

PREPARING FOR A MEDIATION

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This is drawn from our panel of mediators' collective experience of over 1000 mediations.

A key point to bear in mind is that preparing for mediation is not the same as preparing for court. At mediation the objective is to negotiate a settlement to make peace not war. Mediators are not there to make findings of fact, give judgments or award costs. Time spent thinking about the structure and strategy of settlement, as well as about legal argument and evidence, will pay dividends.

Key stages are:

Make early contact with the mediator. The sooner the better. Try not to leave it until the last moment.

As soon as the mediation has been arranged email the mediator and ask:

- What material they want from you and by when
- When you can speak on the telephone/Skype/Zoom

THE OUTCOME

Make an early start on thinking about what you/ your client want out of the mediation. If you do not know where you want to get to you will not know when you have arrived, or how to get there.

Prepare a list of

- What you want
- Why you want it
- How you think you can get it

Doing this helps you prioritise your goals and structure your negotiation strategy.

	WHAT I WANT	WHY I WANT IT	HOW TO GET IT
1			
2			
3			

YOUR STRATEGY

Deals are done by exchanging something you have for something they want and the other way around. You trade. Work out your tradeables.

Make a list of

- What you want
- What you have
- What they want
- What they have

	WHAT WE WANT	WHAT WE HAVE	WHAT THEY WANT	WHAT THEY HAVE
1				
2				
3				

This helps you clarify what you can

- Offer them in exchange for something they want. You may be able to achieve everything that you want but the chances are you will not achieve 100%. People rarely achieve a 100% even in court when they win either.
- Give up as part of the negotiation.

Rank your goals in order of priority.

What I

- Would like,
- Want,
- Need.

	WHAT I WOULD LIKE	WHAT I WANT	WHAT I NEED
1			
2			
3			

YOUR CASE

Work out your assessment of the dispute. Summarise:

- What you are arguing about.
- Why you are arguing.
- Why you not agreeing.
- What needs to happen to end the argument and achieve agreement?

Collect all the documents that are relevant. Prepare

- The Mediation Statement / Position Paper
- The Bundle/ File of Documents

Ideally do this at the same time and after you have spoken to the mediator to find out what they want. This will save you wasting money time and effort.

POSITION PAPER

Mediators will find useful a document that provides information under the following headings:

The parties

Who they are and what they do. What their relationship is.

Attendees

Who will be attending the mediation and their position within an organisation?

A brief description of the dispute

Not more than three sentences.

What stage the dispute has reached

Has litigation started? If so where are you in the procedure? If litigation has not started have there been meetings to try and resolve the matter, exchange of correspondence et cetera.

Refer to copies of court documents/relevant correspondence and meeting notes. Include these in the bundle.

What each side is claiming in the dispute.

The main points each side has put forward in support in support of support of its port of its claim.

Relevant factual background.

If this is set out in litigation papers or in correspondence refer to that. There is no need to repeat it all. Highlight the key points.

Attempts at settlement

Refer to any attempt to settlement, offers to settle/meeting/Part 36 Offers et cetera.

Say why they were not successful.

Costs

The mediation costs, whether legal or professional can become a lot to settlement. Give the mediator details of costs incurred to date and anticipated costs going forward.

THE BUNDLE

The golden rule is less is more. Only include documents that

- You will want to refer to at the mediation
- Well help the mediator understand how the dispute has arisen on white has not settled so far
- Are referred to in any correspondence or court papers

Include

- Up-to-date valuations
- Plans
- Accounts/annual reports
- Schedules summarising damages/interest calculations etc.
- Experts reports

Do not include:

- Notices of hearings
- Draft orders
- Superseded witness statements
- Detailed chronologies-except in extremely complicated disputes.

Decide whether you are going to exchange position papers with the other side. The usual practice is to exchange. If there is confidential information that you want the mediator but not the other side to know send it in a confidential note to the mediator marked "for mediator's eyes-only".

Tell the other side what documents you want to send the mediator. Ask them what they want. There is no point spending a lot of time arguing about what documents should be sent to the mediator. There is no requirement for an agreed bundle in the way that there is for court hearings. It is more convenient if there is an agreed numbered bundle but it is not essential.

PREPARE OPENING STATEMENT/QUESTIONS

There is often a Joint Opening Session at the mediation towards the start of the day, though some mediators may suggest that the Opening Session is dispensed with or any joint meeting is postponed until later in the day.

This is where the mediator speaks to everybody at the same time in the same room. They usually explain the ground rules and outlined the procedure that they intend to follow.

You are then given an opportunity to speak. This is your opportunity to speak directly to the other side. You may not have been able to do that before or at least not for some time.

Remember that you are there to make peace not war. Just set out the main message that you want them to have in their mind when they are in the own room thinking about settlement.

There is no need to repeat what you said in your Position Paper. You can refer to the main points. Let the other side know that you have read their Position Paper. Acknowledge the points they have made and give your response to them-in a non-adversarial way. But tell them if you disagree and why. Adopt a slightly formal conversational tone. You are not addressing a judge.

If you have questions for the other side prepare them in advance. Tell the mediator that you have some and agree with the mediator what is the best way of putting your questions. Sometimes this is best done in the Joint Opening Session: sometimes in a private session either by you or by the mediator.