Trust Mediation

specialist personal injury and clinical negligence mediation

The Complete Guide to Clinical Negligence and Personal Injury Mediation

A guide to the mediation process for clinical negligence and personal injury litigators.

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Objectives:

- To have a clear understanding of the mediation process
- To know when to use it.
- To understand the commercial benefits of mediation for claimants, lawyers, defendants and their insurers.
- To understand the costs risks of unreasonably refusing to mediate.

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Part I: Mediation Overview

1. Module 1 - What is Mediation?

1.1 Mediation is a tool to settle claims which have not settled, or are unlikely to settle, by routine means.

1.2 Mediation is not rocket science. It is about

- negotiating claims,
- recognising that you are dealing with people and
- using your experience, knowledge and common sense to work with the mediator to achieve a settlement if one is available on the right terms.

If you can negotiate the settlement of a claim, you can attend and deal with a mediation.

1.3 Mediation is the most commonly used form of Alternative Dispute Resolution involving a third person to assist (ADR). Other forms include

- early neutral evaluation,
- expert determination,
- arbitration.

1.4 Mediation involves negotiation between

- the claimant and his/her representatives, and
- the defendant's representatives or insurers

using an independent persona mediator - who helps them to negotiate a settlement of the claim.

1.5. Mediation is ideal for difficult claims that should have settled but have not.

1.6. The mediator is not a judge. The mediator does not decide who has the best case or who is right and who is wrong. Instead he/she works with the parties to help them find their own settlement to the claim.

1.7 If, and only if, the parties agree to a settlement the parties will draft a written settlement agreement. By signing the written agreement, often in the form of a Tomlin order, the parties create a binding settlement of the dispute. Each party has to agree to the terms of any settlement so a party never "loses" at mediation – an agreement cannot be forced upon a party.

1.8 The cost of mediation comprises the mediator's fees and the costs of both/all parties being represented at the mediation, including preparation. A cost benefit analysis is required before committing to mediation: is the cost of the mediation worthwhile compared with the savings that can be made by avoiding a trial?

See Modules 3 and 4 and Garritt-Critchley and Others v Ronnan and Solarpower PV Limited [2014] EWHC 1774 (Ch). In cases where the defendant is always going to have to pay some compensation it may well be that it will agree to pay the costs of the mediation in any event.

2. Module 2 - The benefits of, and the business case for, Mediation

2.1 Claimants benefit from a mediated settlement because:

- it removes uncertainty about the outcome and the risks (and, for the claimant, worry) about going to trial;
- it resolves the claim more quickly than going to trial or waiting for a joint settlement meeting late in the proceedings;
- they can be much more involved (if they want to be) in the settlement discussions than is normally the experience with a joint settlement meeting;
- it can reduce the unrecoverable costs payable to their solicitors;
- the outcomes are more flexible than a court judgment (in that the parties are free to make their own contractual agreement, whereas the court can only make a decision on the legal issues in the statements of case);outcomes such as an apology, explanation; a promise to report on changes in practice to avoid future similar errors can all be included in a mediated settlement but cannot be ordered by a judge.
- it can achieve settlement in difficult cases where routine negotiation (for example, at a joint settlement meeting) has not produced a settlement or is unlikely to do so;
- the settlement can remain confidential.

2.2. Claimant lawyers benefit because:

- early settlement means converting work in progress into cash more quickly which is good for cash flow;
- costs can be agreed at the mediation which speeds up the billing process and even if not agreed an interim costs payment can be agreed
- it can reduce the risk of nil recovery cases or reduced costs for failing to beat Part 36 offers;
- they have a satisfied client for the reasons set out at 2.1 above.

2.3. Defendant lawyers benefit because:

- early settlement helps meet life cycle KPIs for their clients;

- reduced claimant costs meet another KPI;

- the work may be done on fixed fees and early settlement makes that more profitable.

2.4. Defendants s benefit because:

- they can save a considerable amount of their own legal costs;

- they can save a considerable amount of costs that would otherwise be paid to the claimant;

- the life cycle of the case can be significantly shortened, releasing the reserve on the claim.

2.5. Perhaps the key attribute of mediation is that it is a risk tool for both sides that enables them to assess and manage litigation risks.

Part II - Preparation for mediation

3. Module 3a – Mediation or JSM?

3.1. There are many similarities between face to face negotiations such as joint settlement meetings and mediation but they are different. The mediator adds a new element to the dynamics of negotiation which helps to settle difficult cases. Mediation may cost more and if so this additional cost needs to be justified.

3.2. Criteria for mediation?

There are no commonly agreed criteria about the type of claim to mediate. Deciding whether to mediate involves a review of all of the circumstances of the claim. This question can be posed:

Is this a claim that it has not been settled, or is unlikely to be settled, by routine negotiation methods?

3.3. There are, however a number of indicators that suggest mediation and these should be borne in mind when considering whether to mediate or use a joint settlement meeting? They are:

3.3.1 More than one defendant

The presence of a mediator can help direct the negotiations. The mediator will effectively run two mediations. One between the claimant and the defendants as a whole concerning liability and quantum and another amongst the defendants to determine levels of contribution.

3.3.2. The lawyers have fallen out

It can happen that relations between opposing legal teams deteriorate to such an extent that direct negotiation between them can become very difficult. The mediator can act as a conduit to re-open the negotiations. The presence of the mediator re-focuses on the issues between the parties rather than the history.

3.3.3. The defendant side wants to assess the claimant

Sometimes the defendant will want to assess the claimant to see if he/she will come up to proof or is genuinely as badly injured as is claimed. Joint sessions at a mediation can provide this opportunity in a managed situation.

3.3.4. Emotional issues

There are emotional issues. (For example, a claim involving a fatality or where the claimant is a child.)

3.3.5. A JSM has failed (or is likely to fail)

Mediations often succeed where a JSM has not resulted in a settlement. If it appears that a JSM will fail it may be more economical to move directly to a mediation.

3.3.6. The claimant appears to have unrealistic expectations of settlement.

Claimants often remain unconvinced by arguments put to them by a defendant lawyer but a mediator, as a trusted neutral, can play an important role in reality testing and challenging unrealistic expectations. The mediator can also assist a claimant's lawyer who is having difficulty managing the claimant's expectations.

3.3.7. The court has ordered a stay for mediation.

The court's duty under the Overriding Objective in the Civil Procedure Rules to deal with cases justly and at proportionate cost includes the obligation of encouraging the parties to use an alternative dispute resolution procedure if it considers that appropriate.

3.3.8. The courts have made it clear that:

costs sanctions will be imposed where a party unreasonably refuses to mediate and;

the fact that negotiations have already taken place and a party believes mediation is not likely to result in a settlement will not necessarily be accepted as a reasonable refusal to mediate.

3.3.9. When the likely costs of trial are disproportionate to the amount claimed.

Wherever legal costs are likely to be disproportionate the court will consider what steps have been taken and should be planned regarding settlement and mediation.

3.3.10. Whenever there are difficult issues in addition to the claim itself.

For example, where there is a dispute about jurisdiction or it is particularly important for one of the parties to settle the claims swiftly or with the benefit of an agreement to settle on confidential terms.

3.3.11. Where it is important to involve the Claimant in the discussions or where no amount of compensation will satisfy the Claimant but compensation combined with other outcomes such as those set out in para 2.1 above may help.

4. Module 3b - When to mediate – and contra-indications to mediation

4.1. Choosing the right time to mediate is important. In one case it might be right to mediate pre proceedings, in another the best time might be just after proceedings are started and in some cases the time is not right until nearer trial. The question of whether to mediate should be reviewed regularly, throughout the life of the claim.

4.2. If you mediate too early the parties may not be in a position to fully assess the risks and a settlement may not be possible. Mediating too late means that costs will have built up considerably and may even become a bar to settlement. Note that the pre-action protocols make it clear that litigation should be a last resort.

There are three important questions:

a) Are you in a position to negotiate a settlement?

Do you have the necessary information to make and accept/reject any offers that may be made? This is not the same as being ready for trial. It is about being in the position to make informed or commercial decisions about the case.

b) Have negotiations stalled?

Negotiations have stalled when neither party is prepared to move from its last offer or there is a denial of any liability. In these circumstances mediation is an alternative to following the litigation through to trial.

c) Would settlement **now** benefit the Claimant personally?

If the answer to these questions is yes then it is probably the right time to attempt mediation.

4.3. **Contra-indications to mediation**

Mediation is inappropriate where:

4.3.1. There is an important reason to proceed to trial, such as when a precedent is required.

4.3.2. The power of the court is needed. For example, an injunction is sought.

4.3.3. Fraud is suspected and a judgment is seen as a first step towards criminal proceedings. However mediation can be used where fraud is suspected but criminal proceedings are not anticipated.

5. Module 4 - Cost benefit analysis – mediation costs

5.1. Benefit. The potential benefit of a mediation is that the case will be settled, thereby avoiding further legal costs of both parties. The costs savings can be estimated. It may be that, but for a successful mediation, the claim would have been settled by negotiation twelve months later or possibly the case would have run to trial – the costs for both potential outcomes can be estimated. (If cost budgets have been prepared the costs to trial will already have been estimated.)

5.2. Cost. The costs of the mediation will comprise:

5.2.1. The claimant's costs for preparing for and attending at the mediation.

Say:

For a half day mediation: 6 hours preparation plus half a day at mediation plus travel.

For a one day mediation: 8 hours preparation plus a day at mediation plus travel.

5.2.2. The defendant's costs for preparing for and attending at the mediation. The same as the above.

5.2.3. The mediator's fees will usually vary depending on the length of the mediation. Trust Mediation fees are set out on its website: http://www.trustmediation.org.uk/ and in NHSLA cases are already agreed with the NHSLA.It may be that the defendant will agree to pay the mediator's fees in any event.

5.2.4. The analysis can be made once the costs estimates are available. In making the analysis proportionality should always be kept in mind.

5.2.5. As mentioned above, mediation needs to be considered pre- action and kept under review throughout the proceedings. Mediation is also a prominent issue to focus upon during any case management conference. This is when budgets, proportionality and the economic sense of the litigation are considered. Practitioners and judges are becoming more familiar with the Jackson approach so the case plan and budget need to include ADR contingency plans and costs.

5.2.6. Where Qualified One Way Costs Shifting applies, mediation may offer the prospect of an immediate settlement as against the irrecoverable costs of a defendant proceeding to trial. The mediation provides an opportunity to defendants to demonstrate the strength of their case and their perceived weakness of the claimants.

6. **Module 5a - Persuading the other party to mediate and court orders relating to mediation**

6.1. The combination of the CPR and recent case law means that a party that wishes to mediate has significant means to either achieve that objective or put the other party at risk of a significant costs sanction.

6.2. A well prepared offer to mediate should be met with either an acceptance or a detailed and reasoned written refusal which is compliant with the case law. If the offer to mediate is unreasonably refused or simply ignored the refusing party may well find that a costs sanction is imposed.

6.3. The carrot is better than the stick and it is best practice to persuade the other party to mediate on a voluntary basis in the context of the benefits of mediation. A verbal discussion may be the best starting point.

6.4. If the other party is resistant to mediation a written offer to mediate should be prepared.

6.5. Such an offer should set out the circumstances which, in light of the CPR and the case law, mean that mediation is an appropriate and proportionate step at the current time.

6.6. Reference can be made to the court's duty under the Overriding Objective in the Civil Procedure Rules to deal with cases justly and at proportionate cost, the court's obligation to encourage the parties to use ADR and the court's power to impose a stay for ADR.

6.7. Reference can also be made to the following judicial statements:

"The aim is that, in general, no case should come to trial without the parties having undertaken some form of alternative dispute resolution to settle the case."

"… an ever-increasing responsibility thrown upon the parties to civil litigation to engage in ADR wherever that offers a reasonable prospect of producing a just settlement at proportionate cost."

6.8 In cases against the NHSLA, note the statement of the NHSLA's Chief Executive, Helen Vernon, on the launch of the new mediation service in December 2016:

"Mediation is an excellent forum for dispute resolution and provides injured patients and their families with an opportunity for face-to-face explanations and apologies when things go wrong and reducing the need for unnecessary litigation. We have used mediation to good effect throughout our 20 year history, including in high profile cases and group actions. The new contracts come into play from today, Monday 5 December, and we will closely monitor the service to ensure we see the positive benefits we believe can result from greater uptake of this non-adversarial approach to dispute resolution."

7. Module 5b – Case law on penalties for unreasonably refusing to mediate

7.1. Reference can also be made, as appropriate, to the case law relating to costs penalties for failing to mediate**.** In the leading case on this issue, Halsey v Milton Keynes General NHS Trust the Court of Appeal confirmed a court may penalise a party which unreasonably refuses an offer to mediate. It provided a non-exhaustive list of factors which may be grounds for reasonably refusing:

- The nature of the dispute;
- The merits of the case;
- Other settlement methods have been attempted;
- The costs of mediation would be disproportionately high;
- Delay; and
- Whether the mediation had a reasonable prospect of success.

There have been a series of recent cases which have made it clear that it can be difficult to persuade the courts that any of these reasons do in practice justify a refusal to mediate.

7.2. In PGF II SA v OMFS Company Limited the Court of Appeal upheld a High Court decision not follow the usual Part 36 costs rules and disallow a party £250,000 costs on the basis that it ignored offers to mediate. This failure to respond was considered to be in itself an unreasonable refusal to mediate justifying a costs penalty.

7.3. In the (so far unreported) case of Phillip Garritt-Critchley & Others v Andrew Ronnan and Solarpower PV Limited the High Court awarded indemnity costs

after a trial against a party that repeatedly refused offers to mediate and dismissed the various "Halsey" reasons the party had put forward for refusing.

7.4. In Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C4I) Ltd (No 2) the court held that although the defendant reasonably believed that it had a strong case its refusal to mediate was unreasonable. Ramsey J said:

> *"As stated in Halsey, the fact that a party reasonably believes that it has a watertight case may well be sufficient justification for a refusal to mediate.*
>
> *The authors of the Jackson ADR Handbook properly, in my view, draw attention at paragraph 11.13 to the fact that this seems to ignore the positive effect that mediation can have in resolving disputes even if the claims have no merit. As they state, a mediator can bring a new independent perspective to the parties if using evaluative techniques and not every mediation ends in payment to a claimant."*

Penalties have been imposed in two recent cases where the NHSLA has failed to respond to offers of mediation. (See Reid v Buckinghamshire Healthcare NHS Trust [2015] EWHC B21 (Costs) and Bristow v The Princess Alexander Hospital NHS Trust & Ors [2015] EWHC B22 (Costs))

7.5. The next step, where a party unreasonably refuses to mediate, is to make an application to the court. The CPR gives the court the power to order a stay at any time to encourage parties to attempt settlement. Further, the latest standard directions include direction Paragraph A03-ADR which reads:

> *"At all stages the parties must consider settling this litigation by any means of Alternative Dispute Resolution (including Mediation); any party not engaging in any such means proposed by another must serve a witness statement giving reasons within 21 days of that proposal; such witness statement must not be shown to the trial judge until questions of costs arise."*

So, you could apply for a stay or for this standard direction to get the opponent's refusal on the record for future reference.

7.6. If an application is made to the court, it will usually be prepared to consider any ancillary directions required to facilitate the mediation, such as a direction for limited disclosure.

8. **Module 6 - Selecting the Mediator**

8.1. The mediator has to be jointly selected in the same way the parties would select a single joint expert. One party typically suggests two or three suitable mediators for the other side to consider. The other side can agree one of those or propose one or more of their own suggestions In personal injury and clinical negligence cases against the NHS the NHSLA has approved panels of

mediators from CEDR and Trust Mediation and in costs disputes from Costs ADR so it is likely that it will accept a Claimant's nominee from those panels.

8.2. Selecting a mediator is like selecting counsel and similar questions arise:

- How experienced is the mediator, in terms of years qualified and number of mediations carried out?

- What specialist expertise does the mediator have in relation to the subject matter of the dispute?

- Is the mediator prepared to provide references?

- Is the mediator prepared to have a brief, private chat with you (and, separately, with the other party's solicitor) over the phone about the approach they would take?

8.3. Trust Mediation has panels of specialist clinical negligence and personal injury mediators with claimant and defendant practice experience for the parties to chose from. Alternatively Trust Mediation's Registrar would be prepared to nominate one with appropriate availability and experience.

9. **Module 7a - The Agreement to Mediate**

9.1. The basis of the mediation is contractual and many of the safeguards needed before a mediation can proceed are set out in the Agreement to Mediate. It is therefore essential to ensure that an Agreement to Mediate is signed by all concerned before a mediation commences.

9.2. A draft Agreement to Mediate is usually provided by the mediator or the mediation provider but should be reviewed, amended where necessary and approved by you.

9.3. It will usually include provisions relating to the following:

9.3.1. The name of the mediator and the details of the date, time and venue.

9.3.2. Confidentiality: whatever happens at the mediation the parties and everyone present agree to keep confidential.

9.3.3. Without Prejudice: nothing that is said at the mediation can be referred to in court if the mediation does not result in settlement.

9.3.4. Voluntary: Parties attend a mediation on a voluntary basis and can leave at any time for any reason.

9.3.5. Confirmation of the role of the mediator: the mediator is not a judge.

9.3.6. Binding Agreement. It is usually provided that here is no binding agreement until it is written and signed by all the parties. Only when the parties have reduced the agreement to writing and signed it is there a binding agreement.

9.3.7. Agreement relating to mediation costs: see Module 7b.

9.4. The Agreement to Mediate must be signed by the mediator and all the parties or by their legal representatives on their behalf. To ensure the confidentiality of the process the Agreement to Mediate must also be signed by any person attending the mediation who is neither a party nor a legal representative of one of the parties, for example the claimant's partner.

10. Module 7b - The Agreement to Mediate – costs

10.1 The Agreement will set out the Mediator's fee and who will pay it. Note:

10.2 In commercial mediations the starting point is often that each party will pay its own costs, but in personal injury claims it is more common for costs to be in the case and in clinical negligence cases against the NHS the Defendant Trust may agree to pay the mediator's fees. The Agreement to Mediate should specify this.

10.3 In National Westminster Bank Plc v Feeney a successful party failed to recover both the mediator's costs and its costs for preparing for and attending at the mediation because:

10.3.1. the mediation agreement entered in to by the parties on the mediation provider's standard terms was on the basis that the mediator's fee would be borne equally by the parties who would bear their own costs;

10.3.2. the Tomlin Order agreed when settlement was reached did not deal explicitly with the costs of the mediation; and

10.3.3. it was held that the Tomlin Order did not alter the mediation agreement.

10.4 In clinical negligence and personal injury claims where the defendant is going to pay some damages, and therefore some costs, it is often agreed that the defendant will pay all of the mediator's fee and both parties' costs. This stance on costs can, in appropriate cases, help persuade the claimant to mediate.

10.5 Subject to the terms of the Agreement to Mediate, the costs of mediation are recoverable, as costs, in the usual way and this is the case whether the mediation takes place before or after the commencement of proceedings provided that the mediation is carried out as part of, and not prior to, the pre-action protocol work.

11. Module 8 - The Mediation Bundle

11.1 It is good practice to provide the mediator with an agreed bundle. This is often prepared by the claimant and should be with the mediator seven clear working days before the mediation to enable the mediator to deal with any issues arising.

11.2 In those unusual cases where it is not possible to agree a bundle the claimant should send a bundle and an index to the mediator (copying the index to the defendant). The defendant can then, if it wishes, send the mediator a bundle of additional documents, with an index (and copy the index to the claimant).

11.3 The purpose of the bundle is to provide the mediator with the gist of the case, the key issues and facts together with the negotiating history. It is not the role of the mediator to read and assess every document and piece of evidence. There is no need to send a trial bundle. Bear in mind the mediator will not be making a ruling on the dispute.

11.4 The bundle need not be paginated (although that helps) but should ordinarily contain:

- a list of all the people attending the mediation;
- any pleadings, if issued, but only the latest version of any amended document;
- the latest schedules and counter schedules, if relevant;
- any relevant witness statements;
- expert reports;
- copies of the key parts of documents such as medical records or other documents
  of relevance;
- any plans, photographs or media of relevance;
- any surveillance evidence;
- details of any offers;
- details of costs to date and to trial if the matter does not settle (these can be non-binding estimates or schedules or agreed costs budgets); and
- anything else that you would like the mediator to have read in advance.

12. **Module 9 - The Negotiation Strategy**

12.1 A mediation is a negotiation. It is helpful to prepare a strategy for the negotiation. Doing so will help you stay in control of the negotiation and not

simply react to offers made by the other side. This will involve a risk assessment of your case (and preferably your opponent's case) and identifying from that assessment, as a minimum:

- Where you will start the negotiation;

- Your walk away point; and

- How you will move between those two positions during the negotiation.

12.2 Here are some prompts on planning the strategy:

12.2.1. Know your case: breach of duty, causation, legal issues, quantum, present procedural position, next procedural steps.

12.2.2. What does your client really want to achieve, by when, and are there any factors out with the case that might impinge on the client's instructions to settle?

12.2.3. What is the total of costs, disbursements up to and including the mediation; what is the estimate of costs from that date to and including trial and what is the estimate of the costs of any appeal? How is the claimant funding costs? What will the claimant be funding out of any compensation payment?

12.2.4. What is your assessment of the risks, taking the above and any other relevant factors into account? What is your advice on a settlement figure or range of settlement figures? What is your BATNA (best alternative to a negotiated agreement)?

12.3 Having decided on your settlement figure (which decision will be subject to anything you learn at the mediation)

How do you plan to run the negotiation to achieve it?

Where do you intend to start, where do you intend to finish and how do you plan to get there?

Are there concessions that you can make?

If so when is the best time to make them?

How can you persuade the other party to get to where you want them to be?

12.4 Plan to listen. Listening is a key element of negotiation. Additionally, how do you hope to persuade a party to your point of view if you are not going to demonstrate that you are prepared to listen to them.

12.5 When you have prepared your case spend some time in your opponent's shoes. If you were him or her, what would you make of your case and your

strategy? How would you respond? How would you see the strengths and weaknesses of both cases? This might well be the most important part of your preparation.

12.6 If you are familiar with decision trees you may wish to prepare one for yourself and for your opponent's case.

12.7 Ensure that you, or someone attending the mediation with you, have authority to settle at the lowest/highest potential figure that you might agree to on the day. Also prepare for the unexpected: you may learn new information that changes your view about the value of the case, in which case ensure that you have robust arrangements (that includes after 5pm) to obtain a decision from any decision-maker who you would need to consult about a change of plan.

12.8 Having formed your strategy, you can:

- decide who should attend the mediation to implement that strategy and what role they should carry out at the mediation

- use your strategy as a foundation for your Position Statement and Opening Statement (see Modules 10 and 11).

12.9 Your strategy may need to change on the day due to new information received so it will be adaptable. Failing to prepare a strategy will, at best, add considerable time to the mediation and at worst is likely to result in no settlement and little progress in resolving the claim.

13. **Module 10 - Position Statements**

13.1 Most mediators will ask both parties to prepare a written position statement in advance of the mediation. Your negotiation strategy is the foundation of your position statement.

13.2 You can send an "open" Position Statement, which will be sent to the mediator and the other party or a confidential Position Statement, for the mediator's eyes only, or both.

13.3 An open Position Statement will usually include some or all of the following:

- The background of the dispute. It is useful to cross reference the pleadings but it is not necessary to repeat them.

- The main issues still in dispute and your view on those issues and your thoughts on the other side's views.

- The history of any offers and counter offers.

- Your suggestions as to how the dispute might be resolved.

13.4 This Position Statement is not only for the benefit of the mediator. It provides you with a means of communicating with the other party and is the first step of

your task in persuading the other party to your point of view. It should be crafted accordingly and disclosed in sufficient time for it to have an impact. The worst time to serve a Position Statement is on the morning of the mediation.

13.5 You normally exchange Position Statements with the other side.

13.6 The purpose of a confidential Position Statement is to provide the mediator with further useful information about the dispute, or the people involved, which you do not wish to share with your opponent at this stage. Tell the mediator of your views about the barriers to settlement; what you think the mediator will need to concentrate on and why.

13.7 Consider, as an extension to, or as an alternative to, a confidential Position Statement asking the mediator for a confidential telephone discussion prior to the mediation. The mediator will be obliged to tell the other party that a discussion has taken place, but not the content of it.

14. **Module 11 - Opening Statement**

14.1 Mediations often start with a joint meeting of all parties. The mediator will usually invite each side to address the other side - the “opening statement”. As with the Position Paper, the foundation for your opening statement is your negotiation strategy. The opening statement is often delivered by a legal representative but in clinical negligence and personal injury claims it is not uncommon for claimants themselves to speak. Often they will take this opportunity to explain what impact the injuries have had on their lives.

14.2 The opening statement is an opportunity to start the negotiation in the right way. However, defendants should always appreciate that the claimant may well be nervous and will not initially trust them as they are “the other side”, the person who is preventing settlement of their claim. The following are likely to help defendants set the right tone:

- Speak directly to your opponent, not the mediator;
- Explain in simple language what your role is;
- Show empathy for their injuries without being patronising or insincere;
- Show that you have listened to any comments they have made in their opening statement;

Explain that your objective is to try and find a resolution of the dispute.

14.3 Both sides should avoid the following:

- Treating the session like a trial opening;
- Using legalistic words or phrases;

- Ridiculing or diminishing the other side's case;

- Using emotive words like "exaggerated", "dishonest", "malingering";

- Abusing or rubbishing the other side's legal advisers.

14.4. Be prepared to discuss the case in the joint session after the opening statements.

- Is there anything you do not understand about your opponent's case?

- Is there anything you think your opponent has not understood about your case?

- Use this opportunity to ask or offer clarification. Remember that either party is free to leave this meeting at any time and nobody is obliged to answer questions if they do not want to.

III What happens at a Mediation - The Mediation Process

15. Module 12a - The usual steps in a personal injury mediation – part 1 of 2

15.1 Mediation is a flexible process and no two mediations will ever be the same. What follows is the typical flow of a clinical negligence or personal injury mediation.

15.2 **Pre-Mediation telephone discussion**

It can often be very useful for the mediator, as well as reading the papers, to have a pre-mediation confidential discussion with one representative for each party prior to the mediation. In cases of high emotion it can also be useful for the mediator to have a pre-meeting with the claimant and or the claimant's family.

15.3 In some cases it may be appropriate to have a joint telephone conference between the mediator and a representative on each side to discuss matters such as outstanding disclosure, up to date schedule exchange and disabled access to the building when required.

15.4. **Meet and Greet**

On the day the mediator meets the parties privately at the agreed venue. Each party has its own private room. The mediator sets the scene for the day, it being a departure from the adversarial process and confirms that the joint objective aim is to work to negotiate a settlement of the claim.

15.5. If the agreement to mediate has not yet been signed by the parties the mediator will ask them to sign it now.

15.6 **Opening Joint Meeting**

After meeting each party privately the mediation often starts with a joint meeting of all the parties. Joint opening meetings are not compulsory. One party or the other may not wish to have one. The claimant may not wish to take part in one. It is best to discuss this with the mediator and the other side in advance of the mediation if possible to avoid allegations of bad faith or failure to co-operate being made on the day. If the claimant does not wish to participate it may still be productive for the legal representatives to meet. If the opening session is to take place the mediator may discuss with the claimant's team whether the claimant might speak as this may in some cases provide powerful support for his or her claims and/or be a cathartic experience.

15.7 The mediator may begin by explaining the golden rules of mediation which are:

- It is confidential – whatever happens at the mediation the parties agree to keep confidential. Any discussions the parties have with the mediator in their private room are confidential – the mediator will not pass anything on to the other side without permission.

- It is without prejudice – nothing that is said at the mediation can be referred to in court if the mediation does not result in settlement.

- It is voluntary – any party can leave at any time for any reason.

- The mediator is not a judge – his/her role is to help the parties negotiate a settlement of the claim. However, there may be times in the private meetings when the mediator asks challenging questions about your case – this is simply part of the process.

- There is no binding agreement until it is written and signed by all the parties – only when the parties have reduced the agreement to writing and signed it is there a binding agreement.

15.8 The mediator then invites each side to make an optional opening statement. This is the parties' opportunity to explain their view of the case to their opponent. The party, their legal adviser or insurer representative may speak – or all may speak. Parties will tell their opponent some or all of the following:

- what they want to achieve at the mediation;

- how they feel about their injuries and how it has affected them;

- why they think the other party should pay/not pay what is being claimed;

- why it is in their interests to resolve the dispute now.

15.9 Each side has the opportunity to respond. Parties can ask questions if there is anything they do not understand about their opponent's case although neither side is obliged to answer any questions. The mediator may also ask some questions to identify or clarify exactly what the issues are.

15.10 The mediator might suggest to the parties that it is not helpful to discuss figures at this early meeting.

16. Module 12b - The usual steps in a clinical negligence or personal injury mediation – part 2 of 2.

16.1 Private Meetings

The mediator visits one party at a time in their private rooms for confidential meetings. This helps the mediator find out what the parties really want and explore possible solutions. The mediator is usually instructed to pass information or offers between the parties. The mediator may invite the legal representatives to pass on offers to the other side so that they can answer any questions about the offer, benefit from seeing first hand the reaction to the offer and ensure the correct offer is made. The mediator will help to ensure the negotiations keep flowing and intervene when problems arise. This will continue until a settlement is reached or it is clear no settlement will be reached on the day.

16.2. Further Joint Meetings

It is very common for the mediator to ask the parties to meet together again during the course of the mediation. Sometimes the mediator gets everyone together, sometimes it's just the representatives and sometimes just the decision maker from each side. The mediator will only do this if he/she thinks it is going to help move the parties towards a settlement.

16.3. Signing the Agreement

If an agreement is reached it is put into writing and signed by both parties so as to form a binding agreement. It is the parties' responsibility to prepare the agreement. To save time drafting from scratch you should bring a draft agreement to the mediation ready to be completed once terms are agreed. If proceedings have been commenced this may be in the form of a draft Tomlin Order.

17. Module 13 - Frequently Asked Questions

17.1 Does clinical negligence and personal injury mediation work?

Trust Mediation has a settlement rate which has, for the last 6 years, consistently been around 90% and that involves cases which by definition have been difficult to resolve.

17.2 Who should attend the mediation?

17.2.1. The claimant (the ultimate decision maker) should attend together with legal advisers. The claimant may also bring somebody along for support, typically a spouse or friend.

17.2.2. The defendant legal advisers and decision maker should be present. If the decision maker is not present the person with delegated authority should make robust arrangements to ensure that it is possible, after as well as during business hours, to contact the relevant person who can authorise extension of that authority if deemed necessary on the day.

17.2.3. Although counsel often attend mediations it is not always necessary. Remember that mediation is a negotiation so if you do intend bringing counsel you should bring counsel who has expertise in negotiation.

17.3. **What is telephone mediation?**

Telephone mediation is a mediation where the parties are not present in the same building. Communications – both private and joint meetings – are conducted by telephone. They tend to be shorter than face to face mediations and are especially suited to fast track or lower value disputes where the fees for a face to face mediation may be disproportionate. Costs only disputes can also be mediated by telephone.. Telephone mediations can now be conducted via internet video link.

17.4 **How long does a mediation last?**

This is agreed between you, your opponents and the mediator. A fast track injury claim is likely to be a two hour telephone mediation. Multi-track claims may be 4 hours. Claims with complex outstanding issues, catastrophic injuries or involving multiple defendants may last a full day.

17.5 **What happens if the claim does not settle?**

The parties continue the litigation. Nothing that happened at the mediation can be referred to any trial judge (see the terms agreed in the Agreement to Mediate). The mediator may ask parties at the end of the session to confirm if any of their offers remain open and if so for what period. The mediator may also keep in touch as many claims settle within a week or two of a mediation.

17.6 **Does there have to be an opening joint session?**

No, like everything in a mediation it is flexible. A claimant may not wish to attend a joint session. The mediator will discuss this with you and generate options for how to proceed which may include meeting the claimant's legal team or having a joint session later in the process.

17.7 **Should we mediate if we have no intention of increasing our existing offer or where we deny liability?**

17.7.1 There can be sound reasons for doing this. For example, you may wish to take the opportunity to explain your position fully to the other

side with the aim of persuading them to settle for the sum you have already offered or for nothing at all where you dispute liability.

17.7.2 If you decide to do this you should make it clear well in advance to the mediator and the other side that this is your intention. If you do not you will face allegations of "mediating in bad faith". You should also be prepared to listen to the other side at the mediation and adjust your position if you learn anything that causes you to do so.

17.8. **Can mediations be used for a single issue such as liability or causation?**

Yes. They could also be used just between multiple defendants to see if agreement can be reached about relative contributions to any settlement.

17.9 **Can legal costs also be resolved at a mediation?**

Costs are usually resolved at the end of the mediation. A well organised claimant will attend with sufficient costs information to allow the defendant to assess and settle their costs. There are clear commercial benefits for claimants settling costs on the day or at least securing an interim payment.