

Persuading your opponent to Mediate

A guide for civil litigators



By Philip Hesketh

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Introduction

Lawyers looking to resolve claims expeditiously are often frustrated by opponents who will not engage in meaningful settlement negotiations. This document is designed to help you persuade an opponent to engage in mediation. Mediation is not compulsory but it is compulsory for solicitors to advise their clients about methods of alternative dispute resolution and to consider ADR throughout the duration of any contentious matter. The court also has an obligation to effectively case manage litigation and this explicitly involves encouraging ADR in appropriate cases.

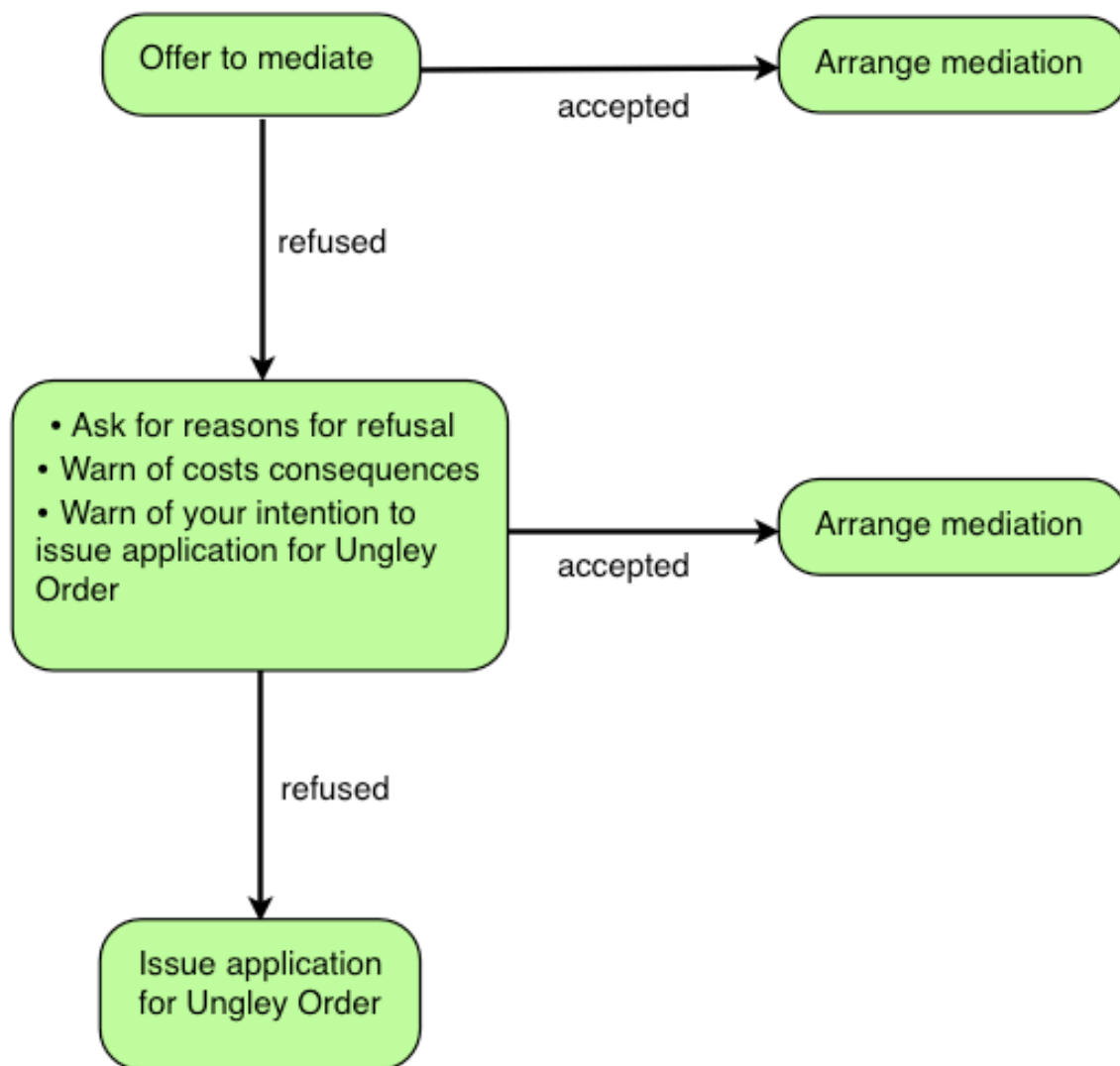
In issued cases it is recommended that you ultimately apply for a variation of the so-called Ungley Order. Essentially this is an order staying proceedings whilst the parties consider mediation. If one party does not consider mediation is suitable then it must file a witness statement explaining why. Further details are available in the Appendices.

There is a flow chart with descriptions of the actions to take in issued and unissued cases. This is followed in Appendix 1 with details of the rules obliging the consideration and use of mediation. The information in Appendices 2 - 4 can be used to support offers to mediate and requests to the court for directions for stays to allow the parties to explore mediation.

Appendix 2 covers precedents on the costs consequences of failing to mediate. Appendix 3 highlights some extra-judicial speeches which can be cited in support of an Ungley Order application. Appendix 4 gives information on Ungley Orders and Appendix 5 has some brief draft letter extracts that you may find useful.

Philip Hesketh, Silverdale, October 2010

Chapter 1 : Procedure in issued cases.



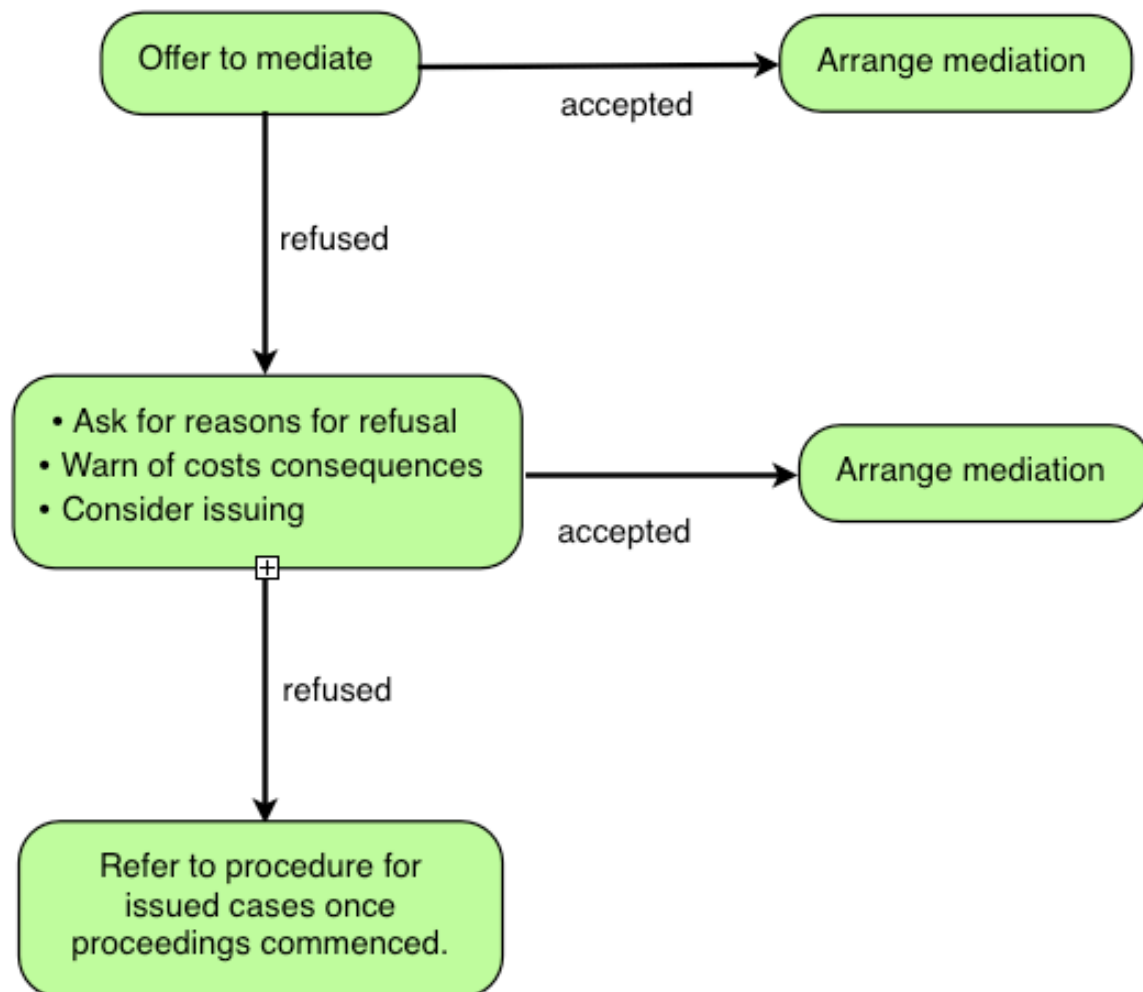
See the Appendix 5 for an example of a letter you could use to offer mediation.

If the initial offer is refused ask for your opponent's reasons for refusal (see the case of Halsey in Appendix 1 regarding

unreasonable refusal to mediate). Warn of the costs consequences and your intention to issue an application for an Ungley Order or seek directions in the terms of an Ungley Order if there is a pending case management conference.

Finally you should be prepared to issue the application if your opponent still refuses to mediate without giving reasonable cause to do so. See Appendix 4 for suggested wording of the order.

Chapter 2 : Procedure in unissued cases.



The procedure is very similar to the issued cases procedure - the major difference being there is no resort to asking the court to use its case management powers in the form of an Ungley Order until proceedings are commenced.

Obviously if proceedings are commenced then you can use the issued cases procedure. A refusal to mediate or attempt to settle the dispute may well result you in issuing proceedings.

Appendix 1 - Procedural requirements to consider mediation in civil litigation.

The Solicitors' Conduct Rules 2007

[Guidance note 15](#) to Rule 2 states :

*When considering the options available to the client (2.02(1)(b)), if the matter relates to a dispute between your client and a third party, you should discuss whether mediation or some other alternative dispute resolution (ADR) procedure may be more appropriate than litigation, arbitration or other formal processes. There may be costs sanctions if a party refuses ADR - see *Halsey v Milton Keynes NHS Trust and Steel and Joy* [2004] EWCA (Civ) 576. More information may be obtained from the Law Society's Practice Advice Service.*

Pre Action Protocols

All of the pre-action protocols have a paragraph similar to this example taken from the personal injury protocol :

“Alternative Dispute Resolution

2.16 The parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, endeavour to agree which form to adopt. Both the Claimant and Defendant may be required by the Court to provide evidence that alternative means of resolving their dispute were considered. The Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if the protocol is not followed (including this paragraph) then the Court must have regard to such conduct when determining costs.

2.17 It is not practicable in this protocol to address in detail how the parties might decide which method to adopt to resolve their particular dispute. However, summarised below are some of the options for

resolving disputes without litigation:

- *Discussion and negotiation.*
- *Early neutral evaluation by an independent third party (for example, a lawyer experienced in the field of personal injury or an individual experienced in the subject matter of the claim).*
- *Mediation – a form of facilitated negotiation assisted by an independent neutral party.*

The Civil Procedure Rules

CPR 1.4 The Court's duty to manage cases

(1) The court must further the overriding objective by actively managing cases.

(2) Active case management includes –

(e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;

CPR 26.4 Stay to allow for settlement of the case

(1) A party may, when filing the completed allocation questionnaire, make a written request for the proceedings to be stayed while the parties try to settle the case by alternative dispute resolution or other means.

(2) Where –

(a) all parties request a stay under paragraph (1); or

(b) the court, of its own initiative, considers that such a stay would be appropriate, the court will direct that the proceedings, either in whole or in part, be stayed for one month, or for such specified period as it considers appropriate.

CPR 44.5 Factors to be taken into account in deciding the amount of costs

(3) The court must also have regard to –

(a) the conduct of all the parties, including in particular –

(i) conduct before, as well as during, the proceedings; and

(ii) the efforts made, if any, before and during the proceedings in

order to try to resolve the dispute;

Queen's Bench Division Guidance Notes

6.6 Alternative Dispute Resolution ("ADR"):

6.6.1 Parties are encouraged to use ADR (such as, but not confined to, mediation and conciliation) to try to resolve their disputes or particular issues. Legal representatives should consider with their clients and the other parties the possibility of attempting to resolve the dispute or particular issues by ADR and they should ensure that their clients are fully informed as to the most cost effective means of resolving their dispute.

Appendix 2 - Costs consequences of failing to mediate.

The courts have applied the rules at CPR 44.5 above to penalise parties who have failed to consider mediation in appropriate cases. The Court of Appeal has set out some guidance as to what would be a reasonable refusal to mediate.

[Dunnett v Railtrack PLC \[2002\] 2 ALL ER 850](#)

The defendant won at first instance and on appeal but the Court of Appeal refused to award the defendant costs of the appeal due to its failure to consider using mediation. Brooke LJ said :

“Mr Lord, when asked by the court why his clients were not willing to contemplate alternative dispute resolution, said that this would necessarily involve the payment of money, which his clients were not willing to contemplate, over and above what they had already offered. This appears to be a misunderstanding of the purpose of alternative dispute resolution. Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve. This court has knowledge of cases where intense feelings have arisen, for instance in relation to clinical negligence claims. But when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live. A mediator may be able to provide solutions which are beyond the powers of the court to provide. Occasions are known to the court in claims against the police, which can give rise to as much passion as a claim of this kind where a claimant's precious horses are killed on a railway line, by which an apology from a very senior police officer is all the claimant is really seeking and the money side of the matter falls away.”

Halsey v Milton Keynes NHS Trust [2004] EWCA (Civ) 576

The Court of Appeal confirmed costs penalties may be appropriate where a party has unreasonably refused to mediate. Dyson LJ identified a non-exhaustive list of reasons which may collectively or individually be grounds for reasonably refusing to mediate. The grounds are:

- the nature of the dispute
- the merits of the case
- the extent to which other settlement methods have been attempted
- whether ADR costs would be disproportionately high
- would delay in setting up ADR have been prejudicial
- whether the mediation had reasonable prospects of success

Gill v RSPCA [2010] *unreported*

In this recent high profile case the RSPCA was ordered to pay indemnity costs for its failure to accept repeated offers of mediation from the defendant. The case is under appeal and as yet the costs ruling is unreported. This document will be updated accordingly in due course.

Appendix 3 - Senior Judicial Support for Mediation

A number of senior judges have made speeches over the past few years encouraging members of the legal profession to make more use of mediation. The following are extracts with links to the full text.

Lord Clarke of Ebony-cum-Stone

As the then Master of the Rolls Lord Clarke spelt out this view that the court can order parties to mediate in a [speech he made to the Civil Mediation Council in May 2008](#):

“It seems to me to be but a small step from an order that the parties meet to an order that they meet in the presence of a mediator. Such orders could surely be made either routinely on allocation as anticipated by CPR 26.4 (1) or at the first case management conference. They could easily be factored into and become an integral part of standard directions. To my mind the power exists under a combination of the court’s case management powers under CPR 1.4 (2) (e) which specifies that “encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure” and CPR 3.1 (2) (m), which enables the court to take any step in managing a case to further the overriding objective. It seems to me that furthering the overriding objective in this sense calls for the case management power to be applied consistently with the duty under CPR 1.1 (2) (e) which requires the court to take account of the needs of all litigants and the court in furthering the overriding objective; to further access to justice for all. Equally, it is surely part of the parties’ duty to assist the court in the furtherance of the overriding objective that they should take active steps to take part in mediation (CPR 1.3).”

In another speech on 10th November 2009 titled [Can Mediation work in Personal Injury?](#) he said:

“I put my cards on the table from the outset. In my opinion mediation has an extremely important role to play. Just as with mediation in general, it must be an integral part of our tools for the settlement of PI claims. I have, of course, made this very point before, but it bears repeating. In fact it is something that MRs, and ex-MRs, emphasize time and time again. Lord Woolf made the point in his two Access to Justice reports. He has repeated it consistently since. His most recent reiteration, as far as I’m aware, came at the start of October. At the London Litigation Solicitors’ Association he once more emphasised how the reforms which take his name were intended to ensure that litigation was truly a last resort. He once more emphasised the central importance of mediation. Lord Phillips has done the same. And even Lord Neuberger, in the short time he has been MR, pitched in with his support when he gave his perspective on the management of claims in the current climate.”

Lord Phillips of Worth Matravers

Delivering a [speech in India](#) as the Lord Chancellor on 29th March 2008 he said:

“Mediation offers many attractions in addition to that of avoiding the cost and trauma of litigation.

In India it may well be that it is not so much the cost of litigation as the delay involved that makes the parties anxious to find an alternative way of solving their disputes. Before this audience I suspect that there is no need to labour the other attractions of mediation. It is a private and confidential way of resolving a dispute. It is informal. It is voluntary. It is a process that those involved can understand.

Once you are in the hands of professional litigants they take charge of you, willy-nilly, and you find that you have embarked on a course that has no turning back and the incidents of which you cannot even understand. Mediation is not like that. You can always turn back and

you have explained to you precisely what is going on. You are in control of what is happening to you.

You can preserve, or restore, good relationships with the other party to the dispute – you can come to feel that you are partners in a common endeavour rather than antagonists. And the resolution of the dispute can involve a much wider range of remedies than the court can offer.

There are of course down sides to mediation. If what you are after is your just rights according to the law, then mediation is not the place for you – but you need to consider carefully the cost of seeking those rights. Above all, so it seems to me, mediation is really suited for two parties who are in genuine dispute.”

Lord Woolf

In a speech reported in the [Law Society Gazette](#) reported on 22nd October 2009:

He said litigation was intended to be used as a ‘last resort’, but this was ‘not generally the attitude of the profession’. Large City law firms have not worked to reduce fees by going to mediation, he said, but have snared business in the ‘blackmailing situation’ of costly litigation. Woolf said he had been told by one large corporation that the cost of defending litigation was so high that it always settled cases unless there was a public interest reason not to do so.

Lord Neuberger

The new Master of the Rolls said in a [speech on 22nd October 2009](#):

“A lot has of course been said about the importance of ADR in recent times by Lord Phillips, Lord Clarke, Sir Alan Ward, Sir Henry Brooke, and Sir Gavin Lightman. Its importance was, of course, underlined by Lord Woolf in his two Access to Justice reports. I am conscious that,

like me, they became Judges before mediation had really come on the scene in this country. However, in many ways, that emphasises the value of mediation. I believe that there will be many cases where it will be right for parties and their representatives to consider ADR in its various forms. They should do so during the pre-action stage of litigation. They should consider it after proceedings have been issued. And they should continue to consider it while the claim progresses to judgment. It is often said that it is never too late to settle.

Equally, in some cases it may well never be too earlier to settle. A lot of course will depend on the nature of the claim. But in the field of commercial litigation I can see no good reason why parties should not routinely, in almost all cases, consider adjudication, arbitration or some form of mediation. I suspect that in many cases this is already second nature to many commercial lawyers; not least those faced with the type of commercial considerations I outlined earlier. For those to whom it isn't yet second nature, it ought to be."

Appendix 4 - Ungley Orders

Ungley Orders were cited with approval by Dyson LJ in [Halsey v Milton Keynes NHS Trust](#) [2004] EWCA (Civ) 576. He said :

“A less strong form of encouragement is mentioned in the other Court Guides to which we have referred at para 6 above. A particularly valuable example is the standard form of order now widely used in clinical negligence cases, and which was devised by Master Ungley. The material parts of this order provide:

“The parties shall by [date] consider whether the case is capable of resolution by ADR. If any party considers that the case is unsuitable for resolution by ADR, that party shall be prepared to justify that decision at the conclusion of the trial, should the judge consider that such means of resolution were appropriate, when he is considering the appropriate costs order to make.

The party considering the case unsuitable for ADR shall, not less than 28 days before the commencement of the trial, file with the court a witness statement without prejudice save as to costs, giving reasons upon which they rely for saying that the case was unsuitable.”

*This form of order has the merit that (a) it recognises the importance of encouraging the parties to consider whether the case is suitable for ADR, and (b) it is calculated to bring home to them that, if they refuse even to consider that question, they may be at risk on costs even if they are ultimately held by the court to be the successful party. **We can see no reason why such an order should not also routinely be made at least in general personal injury litigation, and perhaps in other litigation too.** A party who refuses even to consider whether a case is suitable for ADR is always at risk of an adverse finding at the costs stage of litigation, and particularly so where the court has made an order requiring the parties to consider ADR.” (Emphasis added)*

Appendix 5 - Suggested draft letters

Proposing mediation

We consider this matter is capable of settlement at this stage by mediation. We invite you to consent to mediation. We reserve our positions on liability/quantum but make this offer in accordance with our obligations under the Solicitors' Conduct Rules and the Civil Procedure Rules.

If you are not prepared to agree to mediation at this stage please clearly explain your reasons.

Response to refusal to mediate - pre proceedings

We note your rejection of our offer to mediate. We consider your refusal to be unreasonable/You have failed to provide any reasons for your refusal. We ask you to reconsider your position. We refer you to paragraph [number] of the [relevant] Pre Action Protocol and the provisions of CPR 1.4, 26.4 and 44.5.

We will refer to this correspondence when costs are ultimately resolved.

Response to refusal to mediate - post proceedings

We note your rejection of our offer to mediate. We consider your refusal to be unreasonable/You have failed to provide any reasons for your refusal. We ask you to reconsider your position. We refer you to paragraph [number] of the [relevant] Pre Action Protocol and the provisions of CPR 1.4, 26.4 and 44.5.

If you are not prepared to consent we will issue an application for an order that:

- 1. The matter be stayed for 28 days during which time the parties*

shall consider whether the case is capable of resolution by ADR. If any party considers that the case is unsuitable for resolution by ADR, that party shall be prepared to justify that decision at the conclusion of the trial, should the judge consider that such means of resolution were appropriate, when he is considering the appropriate costs order to make.

2. Any party considering the case unsuitable for ADR shall by [end of period of stay] file with the court a witness statement without prejudice save as to costs, giving reasons upon which they rely for saying that the case was unsuitable."

We will refer to this correspondence when costs are ultimately resolved.

About the author

Philip Hesketh is a full time Professional Mediator. He qualified as a Solicitor in 1991 and worked for national firms Thompsons and Russell Jones & Walker in Liverpool and Manchester. He was a Senior Litigator member of APIL. Philip trained as a Civil and Commercial Mediator in 2006 with the ADR Group and became a full time Mediator in 2008. He runs his own dispute resolution service at Hesketh Mediation Services, is a member of the Association of Northern Mediators. He is a panel mediator with NorthWest Mediation Solutions, a commercial mediation provider and with Trust Mediation, a not-for-profit provider of specialist personal injury Mediators.

He is the author numerous articles on mediation for the Law Society Dispute Resolution Section magazine *Solutions*, APIL's *PI Focus*, *The Costs Lawyer Magazine*, The Association of North West Law Societies, The Chamber of Commerce, Butterworths *Personal Injury Newsletter* and the on-line publication *PI Brief Update Law Journal*.

He blogs about mediation at www.heskethmediation.com and personal injury law and mediation at www.injurymediation.co.uk.

PO Box 125, Carnforth, LA5 5AD

0845 056 3625

phil@heskethmediation.com