PREPARING FOR MEDIATION

What is the purpose of the mediation meeting?

It is very important to appreciate that mediation is an ***assisted negotiation***. It is ***not a mini-trial***. The only purpose of the mediation meeting is to reach an agreement. We will not therefore focus on the legal and technical issues that would be appropriate at a trial but on the needs of the parties and possible solutions that will help settle the dispute. Each party should come to the meeting prepared to settle. That does not mean at all costs but it is necessary to keep an open mind and to enter into the process with the right frame of mind.

Prior to the mediation

The mediator will contact all the parties (or their representatives) prior to the mediation meeting, partly just to touch base, partly to make sure that everyone understands the process and partly to get an initial idea of what the case is all about. Each conversation will be confidential.

You will need to sign a mediation agreement. This deals with various matters, including some of those referred to in this document and the mediator's fees. The mediation cannot go ahead until all the parties have signed the mediation agreement and paid the fee. Please return the signed mediation agreement as soon as possible after it has been sent to you. Scanning and sending it by email is fine.

Venue

The parties will need to arrange the ***venue*** for the mediation. The mediation meeting can take place at any venue. It is usually in a solicitor's office or at a hotel with meeting rooms.

When the dispute is a boundary or right of way dispute the mediation often takes place on site, with the mediator going between the parties' homes. At the very least, the mediator usually likes to make a visit to the site. There can be a downside to the negotiations taking place on site, as parties sometimes lose focus when they are in their own homes. It can also make it more difficult for the parties and their lawyers to meet together with the mediator to discuss the case. It is therefore often better if the actual negotiations take place close to but away from the site, such as at a local hotel. Being nearby allows everyone to return to the site where appropriate, e.g. to mark things up later in the day.

Authority to settle

Everyone who is a party to the dispute to be settled must be present at the mediation meeting or must be represented by someone who has ***authority*** to settle the dispute. ***This is absolutely crucial*** and is a term of the mediation agreement. Unless this is the situation at the beginning of the meeting the mediation will not be able to go ahead.

Preparation for the meeting

Preparation is the key to success. A mediation meeting is not like a court hearing. The parties do not present evidence or "argue" their case in order to persuade the mediator that they are correct. As indicated above, the mediator will not make findings or deliver a judgment. Thus, the sort of preparation that goes into a trial is not necessary. However, the mediation is much more likely to succeed if all the parties are ***well prepared***. If a solicitor or a barrister will be attending with you at the mediation, you should have a meeting with them beforehand to discuss your strategy. You should carefully consider the following points:

- Your ***objectives***. What do you hope to get out of the mediation? What ideally would you like to have; and what are your most important ***needs***?

- What do you consider to be the objectives and needs of the other side?
- What do you consider to be the obstacles to settlement?
- The real drivers behind the dispute – on both sides.
- What the proceedings have cost you so far.
- What the proceedings will cost you if the case goes to trial.
- The position that you will be in if the case goes to trial and everything goes your way – the best-case scenario.
- The position that you will be in if the case goes to trial and everything goes wrong – the worst-case scenario.
- Your strong points – legal, factual and practical.
- Your weak points – legal, factual and practical.
- What alternatives you have to pursuing the litigation.
- Possible ***solutions*** that would be acceptable to you and what you think the other side might accept. Can a win-win situation be created?

Documents needed

The Property Mediators offer questionnaires to find out the information they need prior to the mediation. These questionnaires can be found on their website in the Documents section or can be emailed by the mediator in advance of the mediation (www.thepropertymediators.co.uk/downloads). There is a ***Solicitor's Questionnaire***, which sets out basic information such as venue, costs, and a bullet point summary of the basic facts and issues in the case. There is also a ***Confidential Mediation Questionnaire*** to be completed by the client. This is usually the most important document that will help the mediator in preparation for the mediation.

The parties should not prepare the equivalent of "trial bundles". Please send the mediator copies of the questionnaires and any ***key documents*** at least ***seven*** days before the mediation. If court proceedings have started please send the Particulars of Claim and the Defence. In property disputes a plan is usually required and photographs are often useful. Please be selective. There is, for example, no point in sending the mediator large amounts of correspondence between the solicitors. Copies of ***offers to settle*** are very helpful.

Any ***other documents*** that you think might be relevant should be brought to the meeting.

If you have any concerns about what documents might be needed prior to the mediation please contact the mediator.

Mediation statements

Parties to mediations sometimes exchange "Position statements". However, the Property Mediators have found that these do not always aid the process and that sometimes they handicap it. However, it is useful to convey to the other side things that are important to you. If you wish to send a Mediation statement to the other side, we would recommend that it contains some or all of the following:

- Expression of a willingness to negotiate and settle the dispute.
- Up to date figures, eg valuations, loss claimed, interest, debts, costs to date and those projected to trial.
- Acknowledgement of the other side's position, wants, and emotions.
- A statement of what you (your client) wants / needs rather than what they are 'entitled to' and an explanation of their interests and emotions.
- An expression of any points you may be willing to concede.
- Suggested ways that the matter might be settled. This does not necessarily involve revealing your final figures / bottom line but may set out some ideas for settlement including matters that a court could not order.
- Exploring other matters that may be relevant / negotiable that are not the subject of the proceedings.
- Confirm that there is authority to settle and what limits there are and how they might have to be overcome at the mediation, eg. telephone calls, subsequent ratification by a board etc. It is best to have this dealt with up front.
- Make any time restraints clear.

It might not always be appropriate to share all of these with the other side in advance but you can share them confidentially with the mediator by completing the Confidential Mediation Questionnaire referred to above. You can of course also discuss the case with the mediator on the telephone prior to the mediation.

What happens at the meeting?

Lawyers usually represent the parties but it is not always required. If you are not going to be represented at the mediation you should consider whether or not you should take legal advice prior to coming to the meeting. It is also usually preferable that either both parties or neither are represented by lawyers at the meeting. You may bring any other person to the meeting that you think might help you or the process, or simply to "hold your hand". Even where lawyers are involved in the mediation the mediator will talk directly to the clients. This is an essential part of the process.

Initially, the mediator will see each party in their separate rooms so that they can meet him / her and begin to talk through the process and to put people at their ease.

The process usually continues with a ***joint session*** at which everyone is present. The atmosphere is relaxed and informal. The mediator will usually talk about the process and then ask each side to make an initial short statement (no longer than 5 or 10 minutes). You or your legal representative, if you have one, may make the statement. This is a good opportunity to talk directly to the other party and to explain how you see things; and to ***listen*** to the points the other side make. The following points are worth noting in relation to an ***opening statement***:

- You should address yourself to the other party. Remember that is the person with whom you are negotiating.
- It should indicate that you wish to work towards a settlement. This gives a positive impression and is a good start to the meeting.
- You should not belittle the other side or their legal case. It will simply lead to defensiveness and a negative reaction. There is a difference between that and explaining how you see things.
- Explain ***what is important to you***.
- Show that you are trying to understand ***what is important to them***.
- Do not mention specific settlement figures in the opening. It will not help and may well antagonise the other party.

Joint sessions are usually a very useful part of the process; and the mediator will try to encourage discussion. However, sometimes parties are particularly uncomfortable at the thought of sharing a room with each other. If you do not wish to start the process with a joint session you are not required to do so. You can wait until the private session with the mediator to explain your side of things. If appropriate a joint session might take place later if you feel comfortable with that.

Private sessions: After the opening session the parties go into separate rooms and the mediator will shuttle between each of you, trying to ascertain what everyone's real needs are, sometimes testing positions, identifying obstacles to settlement and trying to find solutions.

The process is ***confidential***. The mediator will not reveal anything told to him/her by one side in private session unless it is something everyone already knows about or the mediator is given express authority to do so. You should therefore feel that you can be completely frank with the mediator. The more open you are with the mediator the easier it is for him / her to help the parties reach an agreement. During these sessions you should try to work with the mediator to find a solution.

There can often be quite a long wait between private sessions whilst the mediator is with the other party. You should use this time profitably to consider what has been said, what you might be able to offer and to formulate possible solutions to the dispute. Think "outside the box".

There is no fixed procedure. If appropriate the parties will all come together again in a joint session or it may be that just the parties may meet for a period, or just the lawyers. Each case will depend on what seems best to resolve the dispute. If you have any thoughts about the process you should let the mediator know. This is your mediation.

The mediation is "***without prejudice***" so that nothing said at the meeting can be used in any subsequent court proceedings. However, once a solution is reached the parties write out their agreement, it is signed and from that moment on it is binding.

The mediation is scheduled to last between ***10am to 6pm***. It is best not to go late into the night. People get tired and there needs to be a deadline to ensure that parties focus on resolving the dispute. It also often takes a long time to finalise terms once the basic agreement has been reached. In most cases therefore the basic agreement needs to be reached by about 2pm / 3pm. The mediator will obviously not walk out the door on the dot of 6pm! But it is important to make this a target. If you have any time constraints you should let the mediator and the other parties know as soon as possible before the mediation.

Can the meeting be brought to an end prior to settlement?

The process is ***voluntary***. Anyone, including the mediator, can withdraw from the mediation at any time without giving a reason. You should not therefore feel that any solution will be imposed upon you.

Examples of circumstances in which the mediator might bring the mediation to an end are if he / she considers that one or more of the parties is not negotiating in good faith, that a stronger party is seeking to bully a weaker unrepresented party into a settlement, or if the mediator considers that further negotiations are a waste of time. The mediator will not necessarily give a reason for ending the mediation as this may breach the confidentiality of the process.

What if there is no agreement?

Most mediation meetings result in agreement. Settlement only takes place once the terms have been written down and signed by the parties. This is essential to ensure certainty.

Where no settlement is reached the meeting will nonetheless, almost invariably, still have been useful. The parties will often have clarified their own goals, options and preferences. Issues may have been narrowed and each side will have a better understanding of the other side's perspective. Settlement frequently takes place shortly afterwards and there will be nothing to stop you having another go at agreement. However, you should remember that if settlement is not reached at the mediation meeting costs will start to mount up again. The mediation meeting is a golden opportunity to resolve the dispute and to move on with your life / business.

Conclusion

If you have any questions or want to discuss anything at all about the mediation you should not hesitate to contact the mediator who you have chosen to mediate your case.