A Guide to Mediation Advocacy for the Bar

Helping you get the best settlement for your client

Purpose:	To assist barristers in mediation advocacy
Scope of application:	All barristers
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This assistance document is to help barristers in situations where they are involved in mediation advocacy.

Contents

PRELIMINARY

For the benefit of those who are unfamiliar with mediation and how it differs from Litigation or Arbitration the following diagram maybe useful

REMEDIES

NEEDS WISHES

RIGHTS

In Court, an Arbitration or a Tribunal, the Judge, the Arbitrator or the Tribunal is concerned with the parties' respective rights and whether they have been impaired or breached by the actions of the other. If they have, then the Judge, Arbitrator or Tribunal is constrained by Law, the Arbitral Agreement or Statute to award the available remedies. However, in every dispute the parties have needs and wishes which are not necessarily fulfilled. As advocate in litigation, we are instructed to win; in mediation, we are paid to help our client to resolve the dispute. This subtle but vital difference in role once appreciated will enable us to achieve the best result for our client. It is important to bear in mind of course that the 'best result' may not be a complete resolution, but properly conducted, every mediation should produce a beneficial conclusion.

We start from the premise that **ANY** dispute is capable of resolution through mediation **provided all parties come with a genuine desire to explore settlement**. However, willingness to try and resolve matters is only the start and the success or failure of mediation can depend upon the advocacy skills of the parties' representatives.

This short guide is designed to assist you with each stage of the mediation, so that whatever the conclusion, your client will appreciate that it was worthwhile, and, more importantly from our point of view, your contribution made a difference. This guide covers three stages.

BEFORE THE MEDIATION STARTS

1. Preparation

1.1 The Advocates.

a. It is vitally important for those representing clients in a mediation to be fully prepared. One of the commonest reasons why some mediations go wrong is a failure by one or other party to prepare properly before going to a mediation. Preparation for mediation should be at least to the same level as when preparing for trial, and then additional preparation bearing in mind the different role we are expected to play. Although mediation is not a trial, if one party is ill prepared it becomes all too painfully apparent in a mediation, particularly when appearing against a party who is well prepared and knows precisely where they are going. In many ways, preparing for mediation is sometimes more difficult than preparing for trial. At least at trial or in an arbitration there is a judge or an arbitrator to decide an issue, in a mediation the advocate is faced with an opponent who is equally certain that his view of the law/the facts/the outcome of the case is as strongly felt as your own. Lawyers may have to dispute the issue with their opponent in the presence of both sets of clients. It is not easy, and being ill prepared is the worst possible position to be in.

b. Remember that in mediation the advocate has two unique advantages which are **never available** in a trial: it is the only occasion when you have the opportunity to speak **directly** to the other party and to **the mediator**. Don't waste those unique opportunities.

1.2. The Client.

a. An equally common cause of a mediation going wrong is the ill prepared client. A mediation is more than likely to fail to achieve a resolution if the client has not considered with their team beforehand three essentials:

'what we **must** have out of any settlement'; and
'what we **cannot** possibly have'; and
'what we **would like** to have if possible'.

b. If you allow your client to enter into a Mediation without having properly prepared for it along the lines set out above then not only will they fail to get a result with which they will be satisfied at the Mediation but the person they will blame, of course, is you!

c. Obviously, the expectations must be realistic and managed. Once you have achieved the 'shopping list', consider sharing it with the mediator. Too little use is too often made of the mediator's unique position.

1.3. The Bundle.

Sometimes barristers are sent boxes of ring files, trial bundles, full witness statements, all the exhibits. Given that a Mediation is not a trial, one should give careful consideration as to what is absolutely necessary in a mediation in order to provide sufficient documentation for the Mediator to understand the nature of the dispute, the parties' respective positions, and also to allow the other parties to have in the bundle what they need for the purposes of the Mediation. What can create a problem is if the bundle is prepared unilaterally and the other party complains that half the most important documents for their case have been omitted. A mediation is unlikely to fail simply because of complaints about the bundle itself, but there can often be a breakdown in the mediation when one side produces a document the other has never seen before. Last minute expert reports are a prime example which can cause a mediation to founder. If you are planning to use an expert report which is not ready, say so beforehand and avoid the accusation of 'ambush'.

1.4. The Mediation Position Paper.

Curiously, an aggressive Position Paper can cause more upset than the most polemic pleading. Somehow clients can live with rude combative letters passing between their respective legal advisers, and even read with equanimity diatribes criticising their behaviour and alleging heinous breaches of contract or duty, but, put in what they regard as a rude and uncompromising Position Paper and they immediately cry 'foul'; 'they are not serious about mediation' and ask 'what is the point?', 'they are not hear in good faith. An ill-judged Position Paper can cause a mediation to be pulled by the other side, and mediations can go wrong from the start because of the perceived lack of good faith by those on the receiving end.

1.5. Experts. Mini mediations.

If a dispute revolves to a greater or lesser extent around expert evidence, a mediation is almost certain to go wrong if each party serves expert reports which express widely differing opinions and there is no attempt at a rapprochement before the mediation itself. Joint meetings seldom resolve much, and there is nothing more soul destroying for the 'commercial' team than to sit around a long mediation day while their legal team and the mediator try to get a common position between intransigent experts. Failure to address this problem before hand can often be fatal for a successful outcome in the mediation. A successful approach can be to first hold a 'mini-mediation' with

experts to get them to a position they can sign up to for the purpose of assisting the parties in the mediation.

1.6. The Mediator.

This is obviously extremely important. Every person has a different idea as to who is the best Mediator for any particular dispute. When advising clients you must decide whether you want an evaluative mediator or one who is going to simply facilitate or, best of all, a mediator who is able to do both as and when required. We recommend not to have a particular predetermined style for any particular dispute but to be ready to adapt to whatever the parties want on the day as and when. Ian Hanger KC, expresses the view that, in his experience, members of the legal profession choose a mediator who:

a. Is a senior practitioner trusted by the parties;
b. Has a knowledge of the area of law; and
c. Has some mediation skills.

Most lawyers when choosing a mediator wish for all three without necessarily specifying whether one is more important to them than another. We would add that trust and experience are equally important and knowledge of the area of law a necessary ingredient.

1.7. Preparing the Mediator's Brief.

This is a unique opportunity for the advocate to help the Mediator to understand not only what the dispute is about, but their own client's position. Mediators may receive confidential briefs from one party which is not copied to another. Do not overlook the possibility that you can do this. [See also 2.4 "Speaking to the Mediator"].

2. Foresight

2.1. Anticipating the reaction from the other parties.

Too often a mediation has failed almost at the start because one party has misjudged the reaction from the other parties either in the plenary session or in response to their Position Paper. Most reactions are predictable and therefore should be anticipated and factored in so that the mediation is not derailed by the disappointment or anger of one's own client at the reaction from the other party.

2.2. Getting the representation right.

This decision can make or break a successful mediation. Apart, of course, from the real decision maker, and make sure which is the real decision maker, who should attend the mediation is of vital importance. If there is an imbalance of representation between the parties this is bound to lead to friction and very often prevent a settlement occurring. Do not underestimate the sensitivities of the lay client in terms of the effort and time (and money) they are putting into the mediation and if they fail to see a similar commitment from the other side, the mediation will get off to a bad start. Very often there are complaints at the mediation that 'we have sent along our Chief Executive, the other side have only sent along the Manager' and similar complaints in relation to experts, witnesses etc. If in doubt, liaise with the other side, there is no harm in talking to other parties before the mediation takes place so as to be able to get the best out of the day and provide your clients with the best opportunity to achieve the solution they want.

2.3. Flexibility.

One of the commonest failings in a mediation which often leads to no settlement is an absolute inability by one party or another to be flexible. The preparation of the client and those representing them requires the need at some stage to be flexible. If this has not been addressed before the mediation there is a danger that the inability to be flexible in terms of a potential solution will cause the other side to regard that as a sign of complete intransigence and, worse, bad faith. One cannot always anticipate what 'outside the box' thinking might produce by way of a possible solution, but readiness to consider such suggestions is an essential requirement of a successful mediation and preparing the client to be flexible is the mark of a good mediation advocate.

2.4. Speaking to the Mediator.

This can be critical. We don't mean of course the preliminary courtesy call, but failure to tip off the mediator beforehand about an issue which is a 'must' or a 'no-no' for your client can lead to disaster. Not telling the mediator about personality clashes which are not apparent from the papers can be a classic cause of a failed mediation. The preliminary contact with the mediator provides parties' representatives with a unique opportunity to help the mediator to understand not only what the dispute is about, but their own client's position. How often have we, as advocates, wished we could see the judge and tell him what the case is about or tell him something about the case which we think is vital that he understands in order to be able to determine the case? With a judge of course it's impossible, with a mediator not only is it possible but it is highly desirable and failing to use the opportunity may deprive your clients of an opportunity to secure a settlement.

AT THE MEDIATION: THE PLENARY SESSION

3. Never pass up the opportunity of an opening plenary session.

Too often a mediation does not result in a settlement because the parties have refused to take part in a plenary session. This is a unique opportunity that should not be passed up and simply dismissed as being "unnecessary". You may be telephoned to say "we don't think we need an opening session, we both know what the other side's position is". Encourage parties not to take this attitude, there are several reasons why. The opening session provides a vital opportunity for the mediator not only to understand who the decision makers are, what their aims are, but also the effect that they have on the other side. This is an essential element in mediation which is unavailable at trial. Sometimes there are real concerns that the degree of animosity or distrust or even fear between the parties will dictate that a full plenary session may set back the mediation process. If that genuinely is your concern share it with not only the mediator but also the other side so that you are not accused of 'funking' a face-to-face meeting with the other side's principals. If there is a real concern that an early face to face meeting by the parties themselves, discuss that with your opponent and the mediator.

4. Alienating your opponents.

The importance of language and style of speaking in an opening statement cannot be over emphasised. The words used and the manner of delivery will influence the way the mediation progresses throughout the day. Immense damage can be caused by an inflammatory address and can 'put back' the settlement considerably while the mediator tries to repair the damage. Sometimes, even after a long day in which the unfortunate events of the opening session have been smoothed over, the resentment caused by injudicious opening remarks will return and destroy what looked like a promising resolution.

5. Language best avoided.

Overstating one's case will provoke a reaction. Insisting on success: "You must agree with us"; "Your case is hopeless"; "You have no answer"; "This is a try on"; "This is a crude attempt to extract money"; and the myriad other ways of asserting the overwhelming strength of one's case will cause the other side to be equally assertive in support of their own client's case and the mediation becomes an acrimonious trial with the legal teams forgetting why they are there in the first place! There are ways of making a point without running the risk of scuppering the mediation at the outset. Equally, there are ways of having a sensible discussion about an issue without the mediation becoming a trial.

6. Do's and Don'ts for the Advocate.

Remember mediation is not a trial, don't hector the other side, don't condescend, and don't treat them with anything less than respect. Your body language is hugely important, the way that you look at the opponent and the other side's clients is vital. If they think you are arrogant or rude or worse, incompetent, then they will have no respect and they will not do a deal. If they respect you they will listen to what you say. If they gain the impression that you know what you are talking about then they are much more likely to move from their own arguments and give way to yours. Advocacy is always the art of persuasion, the difficulty in mediation is not persuading a judge who is going to make a decision, you have to persuade the other side's clients and their representatives that perhaps their position might not be as strong as they thought and that yours might be stronger than they think. That is the real test of an advocate in a mediation. Do always establish a rapport with your opponent if you can. Never lie to the mediator, it doesn't work, a good mediator will see through it and you will lose their respect and the mediator's respect for you as an advocate. Dishonesty is serious misconduct (gc96.1) and could result in disciplinary action by the BSB.

7. Don't duck a difficulty.

Just as overstating one's case may result in no settlement, refusing to engage with the other parties on the issues can also cause a mediation to end without a settlement. "We are not here to debate the legal points"; "It's all in our pleadings"; "Read our protocol letter"; "You are just wrong"; and the numerous variations on the same theme, are quite often interpreted by the other side as a tacit acceptance that you recognise that you are vulnerable. The consequence then is a hardening of their position and an increasing unlikelihood of a resolution. Be prepared to deal with the real issue if necessary and, if you have a weak point, concede it. That will add more credibility to your good points and will engender more realism on both sides. It is essential that you prepare your client for any necessary concessions, agree them beforehand and also prepare the client to be flexible where necessary.

THEREAFTER.....TO THE END GAME AND SETTLEMENT?

8. The first offer.

Mediations can be scuppered by an unrealistic first offer. Remember that there are three types of offer. Acceptable; Unacceptable; and Interesting! A patently untenable negotiation stance or a lack of pragmatism is just as bad as an over-valuation of one's settlement position. The trick is to make an opening offer which sets the agenda from your client's viewpoint without provoking the tired old phrases like: "We are not bidding against ourselves"; the John McEnroe response "you cannot be serious"; "Think again"; or worst of all: "We see no point in staying!" Conversely, the response is equally important to get right and a failure to do so may itself result in no settlement.

9. Absence of decision-making authority.

A frequent, but unforgivable cause of a failure to reach agreement is the absence of the real decision maker. 'At the end of a telephone' is no substitute for experiencing the ebb and flow in a mediation, and, insurers apart, who normally trust their legal team, it is vital that the real decision maker attends the mediation.

10. Mediation is a *process*, not an amount of time.

How often is this simple truth forgotten! Drawing inferences from the amount of time the mediator spends with one side, or the time taken to get a response to the last offer can lead one down a false trail. It is vexing sometimes to be waiting an age for a response, but don't read anything into it. Use the mediator especially when formulating offers as the mediation progresses. Seek their opinion: might the other party react if we offered X? Fresh perspective – on the *dispute* and on the *negotiation*. Neglect to use the mediator to the full can hinder a successful resolution, and the later in the day it is, the more important it is to get the exchanges right.

11. Last minute changes or conditions.

One of the most disappointing reasons why a mediation fails to achieve a settlement is the introduction of a new point or a condition of settlement which has never been raised before. Disappointing, because it could normally have been raised earlier if not at the beginning. Downright aggravating if the late introduction is a tactic. Inevitably the other party will suspect a malicious motive, and all the good which has been done during the day can be destroyed in a moment.

12. The Settlement Agreement.

Don't leave this to the last minute. It is a curious phenomenon that having spent the day helping their respective clients to a resolution of the dispute, the legal teams inexplicably too often adopt a confrontational stance over the drafting of the Settlement Agreement! Is it an inability or unwillingness to let go? A disappointment that weeks of future work have disappeared? Whatever it is, don't fall out with your fellow professionals over the terms of the Settlement Agreement. If you must use boiler plate clauses, the last thing anyone needs at the end of a long mediation is a row about whose clause is best! It is important to have essential elements of any settlement agreement before you come to the mediation. If a particular form of words is required, bring it with you; if an apology is required, bring a draft with you; similarly, a reference etc. Consider tax consequences, VAT and any other potential trap well before the end of the mediation day. It is essential to do as much preparation towards a settlement agreement as you would towards the mediation itself.

Make a list of the essentials that you need in any settlement agreement. If you have that at the beginning of the day with you then nothing will be overlooked. There is nothing worse in a mediation than drawing up an agreement and somebody comes up with a vital clause or issue which hasn't been the subject of the mediation but which is essential to the settlement agreement. Many a mediation has almost foundered at the last because a party has insisted upon a particular clause which has never been subject to negotiation. It always promotes a row and sometimes prevents what would otherwise have been complete resolution taking effect. Most important of all, if there are any special conditions make them clear at the outset so that all subsequent offers and counter offers are made on the same basis. Failure to do this has resulted in many a mediation collapsing at the last minute.

13. Keep the Door Open.

If settlement cannot be reached on the day, make sure that the door is left open. Leave offers open; consider adjourning for a limited period; keep the mediator in the loop. Lastly, never leave a mediation which has not produced a settlement without knowing the three essentials: Precisely why there was no settlement; what the full consequences are; and, as far as possible, what each side's respective real final positions are.

14. We are here to help.

Remember that the Bar's ADR Panel is composed of some of the most experienced mediators in the United Kingdom: if you have a problem before, during or after a mediation, we are here to help if we can. We would much rather help you avoid a potential problem than help you out of one!

Important Notice

This document has been prepared by the Bar Council to assist barristers on matters of professional conduct and ethics. **It is not 'guidance' for the purposes of the BSB Handbook I6.4, and neither the BSB nor a disciplinary tribunal nor the Legal Ombudsman is bound by any views or advice expressed in it**. It does not comprise – and cannot be relied on as giving – legal advice. It has been prepared in good faith, but neither the Bar Council nor any of the individuals responsible for or involved in its preparation accept any responsibility or liability for anything done in reliance on it. For fuller information as to the status and effect of this document, please see here.