

MEDIATION

What to expect?



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BEFORE THE MEDIATION INFORMATION

Remember that mediation is a lot more informal than a trial and people are free to prepare in any way they wish, but it is generally best to provide the mediator with as much information as necessary to save time on the day.

It is also best not to spring new information on the parties on the day because this can cause problems.

The parties normally exchange case summaries and supporting documents with each other and the mediator at least one week before the mediation.

These documents should be:

Delivered to ProMediate at least seven days before the mediation by email if possible.

Length should vary from four to ten pages for straightforward matters to 20-25 pages in a more complex matter

Papers should aim to educate the mediator and persuade the other party to negotiate

Papers should not be a trial advocacy brief nor bundles of pleadings, witness statements or footnotes supporting a brief submission

Additional core documentation can be given if it adds to the mediation submission rather than replaces it

A submission should cover:

factual summary

short statement outlining type of work/business of your party

chronology of events if relevant

details of the individuals involved in the dispute if relevant

outline the legal issues

outline the factual issues

identify common ground and difference

chronology of negotiation history up to last offer

court/arbitration timetable should dispute remain unresolved

glossary of technical terms if relevant

schedule of key documents, indexed and paginated

details of legal costs spent so far and likely future costs.

The mediator will almost certainly introduce him/herself to each party or their legal representative before the day, usually by telephone. The mediator may ask questions about the documents received and will check that each party will be represented by someone with the requisite authority to settle. The mediator will reinforce that their role is not to propose or impose any solution on the parties, but to facilitate their negotiations. The mediator may also ask the parties to begin thinking about their commercial interests in the dispute, rather than the purely legal arguments.

AT THE MEDIATION ON THE DAY

Have a think about who to bring with you to the mediation. It is obvious but check the location and arrive early.

Make sure that you have full authority to resolve the case and to make offers.

There will normally be a room large enough to sit all participants in the mediation and this will be used for joint meetings. In addition, each party will have their own room and this will be used for private meetings with the mediator.

It is ProMediate's policy for an observer trainee mediator to attend each mediation. They will observe the same confidentiality provisions as the mediator and the parties.

Beginning the mediation

The mediator will often begin with informal introductions in the parties' private rooms. Then, ordinarily, the mediation will begin with a joint meeting, unless this is unlikely to assist or it is a short mediation and there isn't time.

At this initial joint meeting, the mediator will establish ground rules for the day, reaffirming the strict confidentiality of the mediation and asking each party to respect the other side's right to be heard.

The mediator may ask each party to make an opening statement. This is a summary of the key issues making up their case, not a summary of the documentation. It will often be the first time each party will have heard the other's point of view first-hand. The opening presentation can be made either by the lawyer or party representative, but we recommend the business principals become involved from an early stage. There is no obligation to have the first meeting or to say anything if you do not want to do so. Sometimes emotions are running high and parties may not feel able to meet the other party.

Private meetings

Following the joint meeting, the mediator is likely to invite the parties to go to their private rooms where the mediator will spend time talking with them in confidence. During this time the mediator will ask the parties about their expectations and will ask them about the strengths and weakness of their case (reality testing). It is important to remember that nothing will be repeated to the other party/ies unless the mediator is given express permission to do so.

You should be prepared for long periods of waiting, while the mediator is talking to the other party/ies. Sometimes the mediator will set a task, such as re-assessing risk analyses or testing alternative solutions in the light of developments that have emerged during the day.

Sometimes parties become concerned that the mediator is spending 'too long' with the other party. Don't worry - this is natural! It can be a sign of progress. Parties can also feel that progress is very slow during the early stages of the mediation session. This is also natural and the mediation will gather momentum as parties come closer to an agreement.

Joint meetings

The mediator may decide that progress would be made by bringing the parties together again. At other times the mediator may suggest bringing together just the lead negotiators or lawyers or experts to change the dynamics of the mediation and bring speedier progress.

Settlement

A settlement is reached when the parties come to an agreed solution. If there are lawyers present they will draw up an agreement which, when signed, becomes binding. It is therefore essential that each party is

represented by someone, or has someone there, with full authority to settle the dispute. Sometimes the mediator will help finalise the agreement.

AFTER THE MEDIATION ANOTHER DAY

Non-settlement

ProMediate's panel of mediators have an excellent settlement rate of 98%. However, there are always cases where the parties do not resolve the case at the mediation, although they may be very close and have narrowed the issues considerably.

Disputes which do not settle on the day of mediation can often settle shortly afterwards as a result of the negotiations during the course of the day and the momentum gathered. Mediations which do not settle on the day often lead to fruitful face-to-face negotiations. In the event of non-settlement it is likely that the mediator will ask the parties' permission to contact them within the following week or two. Further progress can usually be

made once the parties have had time to reflect on the issues that have emerged during the mediation. Sometimes it is necessary to arrange a further mediation meeting.

Where parties cannot reach a settlement, they can leave the mediation and pursue arbitration, litigation or any other dispute resolution procedure. Nothing said or done in the mediation can be referred to outside the scope of the mediation.

After the mediation

The mediator will contact the parties to check that there are no loose ends. ProMediate will also contact the parties for feedback on the mediator's performance and the service provided. We encourage parties to leave feedback, without divulging any details about the case.