

# Preparing Your Case for Mediation

The aim of every mediation is to find an agreement which is acceptable to all parties and which enables the dispute to be settled. The most common reason for mediation failing is that one or both of the parties has failed to prepare sufficiently or manage expectations.

The mediation involves facilitated discussion of the issues in a case not a presentation of evidence as occurs in a trial or arbitration. Preparation is therefore much easier as it is not necessary to organise witnesses, evidence or produce trial bundles and there are no formal preliminaries.

This document is intended for both lawyers and clients and is broken into three sections to help better prepare for a mediation session. This is not intended to be definitive guide and some of the information will not be relevant in all circumstances, however, if you have considered all points then you should be in a prime position to get the most out of the mediation session.

## **1. General Preparation for Presenting your Case at Mediation**

This document outlines the questions you need to consider before the mediation and strategies you can adopt on the day to assist in reaching a positive conclusion. This document will also help you prepare a comprehensive Position Statement and useful Confidential Checklist that you retain and refer to during the mediation.

## **2. Position Statement**

The only pre-written work that should be carried out is the preparation of a Position Statement. It is usually prepared for the mediator's eyes only although in some cases parties do agree to the mutual exchange of this document. The Position Statement is simply an overview of the facts, issues and interests of the case (and each party) to enable the mediator to understand the dispute ahead of the mediation. It is certainly not intended to be an all encompassing document and should be kept as short as possible (we would recommend no more than 4 pages).

## **3. Confidential Checklist**

In order for mediation to be successful you need to have discussed and considered with your client everything about the strengths and weaknesses of the case as well as the pros and cons of settling early. This can either be kept private or disclosed to the mediator if you think it would help the process. Effective management of parties' expectations can greatly assist the chance of settlement. Key examples of information that should be considered are:

- Cost implications
- Litigation risks
- Time restraints
- Settlement expectations

If you require advice or assistance in preparing for a mediation please feel free to contact our Mediation Advisors on +44 (0) 117 946 7180 or email: [mediation@adrgroup.co.uk](mailto:mediation@adrgroup.co.uk)

# 1. General Preparation for Presenting Your Case at Mediation

Mediation only works if all parties are willing to reach a settlement. This certainly does not mean splitting the differences, although compromise from both parties can be a key feature. Mediation can be a great process for presenting the strength of your case, thereby showing why you will not be forced into a cheaper or simpler solution, or why you are confident of succeeding at trial.

In order to get the maximum benefit from mediation you need to be fully prepared. It is vital that you consider your case, your negotiation tactics and how you wish to relay this at the mediation.

The following points are designed to help you prepare your case and present it on the day.

## **Know your case:**

The more familiar you are with the issues of the case and the interests of those involved, the better you will be able to effectively present it. Prior to the sessions you should have considered the following:

- Do you have all the information necessary to evaluate the case - for example do you have all the necessary expert evidence to support your claim?
- Know the facts and witnesses involved in the case. Whilst they will probably not be required at the mediation it is likely that you will be discussing them.
- Identify and analyse the key issues.
- List the strengths and weaknesses of your case. If possible do the same for your opponent. This can be a useful tool to help the mediator develop tough questions for them.
- Consider and confirm who will be attending. Make sure all those with authority to settle will be there. Confirm the same from the other side.

## **Develop a settlement strategy:**

If you have not developed a settlement strategy then resolving the dispute on the day will be more difficult. There are a number of key considerations that you should review to establish what your settlement parameters are and whether they are reasonable.

- Determine your position on liability and damages. What issues or information may cause you to change your mind?
- Develop a negotiation plan including where you want to settle and how you plan to get there.
- Consider the language and terminology you use on the day. For instance, avoid basing your offer on the age of the case ("I never offer that much this early..."). Phrases such as this in an opening session can have a hugely detrimental effect on the whole session.
- Plan to offer or demand what you will eventually be prepared to settle for.

- The mediator is not just a messenger. Allow him/her some leeway in developing possible settlements. Remember the mediator will know much more about each parties position than you will and phrases such as “substantial movement has occurred” may be much more progressive than monetary offers.
- Be candid with the mediator. Assist him/her in determining the best method of persuading the other side of your position.
- Determine if there are any facts that you do not want to disclose to the other side. Either keep them to yourself or tell the mediator in confidence. There are rarely facts which should be kept from the mediator and telling him/her confidentiality means that he/she has a greater understanding of the true issues and therefore where settlement may be possible.

### **Authority - who should attend the mediation session?**

The aim of mediation is to reach and conclude settlement on the day. If the people with the authority to close the deal are not in attendance then this may well jeopardise the settlement. It is thus important that all parties come to mediation with sufficient authority to settle, and not just their legal advisors.

### **Roles and level of participation**

It is important to decide in advance of the session who is going to lead discussions. Often when clients are represented by legal advisors it is the lawyer who takes the lead. However depending on the nature of the case and the personalities of the individuals it may be more prudent and have greater impact if the client were to lead or support the conversations. The most important context for this is the opening statement.

### **Opening statement**

The mediator will commence the session by going over the ground rules for the mediation, explaining the process and timing. You will then be given an opportunity to make a short opening statement (usually 10-15 minutes) explaining your position. As this is your opportunity to talk directly to the other side, you need to be prepared and organised. Once you have agreed who should deliver your statement, you may want to consider the following:

- Introduction of yourself and/or your client/legal representative, and confirmation that it is your or your client’s wish to work towards settlement
- An overview of the facts as you see it. If the other side went first then indicate any agreement or disagreement with their statement
- Your analysis of the issues (e.g. on liability and damages)

During your presentation be realistic. While you obviously want to present your case in the most favourable way be emphasising your strengths, do not ignore your weaknesses. If for instance you have already factored any of these weaknesses into a previous offer, it will add credence to the rest of your case and your rationale for being at the mediation to mention this.

It is also useful in the opening phase to avoid specific settlement figures and emotive language. Saying something like, “I will settle for £50,000 and not a penny less” is likely to cause the other side to become very reactive to the process and they are then likely to spend the rest of the session thinking up why you are not going to get that sum, rather than actively listening to the facts as you see them.

**Other points for consideration**

- Review the mediation procedures so you know what to expect
- Schedule sufficient time for the mediation
- Take your files and sufficient copies of any documents you plan to refer to
- Charts, summaries and chronologies can help to make points, however, be mindful about when you give them out as you will want people to listen to you rather than read through them.
- Complete the confidential checklist before you go

## 2. Preparing the Position Statement

Before a mediation, the mediator will want to know some details about the case. They will not want or need to know about every single aspect, however gaining an insight into the facts, the issues and the interests of those involved will be key in helping to make the mediation progress effectively.

This document is a guide / checklist to help you to prepare your Position Statement. If you are unclear as to whether something is relevant and should be included, please discuss the matter with the mediator or with one of ADR Group's mediation advisors

### General

- The parties' name
- Solicitor's details
- Names and titles / positions of the attendees
- Date and location of the mediation

### Case Summary

- Describe concisely the background to the case ensuring that the issues of liability and quantum are clearly set out. A list of the issues and/or a chronology of the key events is often helpful to the mediator
- What are the key issues?
- What are the unique features that the mediator ought to be aware of?
- Have any negotiations taken place?
- Have there been any without prejudice offers?
- Have there been any admissions or changes since the close of pleadings?
- What do you / does your client hope to achieve by the end of the mediation?

### Your Opponent's Position:

- Please provide a short synopsis of what you believe your opponent's position to be
- What do you think they hope to achieve at the end of the mediation?

### Documents:

- There are no formal rules of disclosure and the mediator only requires, prior to the mediation, sight of those documents that will enable him/her to formulate an understanding of the case and the respective issues involved
- 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 Position Statement

- If a document is to be relied upon at the mediation, please make sure that it is available on the day
- Where legal proceedings have commenced please annex copies of the key pleadings, particularly the claim, defence and counter-claim

#### **Parties and Attendees**

- Name all the people who will be attending the mediation and explain in what capacity
- Ensure that the nominated person with full authority to settle attends the mediation
- Whilst it is not always relevant for all witness to attend (remember the mediator does not assess witnesses of fact) it may be helpful to provide a summary of any witness evidence if it is intended that this is material information that will be considered during the mediation

#### **Costs**

- Litigation and cost risk implications need to be fully considered and discussed with your client in advance of the mediation
- What are your client's costs to date? If possible ensure that a full costs schedule is prepared in advance of the mediation which can be referred to on the day of the mediation
- What are your client's estimated costs to trial? Is your client covered by any legal expense insurance or are they paying privately?
- Do you know what the other sides legal expense position is? Can you estimate their costs to date or what their costs to trial may be?

#### **Mediation**

- What does your client seek from the mediation?
- What are their expectations for the day?

#### **Any Other Business**

- Are there any other aspects, 'red-herrings' or issues you consider the mediator should be aware of?

### 3. Confidential Checklists



In order for mediation to be successful you need to have discussed and considered with your client everything about the strengths and weaknesses of the case as well as the pos and cons of settling early. This can either be kept private or disclosed to the mediator if you think it would help the process. Key examples of information that should be considered are: cost implications, litigation risks, time restraints and mediation expectations.

#### Confidential Checklist

Your case

List your evidence - Witnesses, documents, reports, statements etc.

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_

List damages:

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_

List your legal arguments concerning liability and damages:

Liability:

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_

Damages:

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_

List your strengths and weaknesses and any mitigating circumstances:

Strengths:

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_

Weaknesses:

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_

## Confidential Checklist

Calculate your settlement range:

1. Would like to get
2. Would accept
3. Bottom line
4. Walkaway point

How did you value the case?

What elements are included e.g. special damages etc.

What is your best alternative to no agreement? (BATNA)

What is the worst outcome to no agreement? (WOTNA)

How much will it cost to go to trial? £ \_\_\_\_\_

How long will it take? \_\_\_\_\_

What are your chances of winning in court? \_\_\_\_\_%

What do the other side consider as their chance? \_\_\_\_\_%

What questions / line of argument do you want the mediator to put to the other side?

## Confidential Checklist

The other side's case

List their key issues:

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_

List their evidence:

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_

Guess their probable arguments regarding:

Liability:

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_

Damages:

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_

List their strengths and weaknesses:

Strengths:

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_

Weaknesses:

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_

Consider / guess the basis of their demands/offer:

How else may they have valued their demand / offer?