

Guide to Mediation



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Circles



Doing Disputes Differently

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Guide to Mediation and Online Mediation

What is mediation?

- Mediation is a process where parties voluntarily agree to enter into discussions, facilitated by an independent third party (the mediator), to attempt to resolve differences or a dispute.
- It is a confidential process conducted on a “without prejudice” basis meaning that what is discussed in the mediation is confidential and cannot be disclosed to the outside world or in any subsequent proceedings such as court or arbitration proceedings in the event a resolution is not achieved.
- The mediator is independent and uses their expertise to help the parties try to find a resolution, and if necessary, record the terms of any agreement in a resolution agreement.
- The parties have the opportunity to explore creative solutions to resolve the dispute or agree a way forward which could not be granted by a court.
- Mediation often leads to improved communication which allows the parties to restore, preserve or even enhance their relationship.
- Mediation presents an opportunity to end wasted management time, damaged relationships, lost productivity and legal costs.
- The parties decide the outcome. The mediator does not make a decision or impose a solution on the parties. Nor does the mediator provide any legal advice.
- If the parties agree a resolution it is legally binding once recorded in writing in a resolution agreement and signed by the parties, which is done by way of electronic signature in online mediation.

Traditional “in person” mediation

We continue to offer “in person” face to face mediation services to parties who are unable to mediate online, providing government guidelines on physical distancing and safety measures, including the wearing of face masks, are met.

“In person” mediations will usually be conducted on a “mediation day” as they involve the mediator, the parties and other participants travelling to an agreed venue. We can travel to any location in Scotland for an “in person” mediation. We recognise that parties may be more amenable to mediation if it is conducted in a familiar venue, or one where the parties feel most comfortable and relaxed.

Where parties are legally represented, ordinarily the mediation venue and refreshments would be arranged by the parties’ legal representatives. If so requested, and particularly in cases where the parties are not legally represented, we can make the necessary arrangements for an “in person” mediation in consultation with the parties. This includes arranging the venue hire and any refreshments. These costs are then invoiced to the parties directly, to be shared equally unless otherwise agreed.

Squaring Circles is a signatory to the [World Mediators Alliance on Climate Change Green Pledge](#) which means we are committed to minimising the environmental impact of every mediation in which we are involved, including avoiding unnecessary travel and promoting the use of technology and electronic documents wherever possible.

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The intake process: “in person” mediation

1. **Conflict check.** Once we are notified that the clients wish to appoint one of our mediators, we run a conflict check.
2. **Initial email.** Assuming the conflict check is clear, the mediator sends an email to the lawyers, advisers or clients as appropriate, confirming their appointment and listing the preliminary matters to be agreed including documentation and attendees. This email also issues our terms of engagement, which include confidentiality provisions, and standard agreement to mediate.
3. **Initial private meeting** is conducted with each party separately by video conference. The purpose of the this meeting is to discuss and agree the logistics of the mediation including arrangements for the day, who will be in attendance, and the documents that should be made available to the mediator and each of the parties in advance.
4. **Agreement to Mediate and Confidentiality Declaration** is to be signed by the parties, their advisers and all other participants, either electronically in advance of the mediation, or “in person” at the beginning of the mediation day.
5. **Resolution agreement.** If an agreement is reached and the parties are legally represented the resolution agreement will be drafted and agreed between the lawyers. If the parties are not legally represented, the mediator will assist the parties to record the terms of the agreement in a resolution agreement. This will then be signed at the end of the mediation.

What is online mediation?

- Online mediation is where the mediation is conducted remotely using technology.
- [MODRON Spaces](#) (“**SPACES**”), which is a market leading purpose-built online mediation platform, is our default platform for the secure sharing of files and video conferencing. It is widely considered to be one of the most effective and user-friendly mediation platforms in the world.
- We also conduct mediations through [Zoom Pro](#) at the request of all parties. However, if all parties do not agree to use Zoom, we recommend the mediation is conducted through SPACES, unless the parties agree to use a different platform. Zoom is a video conferencing platform only. So even if parties choose to mediate on Zoom, SPACES is recommended for the secure sharing of documents and case management.
- SPACES and Zoom Pro allow everyone to meet together in a virtual main room and have confidential private discussions in virtual breakout rooms. The mediator can easily move the parties between rooms and bring people together as needed, as well as share a whiteboard or documents as we normally would in “in person” mediation. Typically, breakout rooms will be created for all participants for Party A and all participants for Party B. Breakout rooms are often created for the parties’ lawyers to meet together or for the parties’ experts.
- The technology is mostly managed by the mediator as the “host” making it very easy for parties and their advisers to use. However, it is our standard practice to offer a practice session before the mediation to make sure everyone is comfortable with the technology, can move between the virtual rooms and can share documents.

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MODRON Spaces

The key features and functions of SPACES are listed below.

- It is simple, intuitive and easy to use. It securely facilitates private communications and the sharing of highly confidential information which are vital to, and at the core of, all mediations.
- It offers secure end-to-end encryption, secure and encrypted uploading and file sharing, and integrated digital billing including invoices, payments and receipts.
- Parties to the dispute, their legal or professional representatives, and other participants such as experts are all onboarded to SPACES with secure account access. This requires each participant to create a username and password. Once everyone is onboarded, all communication can be conducted through SPACES.
- Any participant can also choose to have two-factor authentication added to the login process for extra security. This means that each time they sign in they will be asked to provide a unique passcode which is sent to them by email.
- Participants are able to join and leave the main virtual room and private breakout rooms as necessary, in the same way as they can walk into and out of physical rooms in “in person” mediation.
- Parties and other participants will require to consent to the use of SPACES, including agreement to its [Terms of Use](#) and [Privacy Policy](#).
- At the end of the mediation the secure “space” is deleted so that there is no digital footprint of case information, documents or messages.

The intake process: online mediation

1. **Conflict check.** Once we are notified that the clients wish to appoint one of our mediators, we run a conflict check.
2. **Initial email:** Assuming our conflict check is clear, the mediator sends an email to the lawyers, advisers or clients as appropriate confirming their appointment and listing the preliminary matters to be agreed including the preferred online platform, documentation and attendees. This email also issues our terms of engagement, which include confidentiality provisions, and standard agreement to mediate.
3. **Initial private meeting** is conducted by video conference. The purpose of this meeting is to discuss and agree the logistics of the mediation including the technology/online platform, who will be in attendance, and the documents that should be made available to the mediator and each of the parties in advance.
4. **Agreement to Mediate and Confidentiality Declaration** is to be signed by the parties, their advisers and all other participants in advance of the mediation. We use Adobe Sign which automatically circulates the signed agreement to all signatories.
5. **Private mediation and practice session.** After the logistics are agreed and the mediator has received the agreed documents the mediator meets privately with each party and their advisors to discuss the dispute and run through the technology to be used during the mediation. This meeting is also an opportunity for the parties and their advisers to ask questions about the process.

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6. **Practice session** of the technology for other participants can be arranged separately.
7. **Joining instructions.** We send an invitation to all participants to access SPACES or circulate the unique access link for Zoom.
8. **Resolution agreement.** If an agreement is reached and the parties are legally represented the resolution agreement will be drafted, agreed between the lawyers and signed electronically at the end of the mediation. If the parties are not legally represented, the mediator will assist the parties to record the terms of the agreement in a resolution agreement and issue the agreement for electronic signature using Adobe Sign.

Online mediation timeframe

9. “In person” mediation needs to be conducted on a “mediation day” because it is impractical, inconvenient and cost-prohibitive to conduct it any other way. In our experience, parties and other participants greatly benefit from the flexibility offered by online mediation.
10. Whilst flexibility is important, so is progression of the mediation within a workable timeframe. Where parties have legal representation, we usually recommend the mediation concludes within a maximum of 5 working days, preferably in the same working week, unless there is a specific reason for the mediation to have a more flexible timetable. Where parties are not legal represented it is common for mediations to run across several days and sometimes weeks.
11. The table below sets out three variations of a framework which we have found to be effective based on our own experience. The framework is not prescriptive but rather suggests different ways of conducting the mediation within a reasonable timeframe.
12. We agree the mediation timeframe in consultation with the parties.

	A One day mediation	B One day mediation across two days	C One example of a more flexible approach
Day 1	Full mediation in one day	Opening joint session and follow up exploration sessions with each party	Private sessions with both parties
Day 2		Further exploration Problem solving/option generation Negotiation and conclusion	Opening joint session and exploration sessions
Day 3			Problem solving/option generation Negotiation and conclusion

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Benefits of online mediation

Early engagement. Online mediation is conducted entirely online. The mediation can start almost immediately as there is no need to bring everyone together in the same venue at the same time. This means that there are no barriers to parties engaging in mediation at the outset of a dispute or at a far earlier stage than might otherwise have been possible.

Convenient. Online mediation is conducted entirely online from the comfort of the participants' home or home office and the technology is accessible from anywhere at any time.

Efficient. Online mediation is very efficient. By using SPACES all communications and documents are easily accessed on one platform. In addition, a huge amount of time is saved as the participants do not need to travel.

Flexible. The mediation process can be adapted to the needs of the participants. Whilst we can follow the traditional face-to-face approach of having a "mediation day", we encourage parties to embrace the increased flexibility offered by online mediation. For example, the mediation can be split across consecutive days; parties and participants can record opening statements in advance of the mediation; and the mediator can conduct the initial background meetings which traditionally take place before the first joint session in advance of a mediation day or a mediation session.

Cost-effective. Online mediation is a fraction of the cost of going to court and is more cost-effective than traditional face to face mediation. Costs are significantly reduced as the participants and the mediator do not incur costs for travel or accommodation. Because the mediation takes place virtually there are also no hosting or venue costs.

Preparing for online mediation

We recommend that the parties consider the matters listed below for discussion at the initial meeting.

- Whether the parties or any other participants would like a practice session with the mediator.
- The attendees to the mediation, which should be restricted to those who need to participate.
- The background to the dispute and the documents the parties will need to produce. The parties will usually be asked to prepare a summary of the dispute from their perspective, to be produced together with any key documents.
- From where the attendees intend to participate in the mediation. We recommend that participants are in a comfortable and quiet room, away from any distractions or from where other people might overhear what is being said, and that they will not be interrupted during live sessions.

What to expect from online mediation

- Feedback from mediators, lawyers and participants to online mediation has been overwhelmingly positive. Many participants to online mediation often report feeling more at ease when mediating by video conference from the comfort of their own home or office. This is an important factor which is thought to significantly increase the likelihood of the parties agreeing a settlement.

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- It is important for the mediator to be able to see the participants' faces on the video conference. This is best enabled by any light being in front of you.
- It is important to remember there is a one to three second lag in transmission on video conference. The mediator will therefore encourage participants to wait for their turn to speak.
- We recommend that participants have a pen and paper to take notes of the points they wish to address when it is their turn to speak.
- Online video mediations can feel more tiring than face to face mediation. We therefore recommend a maximum of 5 – 6 hours of mediation sessions in any one day. Comfort breaks will be encouraged at appropriate times and will be scheduled, for example, every one to two hours. Participants can also request to take a break at any time.
- Broadband interruptions or connection issues can and do happen. When they do, the mediation will be paused and restarted once all participants are reconnected.

Required equipment

All participants will require the equipment listed below for online mediation.

- A laptop/tablet with a microphone and a camera.
- A secure and stable internet connection.
- Device chargers.
- If possible, headphones or a headset with a microphone.

Telephone mediation

We believe it is important for parties to be able to access mediation services regardless of their ability to access or use technology. Whilst it is not the norm, we have conducted a number of telephone mediations during the COVID-19 pandemic where parties have not had access to a computer, laptop or smart phone or have been uncomfortable using a video conferencing platform.

We always encourage parties to agree to mediate using a video conferencing platform and discuss their concerns and ways that we can assist them to allow that to happen.

Where a telephone mediation is requested by one party, the mediation must be conducted by telephone for both (all) parties. Otherwise, one party could be perceived to be at a disadvantage.

Unrepresented parties

We have conducted numerous mediations where the parties have no legal or professional representation. It is not a requirement for parties to be legally or professional represented to instruct our mediators. Parties are free to decide whether to instruct a solicitor or other professional to represent or support them at the mediation.

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Confidentiality

Our terms of engagement and the agreement to mediate set out the duty of confidentiality which applies to the mediator, the parties and all participants to the mediation. To ensure confidentiality in “in person” mediations the participants are required to undertake that they will not directly or indirectly record the mediation via any digital or non-digital means.

We take the following steps to ensure that the principal of confidentiality is respected in online mediation.

- The Agreement to Mediate contains an undertaking that only those named in the Agreement to Mediate will, for the duration of the mediation, be present in the room from where they are participating in the mediation.
- All participants will be asked to confirm at the start of the mediation that only those named in the Agreement to Mediate are, for the duration of the mediation, present in the room from where they are participating.
- The Agreement to Mediate contains an undertaking that all participants will not directly or indirectly record the mediation via any digital or non-digital means.
- Participants will be asked to confirm at the start of the mediation that they are not directly or indirectly recording the mediation via any digital or non-digital means.
- The Agreement to Mediate contains an undertaking that all participants will agree to conduct a 360 degree sweep of the room in which they are participating in the mediation with their webcam or other video conferencing device at the request of the mediator.

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