The Good Mediation Guide

Easing the way to a positive outcome
The Success of Mediation

It is widely reported that over 70% of mediations result in agreement between the participants on the day, and a further 20% shortly thereafter. That’s a 90% success rate!

Why are some mediations more successful than others? It has a lot to do with how the participants think, act and behave throughout the preparatory stages and during the sessions, and their expectations from such a service. Mediation has the potential to be highly successful, as long as each participant acts in good faith.

We believe that most disputes can be settled using mediation, and with a better understanding about how to approach it, the success rate will be much higher. We have produced this short guide to help you get the best out of the process and increase your chance of a successful settlement.

Getting to ‘Yes’

The purpose of mediation
Mediation is a voluntary process whereby each participant wants to find resolution and put an end to an ongoing dispute. A qualified mediator assists the participants with attempting to achieve this purpose through a process of exploration, discussion and negotiation using their skills to help them agree positive outcomes.

Acting in good faith
When we talk about acting in good faith, we mean each participant has a sincere intention to deal fairly with others.

In order to get to resolution, each participant should therefore be prepared to explore potential positive outcomes, which may involve some compromise or movement away from their initial position, engage in negotiation and move towards a meeting of the minds.

The role of the mediator is to assist participants in finding creative or agreeable outcomes. However, if one or more participants are not willing to change their initial views, are not willing to discuss and negotiate properly, mediation is unlikely to result in resolution.

Agreeing to participate in mediation without being flexible and open minded, and not fully engaging with the process, would be considered as not acting in good faith.
Preparing for Mediation

Mediation is not like litigation (going to court) or arbitration (having someone decide something, which is like going to court). It is designed as an assisted form of discussion and negotiation. Therefore, participants should consider their positions in a forward-thinking manner.

Preparing for mediation requires an acceptance of the current situation and events leading up to the current date. However, it is not an evidence-based or review of the issues in an adversarial context. Rather, the purpose of mediation is to use the knowledge of certain behaviours, actions and decisions to construct a framework for resolving the situation.

How to prepare effectively

Just like anything in life, preparation is the key to success. To provide the best opportunity for your dispute to be settled, we suggest that you consider some of these general questions, which will also assist with preparing effectively for mediation:

1. How long has the dispute been running for?
2. What are my options if mediation does not work?
3. What costs have been incurred to date, and what is the likely cost if I do not pursue mediation and a settlement?
4. What do I want to achieve by using mediation?
5. What will help me to re-think my position and agree outcomes?
6. What am I prepared to agree to from the outset (to narrow issues and ensure focus is on the important aspects)?
7. How will I approach the mediation sessions? Am I prepared to talk openly and honestly about the issues and finding positive ways forward?
8. Mirrored behaviour: how do I hope all participants will behave in the mediation sessions?

Which documents are required?

Unlike preparing for court, your mediator does not need to see all the evidence to support arguments, is not interested in whether some aspect can be proved or disproved and is not looking at whether there have been breaches of codes of practice or other regulatory or procedural requirements.

Instead, your mediator needs to understand the issues and how you arrived at this position. They will be looking to see what options you might consider, and acceptance that each participant has points which they want to address.
Which documents are relevant?

The best way in which to prepare for mediation and to identify which documents or correspondence to share, is to answer a series of short questions. You may need to repeat this process if you have multiple issues with many documents. The core aim is to be able to explain concisely what your issues are without too much reliance on referring to documents.

The types of questions might include:

1. What is the key issue I have, or which has been raised?
2. What are my thoughts about this key issue (how has it affected me and the other participants, even where this may be by perception)?
3. If I were to respond fully about this key issue, what would I say, and how would I support my point of view?
4. If the issue is one which seems very important to the other participant(s), how can I make this better for them (even where you disagree with the issue)?
5. How would I rate this issue in terms of importance? Provide the full list of issues and mark it against these. i.e. if there are 10 issues, grade each from 1-10.
6. Can I explain why I have graded this issue as such?
7. Does the document I intend to share explain or elaborate, or support the point I am making or responding to?

Mediation etiquette

Mediation is a professional process and one which must be conducted as such. Accordingly, each participant is expected to show respect to the others and to your mediator.

Language used and behaviours to be displayed must be non-personal and purely professional. It is important to raise points in issue during the sessions but not in such a manner as to cause offence, be derogatory or descend into an attack on the other participant(s).

Whilst your mediator will establish and foster the expected standards of etiquette from their first point of contact with you, if this is not upheld by the participants, they have discretion to terminate the mediation.
Our top tips for ensuring good mediation etiquette

1. Understand your points: Write lists and clear summaries from your perspective

   a. The issues which you have been dealing with may have taken place sometime in the past or they may be complex and require proper thought as to their chronology (the order of events) or the factual matrix (what happened). We suggest that you write down everything that happened in date order and be as short and succinct as possible.

   b. After you have prepared the above, look at the situation from the other participant’s perspective (an alternative viewpoint). Identify where there may have been a reason for the issue being raised, even where you disagree with their point of view.

   c. Have a copy of the chronology and summary to hand at the mediation session(s) and be prepared to talk about the issues with the other participants. Use the alternative viewpoint to help with using appropriate language in your responses to points raised by others.

2. Be prepared: Pre-mediation sessions

   d. A pre-mediation session is a valuable opportunity for you to speak confidentially with your mediator about the process, your thoughts and ask them any questions you may have. This is also a good opportunity to set the scene for them to understand the issues and allow you to explore your initial thoughts about resolving these.

   e. Pre-mediations are part of the mental agility aspect of preparing for mediation. Your mediator will talk you through everything and this will help you think about how you want to approach the joint session and which issues to raise or deal with first. You can ask your mediator for any hints about preparing in the best way to make the most of the mediation session.

   f. These are provided to each participant equally and the mediator will remain impartial throughout. They will never disclose anything you say to them unless you ask them to or have provided authorisation to do so.

3. Be clear and objective: Framing issues or questions objectively

   g. When you are asked to set out your position or are asked about your views or invited to ask questions, please consider how you would like to be addressed by the other participant. Issues should be framed in an objective and non-personal nature. Objective means that you can look at something from a distance and use language which sets out a point without personalisation. The following example may help:
i. **Objective:** The issue of non-payment was raised, and it is accepted that this may have caused distress to the other participant. However, our records show that the payment was made on [DATE] and [OTHER PARTICIPANT] was informed of this by email on [DATE].

ii. **Personalised:** You said that we didn’t pay you. But we did and I know that [COLLEAGUE] paid and told you on [DATE] but you keep denying this every time.

h. In i. above, the manner in which this is phrased sets a professional tone and is based on fact. It also recognises that even though the assertion is disputed, it recognises the other participant’s view on late payment. This fosters a sense of trust and understanding which is important when moving towards thinking about agreeing a way forward. Did you notice in contrast that ii was a personally directed statement which although presented facts, was not done so in a professional or respectful tone? Think about how you would phrase your own issues to sound more like i. above.

4. **Think language: Avoid emotive language**

   i. Getting to resolution means accepting a situation and working together to move forward. This is very difficult to achieve if one or other participants uses emotive language to address the issues at hand. Mediation is a staged process which involves a certain level of venting (allowing emotions and issues to be explored safely) before resolution can be proffered. However, participants need to consider the reactions of the others when presenting their points or addressing those raised. This recognition is an important element of acting in good faith and being able to reach agreement at the end of the process. Rather than being emotive, set out your points clearly and concisely and without referring to accusations of ill-behaviour of the other participants. Here’s an example:

   i. **Objective:** Although I raised a complaint, this was not dealt with in the 14-day time-frame which is set out in your complaints policy. In addition, when I contacted your office for an update, I was informed that there was no knowledge of my complaint. When I received your official letter of response, this did not address the points I raised and left me to consider that my complaint was not dealt with appropriately.

   ii. **Emotive:** My experience of your organisation was so bad that I was outraged by every interaction. You and your team’s inability to deal with my complaint came across as arrogant and I was upset and enraged by your attitude.

j. How did ii make you feel? It is likely that you reacted to this example more than the one above. The difference between the two examples provides a clear indication of how your words can make people feel. It is important that you phrase your words and the issues you’re raising in an as objective and factual basis as possible.
5. Ending remarks: Closing the session

k. It may be that a lot of complex and lengthy discussion has taken place. It is advisable that you take a note of important points or key actions. At the end of the session, we suggest that you do the following:

   i. Confirm your understanding of the points raised/agreed
   ii. Confirm your understanding of any agreed next steps and any deadlines
   iii. Remain polite even where no agreement has been reached and thank everyone for their time and attempting to settle (if no agreement was reached). Often, where settlement is not reached on the day, it is shortly afterwards. Therefore, remaining polite is important.

l. The mediator will round off the session and confirm any next steps. Where you have reached an agreement, they will circulate the Mediation Agreement for immediate e-signature (if online mediation) by each participant. Please sign this upon receipt and confirm the same to the mediator.