convincing them.

Also keeping in mind that some solutions can be agreed at mediation that a court cannot order, consider:

- what are options B, C and D if option A is not achievable?
- what may the other party really be looking for?

Brainstorm by sketching out internally all the issues you want resolved, all the potential solutions and how critical each issue is to you overall.

Litigation

Put yourself in the other party's shoes. Do they have the funds to go to court? Would litigation have wider implications for them, such as blighting their property? Would a confidential resolution favour their interests? Is there a benefit in seeking to repair or save a relationship?

It may be that the case could never be litigated proportionately and so, in reality, both parties must want to avoid incurring irrecoverable legal costs. [Gilks v Hodgson](#), a dispute between neighbours with costs approaching ?500,000 (in the context of a damages claim of ?3,500) is a sobering recent example of a case that Judge Sir Stanley Burnton said "could and should have been compromised on terms that both parties could live with".

Turning to presentation:

- What would you most like to see or hear in order to be persuaded?
- What can you show the other party to persuade them?
- How can you best present your case in the time agreed?

Consider telling the other party in advance what you want to see, perhaps a receipt or a photo, or evidence of what their costs will be to trial. Failure to have documents ready that support key points of persuasion may mean the mediation fails.

Mediation

If the case is complicated by its size, plan in advance how best to deal with it in the time agreed. Could it be presented on a sample basis? Could it be agreed in advance that only certain items will be addressed? Would a pre-meeting help? Could showing contemporaneous video or photo evidence short-circuit matters?

As for the mediation day itself, consider also:

- who to bring? As well as someone with full authority to settle, who may the other party want to talk to?
- what might work in terms of format? There is no pre-determined procedure and the process often evolves during the mediation day. If, however, the parties have previously had a good relationship or never even met, consider whether it would help if the decision makers sat together and discussed some issues.
- where? Parties often agree an 8-hour mediation, which means venues need to be good working environments.

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Further information

- [RICS Dispute Resolution Service](#)
- [RICS Accredited Mediation Training](#)
- Related competencies include: [Conflict avoidance, management and dispute resolution procedures](#)
- This feature is taken from the RICS *Property journal* (July/August 2015)