# JEFFREY C ROSENTHAL BSc (Econ) FCCA FCIArb MAE

**CEDR ACCREDITED MEDIATOR**
**CHARTERED CERTIFIED ACCOUNTANT**
**CHARTERED ARBITRATOR**

**BKR HAINES WATTS - CHARTERED ACCOUNTANTS**
**FIFTH FLOOR HUMBERSTONE HOUSE HUMBERSTONE GATE**
**LEICESTER LE1 1WB**

---

**TELEPHONE: 0116 241 4316** **E-Mail:**
jcr@JeffreyRosenthal.com
**FAX: 0116 241 4316** **www.JeffreyRosenthal.com**


**January 2001**

## ADR and Mediation - a Guide

Alternative Dispute Resolution (ADR) embraces all those methods of resolving disputes that are alternative to the formal processes of litigation and arbitration. It includes third party adjudication, particularly in the construction industry, right the way across to straightforward negotiations.

Mediation, the most common form of ADR, involves the participation of a neutral Mediator to assist the parties in the dispute to negotiate a settlement. It is a voluntary process that helps the parties to reach a binding agreement more effectively than by direct negotiation or by litigation and with less costs, less disruption to management time and often with better solutions. Mediation cannot guarantee a settlement although the vast majority of disputes do settle either in the mediation or shortly afterwards.

The Lord Chancellor said that "There is a significant role for Alternative Dispute Resolution in a streamlined civil justice system and for some it is the best way to reach a settlement".

## What is mediation?

Mediation is the name given to a confidential process whereby parties to a dispute invite a neutral individual to facilitate negotiations between them with a view to achieving a resolution of the dispute.

## I can negotiate: why should I mediate?

If your negotiation leads to a conclusion with which you are happy then you do not need to mediate. However, negotiations sometimes end in deadlock. A mediation session can break that deadlock.

## Why should mediation work where negotiation has failed?

There are three parts to the answer:

- Negotiation tends to be confrontational. The parties perceive themselves to be opponents and each wants to "win". A mediator will try to shift the dynamics of the negotiations away from positional bargaining towards principled negotiation where the parties view each other as collaborators in a problem solving exercise.

- In a mediation the parties are not "eyeball to eyeball" across a table - rather they negotiate through a mediator who helps to introduce objectivity.

- The discussions with the mediator are private. The parties can share confidences with him/her and reveal their true interests. The mediator, in this way, achieves a unique overview of the dispute and can help identify ways in which the parties can satisfy their needs. Through questioning techniques and by suggesting options for consideration, the mediator can gradually help the parties to devise an agreement that will resolve the dispute.

## Surely agreeing to mediate is a sign of weakness?

No - agreeing to mediate is neither a sign of weakness nor of strength - it is simply common sense. All that you are doing is saying to the other party "lets talk about this and see if we can resolve the dispute in a way that satisfies our respective needs, thereby avoiding the delay, expense and aggravation associated with traditional methods such as litigation and arbitration".

In mediation you have nothing to lose. The mediation process is conducted on a "without prejudice" basis. If anyone is unhappy with the way it is going they can walk out. Nothing has to be revealed to the other side unless you want it to be. If mediation fails then you can turn/ return to litigation or arbitration. The preparations that you and or your professional advisers have done for the mediation will still be useful, although what happens during the mediation cannot be used in any subsequent court proceedings should the mediation not result in a settlement.

## I have heard that mediation is non-binding so what is the point of it?

This is a common misconception. Mediation is non-binding in the sense that entering into the process is voluntary, it involves no commitment to settle and the mediator has no power to impose a solution.
However, when a mediated agreement is reached, it is normal for the mediator to set down the terms of the agreement in writing. The parties then sign the written agreement with the intention that it becomes a legally binding contract.

## Do I need a professional adviser?

No - you can represent yourself, although the experience of the organisations providing mediation services is that most parties do employ a professional adviser, for example an expert and or a solicitor or barrister.

## What cases are suitable for mediation?

Any dispute is suitable for mediation provided the parties to it are willing to try. Some cases are more suitable than others. Experience shows that multi-party disputes are particularly suitable for mediation, perhaps because they are often complex and the cost of sorting them out through more traditional techniques can be fairly high. The process is also especially well suited to a dispute between parties that have a long-term relationship to protect. Some international and cross-border disputes have been found to be appropriate cases for mediation.

## Does mediation work and if so why?

Yes - it is estimated that the mediation success rate exceeds 90 %. It works because, unlike traditional methods, mediation provides an opportunity for the parties to work together constructively towards a settlement. It also offers the chance to bring into discussion elements quite outside the original dispute that can frequently lead to a resolution where both parties gain from the agreement.

The result is that, unlike litigation, business relationships are preserved or even strengthened. A further attractive feature of the procedure is that mediation can be conducted on a confidential basis, away from the glare of publicity.

## When To Mediate?

Mediation can be used at any time although the earlier it is used the more cost effective it becomes subject to everyone having sufficient information about the arrangements. Standard directions in many Courts now have a mediation clause if the parties wish to use it and the new Rule of Court 26.4 effective from April 1999 will allow the Court either on its own initiative or at the request of both parties to schedule a break in the case timetable of litigation specifically to try mediation. The inherent jurisdiction of Arbitrators will allow similar opportunities.

## How To Mediate

You will need to provide a short summary of the dispute and details of who is involved. You will be asked to prepare a brief written statement setting out the facts annexing any important documents. You will be asked to sign a Mediation Agreement that everything in the mediation is confidential.

The parties and their representatives sit together with the Mediator. The Mediator tells you more about the process and how he intends to proceed. Each party or their representative will then explain their case, limited usually to a brief introduction. The Mediator then talks privately with each party in separate rooms. The Mediator continues to meet privately with each party or in further joint meetings until a settlement is reached. Mediators will not tell you what to do nor advise you if a settlement is just or fair. The case will only settle when and if the parties are all satisfied. Once the details of the agreement are written down and signed, it becomes a fully enforceable contract.

Jeffrey C Rosenthal