

CEDR Mediation Preparation Guidance

Overview

In order to ensure the best possible results in a mediation process it is very important that parties and their advisers are well prepared and the mediator sufficiently briefed.

This guidance is intended to assist parties with preparation and should be read in conjunction with the CEDR Model Mediation Procedure.

Key Points

- Prepare the clients for what to expect at the mediation.
- Expect pre-mediation contact from the mediator.
- Keep case summaries brief and restrict supporting documents to essential reference.
- Mediators can assist you with advice and guidance on what to provide.
- Deliver all documentation to the mediator at least 10 days before the mediation.
- Consider providing a confidential briefing to the mediator.
- Consider your negotiating agendas and those of the other party.
- Don't expect the mediator to divide their time equally between the parties.
- Prepare draft settlement terms and/or bring precedents.
- CEDR advisors are available to assist you throughout the process.
- Be prepared for a long day.

Preparation for the mediation

To ensure you and/or your clients achieve the best outcome from the mediation process, adequate preparation of your own team, including the clients, is important.

Case summaries and documents should be concise and informative; ideally summaries should be no more than 10-15 pages with supporting documents only where they are essential reference for understanding (see below). They should be written to assist persuasion in the negotiation process, not as trial submissions.

All the documentation should be delivered promptly to the mediator to allow them time to be properly prepared and adequately briefed on the issues for the mediation. Ideally the mediator should have all the documentation no later than **10 days before the mediation** takes place.

The mediator will contact each team before the mediation unless limited time or the parties' circumstances make that difficult. This initial contact will provide an opportunity for an informal confidential briefing to cover issues the parties prefer not to commit to paper. Subject to the magnitude of the dispute, this contact will vary between a simple telephone call to a number of in-person meetings conducted over a number of weeks. One pre-mediation telephone call with each party is usually sufficient for the majority of UK mediations.

Mediators can assist you with advice and guidance on what to provide in terms of written material. The principles underlying mediation submissions are:

- To inform but not deluge the mediators
- To persuade the other party to negotiate, not to be a trial advocacy brief.

Core submissions

These should be brief, clear statements to educate the mediators.

Guidance principles are:

- The definition of 'brief' will depend on the nature and complexity of the case. Length may vary from 4/10 pages in a straightforward matter to 20/25 in a more complex matter. It is better to produce a detailed mediation submission covering the relevant areas rather than simply submitting bundles of pleadings, witness statements or footnotes to support a skeleton submission. This can significantly

increase the cost of the process if the mediator is expected to work through large volumes of material.

- The mediation submission content should aim to educate efficiently and emphatically the mediator and the other team's decision-makers. Effective education assists persuasion and risk assessment.

What should you cover in the submission?

1. A factual summary
2. A short statement outlining the kind of work/business performed by the party named in the mediation
3. Chronology of events if sequence is essential
4. Dramatis Personae if relevant
5. What are the legal issues in the dispute?
6. What are the factual issues in the dispute?
7. Identify common ground and difference
8. Negotiation history and present position, e.g. who made the last offer and/or Part 36 offers/cost positions/budgets
9. Financial spreadsheets, calculations and alternative calculates (Quantum)
10. The court or arbitration timetable and next steps if the dispute remains unresolved
11. Glossary of technical terms if relevant
12. Schedule of key documents or acronyms- indexed and paginated.

Additional documents

Critical documentary evidence will vary from case to case. The principle is to provide a small relevant bundle of core documentation that adds to the mediation submission rather than replaces the submission.

What should you include?

- Key contracts & agreements
- Key correspondence
- Photographs which assist understanding
- Charts or diagrams that are particularly informative
- Relevant and important extracts from witness statements
- Relevant and important extracts from key expert reports
- Extracts from relevant legal authorities that are statements essential to assist the mediator
- Spreadsheets where useful to highlight quantum elements.

It is sometimes the case that the mediator will need to consider more documentation from one party than another.

Confidential briefings/ pre-mediation telephone contact

You have the opportunity to provide the mediator with a “for your eyes only” briefing, e.g. a part of a draft expert report. **Please mark this very clearly as confidential to the Mediator only.** This may provide a better understanding of the issues and negotiating positions and may speed up the process.

What you could include in a confidential briefing – written or on the telephone:

1. What are your clients' views on this dispute? Future interests?
2. Views on previous negotiation proposals
3. Views on why the matter has not been resolved
4. Your view on the other team's negotiating agenda.
5. Decision-makers in the mediation process – previous relationship with the other team's decision-makers
6. Challenges for the other team
7. Challenges for your team
8. Funding for litigation – your team's/the other team's
9. Insurance coverage issues/contribution
10. Do you believe everyone has a genuine wish to resolve the dispute – if not, why not?

Who should attend the mediation?

A well prepared small team who can:

- Present the case persuasively
- Work well together (and who may work well with the other team)
- Look at all the agendas that effect potential negotiated outcomes – i.e. commercial, legal and emotional needs of the clients.
- The team should include the decision maker with the authority to settle.
- Insurers with authority where relevant.

You should avoid bringing an unnecessarily large team. You may wish to bring counsel and experts if they will add value to the decision-making and negotiating agendas. Alternatively, they can be available on the telephone if required but the parties should ensure they have out of hours contact details as a precaution.

What will happen on the day?

- Each team will have their own room.
- The mediator will speak to each team before an open session.
- An open session with everyone present where each team will set out their view on the dispute and expectations for the mediation.
- The mediator will chair the open session, decide on its utility and length and set a provisional agenda for the day.
- Private & confidential meetings with each team and the mediator will follow.
- Further joint meetings with some or all of the team members if the mediator sees that as a productive step.
- If a negotiated outcome is reached the drafting of the terms of settlement will follow. This is undertaken by the parties or their legal representatives in attendance. CEDR recommends that where possible the parties come prepared with drafts anticipating their needs. This can save a considerable amount of time on the day at what might be unsociable hours.
- The mediator cannot draft the terms of settlement on the parties' behalf but they will remain on site until they are completed. This is to ensure that they can deal with any last minute issues that may become apparent during the drafting process.
- When drafting the terms of settlement the parties should ensure that issues such as tax implications, confidentiality and implementation are adequately covered.
- If there is no negotiated outcome, a meeting with the mediator, to decide on the future progress of the dispute and what further steps CEDR and the mediator can take to help the parties.

How long will the day last?

There are no pre-designated time scales (with the exception of time limited services such as Mediation 125) so please note or advise your client that it is possible it might be a long day.

There may well be periods of no apparent activity while the mediator is working with other parties. Some parties will need more of the mediator's time than others but the ultimate goal of the mediator is always to do whatever it takes to bring all the parties to a consensus.

Patience, a willingness to negotiate and work effectively with the mediator and a realistically positive approach to the process is essential. With this combination, the majority of mediation processes deliver great value.