

# Preparing for a Mediation

## Areas to consider

- A. Effective preparation
- B. Papers for the mediator
- C. Pre-mediation discussions
- D. Ending the mediation

### A. Effective preparation

1. Effective preparation for mediation can significantly improve the likelihood of reaching agreement, and even the terms of settlement. Some points to bear in mind are:
  - Who needs to be there?
  - Each party needs to be represented by a decision maker, someone with authority to do a deal.
  - If that is genuinely not possible please contact us to discuss the situation as soon as possible.
  - In addition, it is usual for each party's legal advisers to attend.
  - Include experts and counsel if you believe they can assist in settlement.
  - Consider who will attend from the other side and ensure you are matching them i.e. C.E.O. and C.E.O. etc.
  - As a general rule, however, try to keep the team as "lean" as you can.
2. Brief your clients thoroughly
  - What is mediation?
  - How the day will operate.
  - The difference between litigation and mediation.
  - Their role at the mediation.
  - They will be taking the lead during the day and negotiating.
3. Know your case
  - Mediation provides a unique opportunity for directly influencing the other party's decision-makers and advisers.
  - Knowing your case well, and being able to articulate it clearly, will enhance the use you can make of the opportunity.
  - Do you have all the information you require to evaluate your case?
  - Do you have experts' reports if appropriate?
4. Consider both the legal and the commercial arguments
  - Mediation tends to involve a mixture of legal and commercial (and sometimes personal) issues.
  - Know strengths and weaknesses of your case and the other side's case.

- What is your position on liability and damages?
  - It is worth thinking these through in advance?
  - Know what your client wishes to achieve.
  - Consider what the other side wish to achieve.
  - Agree what you may have to give/are prepared to give to achieve settlement.
  - Know where you would like to settle and develop a plan for negotiation.
5. Consider your alternatives to settlement
- You need to be able to assess any settlement proposals in the light of these.
  - Attend with knowledge of your legal and other costs to date, and an accurate forecast of future costs.

## **B. Papers for the mediator**

1. Prepare a written mediation position statement and exchange with the other side. Agree a bundle of relevant papers with the other side. Provide mediation position statement and the bundle to the mediator at least a week, but if possible 2 weeks, before the mediation.
2. Include in the mediation position statement (max 10 pages):
  - Background to the case.
  - Liability and quantum.
  - Key issues.
  - Have any negotiations taken place?
  - Have there been any admissions or changes since the close of pleadings?
  - Have any offers been made – without prejudice or Part 36?
  - If there is a fundamental aspect to the claim which can only be explained by way of a document then please enclose this with the case summary.
  - What does your client wish to achieve at mediation?
  - What do you think other parties might wish to achieve?
3. The bundle
  - Provide those papers that are relevant to the mediation and will assist the mediator in understanding the issues for mediation.
  - Include latest pleadings, and any relevant witness statements and experts' reports.
  - Other documents may be taken to the mediation and used on the day.

## **C. Pre-mediation discussions**

1. We try to ensure as few surprises as possible in the mediation. Whenever possible, the mediator will telephone the parties/their lawyers before the mediation. The mediators' purpose is:
  - To introduce themselves to the parties.
  - To ensure that all arrangements are in place for the mediation.
  - To discuss how the parties wish to deal with any joint meeting at the start of the mediation.
  - To answer any questions from parties/lawyers.
  - To ask any questions arising from the mediation papers.
  - These discussions are also private and confidential and covered by mediation agreement.
  - The mediator is there to help you to arrive at settlement, trust the mediator, give them information, discuss issues with them and allow them to help move the process forward.

## **D. Ending the mediation**

1. Most mediations end in agreement between the parties. Where that is the case, it is usual to record the terms in an agreement, for signature at the time.
  2. If terms of agreement are not reached on the day, there are still other possibilities. Our experience has been that terms can often be agreed in the days or weeks following the actual mediation. You may consider:
    - Re-scheduling a further half-day or day.
    - Leaving the mediation agreement in place, so that further discussions can take place under its confidential and "without prejudice" terms.
    - Where appropriate, the mediator will maintain telephone contact to see whether further progress can be made.
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