

A Lawyers Guide to Preparing for Mediation

This guide supplements the **Client's Guide to Preparing for Mediation** which can be found on our website. It is designed to assist professional advisers who are representing clients in a mediation, and who may not have used mediation before.

The single biggest factor affecting the prospects of success in a mediation remains the extent to which the parties and their advisers have **prepared for mediation**. Although the process itself is very flexible and informal, it is vital that each side has a **realistic and accurate understanding** of where their position is strong, where it is weak, and the extent to which these strengths and weaknesses can be fatal or merely incidental to each party's case. Having gained this understanding, it is important that these findings are discussed with clients so that on the day of the mediation the parties come to the process with a realistic understanding of the merits of their positions.

Important considerations in preparing to mediate are as follows:

- What are the client's realistic prospects for success in this case? How can I demonstrate those prospects to an opponent at the mediation if my opponent has an unrealistic assessment of his case or mine?
- What are my client's legal costs, now and estimated to the end of the case? Can my client afford to pay them? Can the opponent afford to reimburse them if we win? What element of the costs might be irrecoverable?
- Who is going to be present at the mediation? Who needs to attend for my client to have full decision making authority on the day? What other professionals might I need present or available by telephone, perhaps for tax or other specialist input? Will counsel be used and if so at what point do we brief them?
- What does my client really want out of this? Are there options which do not simply involve money? Can any other risks be guarded against?
- If we were to reach a settlement, what might it look like? How am I going to document it? If proceedings are live, having a pre drafted Tomlin Order might be useful, with blanks to be filled in depending on the exact settlement reached. If no proceedings have been issued, having a draft deed of settlement might be a sensible step. If the mediation is taking place at a professional office, having these documents on a laptop so they can be amended and modified as the day progresses is useful.
- If any settlement would involve unusual options such as share transfers or land transactions, give advance consideration as to how this might be dealt with.

The **Position Statement** is an important document. It provides the mediator with an insight into what you and your client see as the key issues. It does not need to recite or repeat pleadings, although a summary of key issues can be helpful. The Position Statement should assist the mediator in understanding what it is your client seeks to achieve from a settlement of the dispute, any obstacles they foresee in arriving at a settlement and an indication of previous settlement offers made, if any. Position Statements are usually no more than 5 to 10 pages of A4.

If you have confidential information which it would be helpful for the mediator to know in advance of the mediation then you can provide this information to the mediator in a **Confidential Statement** which is not served on your opponent. Typical information which might be contained in this statement would include any financial sensitivities, possible ideas for settlement options, indications of personal information or circumstances which might impact on settlement, and an honest indication of the real reason for the dispute if there is something hidden which is a factor. This information is not shared with the other party and the more information you provide to the mediator the better placed he will be to assist the parties.

Mediators will usually ask for **schedules of costs** incurred to date and estimated costs to trial to be provided before the day of the mediation.

You will be provided with a **mediation agreement** for signature. This agreement binds the parties to confidentiality, deals with the role of the mediator, restrictions on using mediation documents in the event of an unsuccessful outcome as well as setting the timetable and venue for the mediation. On the day of the mediation the parties will also be asked to sign a copy.

Mediation fees will need to be paid in advance of the mediation.

A large part of any adviser's role is to ensure that their client has **realistic expectations** for their case, and that is as true of mediation as it is of taking any case to trial. If one party has unrealistic expectations of their claim then they may have difficulties in reconciling what would otherwise be beneficial offers of settlement made during mediation. If a client rejects a settlement at mediation based on false expectations, that rejected settlement usually becomes the benchmark to beat when the claim later proceeds to trial.

In addition to your Position Statement, you will need to provide your mediator with copies of the key documents in your dispute. Ideally, this should be done by way of an **Agreed Bundle**. If you cannot agree the contents with your opponent it is possible for the bundle to be 2 separate but non agreed bundles. Your mediation agreement will set out the ideal size of these bundles. You are free to bring additional documentation to the mediation so these bundles do not need to be comprehensive.

Your mediation agreement will specify when the Position Statement and Agreed Bundle need to be sent to the mediator. Please try to keep to this timetable as your mediator may have other commitments which mean he allocates specific preparation time to your dispute based on when the documents are to be received by him.

Your mediator will usually **contact you by telephone** before the day of the mediation to ensure that you are comfortable with the venue, timings, process and other aspects of the day. The mediator may want to discuss specific aspects of your Position Statement with you, or clarify other issues. If you have anything you wish to raise with the mediator in advance of the day, this is a good chance to do so.

The mediation will usually begin with a **joint session** in which all are present, the parties are introduced, the principles of confidentiality are explained and each side may make an **opening statement**. Whilst there is no obligation to make an opening statement, and indeed some parties simply chose to say nothing or to reiterate what is already set out in the statements of case or Position Statements, the opening statement does give an opportunity to speak directly to your opponent and their client

and to explain to them, perhaps for the first time, why your client has the views he does. This may be the only chance during the day when you can address your opponent directly. It can be a powerful time to have your client say a few words, particularly if there is strong emotion driving the dispute forwards. Consider your strategy for the opening statement and if you wish, discuss your thoughts with the mediator in advance of the mediation.

Most of the day is often spent with the mediator working with each side in **private sessions**. In these sessions the mediator will explore possible settlement routes and also examine each party's ability to deal with the case put by the other. The key to mediation is understanding that **what is discussed in these private sessions is not revealed to your opponent** unless you expressly agree otherwise. Your client can therefore speak openly to the mediator on all issues without fear of compromising their position with their opponent. Your ability to present your client's position in these more informal settings, and your ability to evolve your thinking and accommodate perhaps unforeseen arguments and solutions, will be invaluable. The mediator will explore and propose solutions but it is up to the parties to work through the options and determine whether these solutions can be made to work for them, with or without further modifications. You must also be prepared for quiet periods, since the mediator will spend roughly equal time with each party and so there may be times when you and your client can gather your thoughts.

If an agreement is possible it will be up to the legal advisers to document that settlement, advise their clients on any issues of concern and ensure that their clients are happy to **sign a binding agreement**.