



PREPARING FOR MEDIATION WITH NIGEL WADDINGTON

Please download and fill in this document so that I am well briefed
on what you hope to achieve through the mediation process.

1. Mediation meeting to take place on: [INSERT]
2. Start time of [INSERT] a.m. on a Confidential and Without Prejudice basis.
3. Mediation Venue: [INSERT]
4. Private pre-mediation conference with each participant on Zoom or Teams currently planned for: [INSERT DATE]

[In some cases a pre-mediation site visit can be arranged to identify relevant features of a property that would assist in my understanding the dispute]
5. Please list people you intend to have accompanying you at the main mediation meeting (please include their role / authority to settle and email address): [INSERT]

Thank you for choosing me as the Mediator of your dispute. Mediation is acknowledged as a highly effective process and disputes such as yours are typically ended or greatly narrowed within the standard one-day model of the process that operates in the UK.

Introductory points

I have set out a general explanation of the procedure so that you and anyone accompanying you will know what to expect. This will enable the meeting to run smoothly and allow us to make progress from the very start through a collaborative approach. Please do send me any queries that are not answered by my explanations in the pages below.

Time passes very fast during a mediation. The more familiar you are with the process, the more efficiently our time will be used. Even more important is full preparation beforehand. I repeatedly find that this considerably raises the likelihood of settlement and enables a smoother experience.

Pre-mediation Meetings:

I always find it extremely helpful to have an initial separate meeting with each participant. This enables me to understand the history of the dispute and the issues contained in it. Zoom or Teams meetings are ideal for this. These meetings also help to put minds at rest about my role and answer questions from the participants or their lawyers. It is important that the electronic meeting invitations are sent only by me so that I can control entry to the meeting.

Mediation Brief and Documentation

I will need to be sent an agreed bundle of relevant documents which everyone can refer to during the mediation. This typically consists of:

- Letters, emails, notes of discussions and meetings, photos, invoices, accounts etc
- All court papers in cases where proceedings have been issued

Thank you in advance for co-operating with each other to collate this bundle. It contains the core content, providing clarity to everyone. I will look forward to receiving this as soon as it is available. My practice is to ask that this is sent to me at least 7 days before the main mediation meeting.

Position Statements

Each side should provide a Position Statement to me and to each other. There is no particular format for this document but, as far possible, it should contain the bulleted points below. The effort put into a well-prepared Position Statement can save hours of time during a mediation and make the difference between settling and continuing to a trial.

- A brief outline of the facts giving rise to the dispute. A chronology of dates and events is very useful for this which can be attached at the back.
- Your summary of what is agreed ("agreed facts") and not agreed ("the issues")
- Pointers to evidence which supports your case and where to find it in the jointly prepared bundle).

- If you are waiting to obtain evidence, an indication of when you think it will be obtained (this will need to be before the day of the mediation)
- What you see as the strengths and weaknesses of your case
- What you see as the strengths and weaknesses of the other side's case
- Any 'red herrings' (to be ignored) or 'elephants in the room' (to wake up to)?
- Settlement offers which have been rejected, or are still currently on the table

Your Position Statement will be seen by the other participant. Therefore please also let me have a separate **confidential note** to give me your **private thinking** behind the Position Statement. This is a good example of how the strict confidentiality of the mediation process (between the parties and also from the outside world) gives me valuable insights into how a dispute can be settled.

My experience is that this detailed preparation saves hours of time at the mediation meeting and focuses attention on a forward-looking resolution rather than aspects that might have mattered in the past but now do not. When people talk about "coming to mediation with an open mind" they are referring to the almost unlimited range of settlement options available compared to the narrow outcomes of litigation. Part of my role is to assist you in identifying that far wider range of options.

The Mediation Agreement

Please sign this and return it to me. By following the obligations contained in it, you unlock the advantages that have earned mediation its reputation as the most effective dispute resolution process. I will circulate the signed agreements to you when I have added by signature (there is no need for all the signatures to be on the same document). By entering the Mediation Agreement you agree that the process will be conducted confidentially and without prejudice, providing you with complete safety and peace of mind. This gives us all the space and confidence to work freely to reach a settlement.

More on the safety of the mediation process

The confidentiality in mediation is a two-layered, three-way contractual promise between the mediator and the two participants under which no one will reveal:

- what happened or what was said during the mediation to the outside world;
- private communications between a participant and the mediator (unless the mediator is given permission to reveal these in the interests of reaching settlement).

My contractual duty of confidentiality means that no one is permitted to call me as a witness if the dispute is taken to trial.

Without Prejudice means that if the mediation does not succeed and the dispute is taken to trial, no communications between the participants during the mediation (such as unaccepted offers of settlement) are permitted to be revealed to the trial judge unless the participants agree otherwise.

My role

Conflict Check: I confirm that I do not know either of the participants and I do not believe that I have any conflicts of interest. If I were to become aware of any such conflicts, it would be my duty to bring them to the participants' attention and withdraw, enabling you to engage another

mediator under a new Mediation Agreement.

What I do not do: I will not decide the outcome and I will not act as a judge, arbitrator, adjudicator or decision maker. I will not offer legal advice or give my view of whether I think you have a strong or weak legal case (this is the role of your lawyers). My role is to facilitate, as far as I can, in a settlement of the dispute that is your own and which you can live with.

In our private initial meeting, I will ask you questions to give me a clearer view of what is disputed and what is not. I may assist you to draw up a list of the points that are disputed so that these can be used to create a neutral chronological agenda. I will seek details from you to help me understand what obstacles have prevented you resolving the dispute so far.

Expectations for the one-day mediation meeting

Not every mediation brings complete settlement. However, in these cases, the participants generally do succeed in narrowing the scope and depth of their dispute. This is valuable because, if the dispute does progress to trial, there will be significant savings in legal costs and court time.

I find it helps greatly if each participant or their legal advisor comes to the mediation with a written, without-prejudice, confidential proposal. I then discuss these during the first private session.

Preparing this proposal carefully before the mediation day provides important focus and forward thinking about what offer the other participant might accept. It would therefore be extremely helpful if you would each confidentially email to me this opening proposal before we meet. This will be for my eyes only. Only later may it be communicated to the other participant depending on my private discussions with you and you providing me with permission to do so.

Draft Tomlin Order / Consent Order / Settlement Agreement / Deed of Variation

If no proceedings are yet running it will be necessary for the participants' lawyers to draft a settlement agreement. If proceedings are running the terms of the agreement will need to be drafted into a Consent order or into the schedule of a Tomlin order to be lodged at the court, so that the proceedings are brought to an end. I ask that solicitors / mediation advocates bring with them an electronic draft outline of the Agreement/Consent order/Tomlin order on a laptop, containing any terms that have already been agreed. Amendments can then be made easily and quickly within the time available. Most venues have printing facilities to enable hard copies to be signed.

In the event that lawyers do not attend in person, participants have the option of asking their lawyer to be available all day on the end of the telephone to provide advice while the mediation is running. However, when a settlement is reached, the telephone is not a workable basis for the drafting of the Agreement or order. If no lawyer is present with a participant, the best that can be hoped for is a "heads of agreement" document. This can be taken to the solicitor's office on the next business day after the mediation for checking and agreement of wording with the other participant. This is a more cumbersome process than when both lawyers are present. But will be absolutely necessary to stop any proceedings that are running and to give the participants peace of mind.

Authority to Settle

It is essential that those present at the mediation have full authority to settle the dispute themselves, or can obtain authority to do so quickly and easily by telephone. A person attending may well have authority up to a particular figure, but will need obtain authority from

another person if there is a wish to pay a higher figure. If you need to refer to anyone else for a decision of whatever nature, please make sure they are available throughout the mediation meeting. Well in advance, please tell me their name, status and the extent of their authority. Sometimes, for tactical reasons, a participant may not mention a need to obtain further authority. This generally achieves nothing apart from wasting time. A frequent question during private sessions is “do they have authority to offer that much?” Any doubts about your authority to make an offer will be met with a refusal to accept it. This is an unwelcome stumbling block in any mediation and is avoidable by thorough preparation.

Mediator's fee

This has been agreed in our Mediation Agreement at £[] including VAT per party. The fee includes the pre-mediation meeting, the main meeting, my preparation and (if applicable) staying in touch by telephone for 7 days after the main mediation meeting to assist in achieving a settlement agreement if this is not achieved on mediation day.

The mediator's fee must be cleared in full before the day of the main mediation meeting.

My overtime charge for mediations continuing beyond 6.00pm on the meeting day is £125.00 incl. VAT per hour per party. Any overtime charges will be invoiced to each participant immediately following the meeting, for payment within 2 days.

Attendees at the Mediation

Generally the only attendees at the mediation meeting will be the parties to the dispute and their lawyers. Any observers, such as trainee lawyers or newly accredited mediators, may only attend with the permission of the participants and if they sign the confidentiality agreement. If a participant is attending without a lawyer (for example, with the lawyer available on the phone) they may choose to bring with them someone for general support. Because of the confidential nature of the process I always advise that the agreement of the other side is obtained before doing this. The last thing anyone wants at the start of the mediation day is a fresh dispute. Bear in mind that the fewer attendees there are, the less likely it is that either participant will sense a power imbalance or risk of publicity. Sometimes a “team” arrives for one side only, which can be disconcerting for the other, putting the dynamics in jeopardy. This can be discussed during our private pre-mediation conferences. For similar reasons, please do not share any Zoom or Teams invitations that I send out for that meeting.

What happens on the Mediation day

The process is entered voluntarily. A participant is free to abandon the process at any time (although doing so prematurely is a obviously wasted opportunity). The process is very flexible and is yours, not mine. But my duty to both participants is to control that process in ways that serve your best interests. I usually conduct the day as follows:

- Introductions / Joint opening meeting

During my private pre-mediation meetings with each participant (usually the day before mediation day) I will check that everyone is happy to commence the next morning with this joint meeting. Assuming that three rooms have been booked, this takes place in the “shared room”. It enables everyone to be introduced to each other (new faces may be there e.g. from an insurance company, or a company's management, to provide authority to enter a settlement agreement later in the day). We agree various ground rules. At this stage a little caution is needed to ensure a positive atmosphere, with people speaking only one person at a time so we can all listen carefully to each other.

The Participants usually know each other well enough for us all to use first names, but I will abide by the participants' preference in this.

The initial joint meeting is nearly always my preferred way to begin the mediation and I encourage it very much. Sometimes, where relationships have become very fractured, people prefer not to be in each other's company in the same room. If so, I will direct that we progress straight to the private meetings phase in each participant's own private room. In this flexible process that is fine if it is the most productive way to proceed. Please let me know if you have strong feelings about the initial joint meeting when we have our private pre-mediation meeting. This avoids awkwardness on the day itself.

- Opening Statements

If we start with a joint opening meeting I will invite the participants (often through their lawyers) to summarise what they hope to achieve from the mediation (**not** by suggesting any sums of money or outcomes, but in general terms). This gives you the opportunity to say exactly what you wish to say. It is a rare opportunity for the two sides to hear and see each other. Far more can be expressed this way than by the written word (especially when written by someone else such as a lawyer).

After each participant's opening remarks I like to look for common ground. This will often already be clear from the position statements provided by each side, but the flavour of a particular settlement often starts to express itself for the first time at this stage. We may circulate and annotate a document between us, keeping a tally of evolving points of disagreement with comments inserted for later discussion.

- The private sessions - "Caucuses"

Almost all of the day's work takes place in the two private rooms designated for each participant. My role is to move between the rooms, carrying questions, answers, offers, counter-offers and newly-provided information from one to the other. I will help you to clarify your view of the other participant's position, enabling you to explore the range options for settlement, which typically grows in response to the amount of information exchanged. In these discussions it is essential that you speak frankly to me. Anything said to me in a private session is confidential and will not be repeated to the other participant unless you give me permission to repeat it. For this reason you should not ask me about conversations I have had in the other room. You are free to express anything you choose in whatever language you choose in the safety of our private session.

Private sessions are driven by momentum, and momentum is driven by imagination and hard work. The aim is to generate as many settlement offers as possible, regardless of how unattractive some might seem (and regardless of how unattractive you might think they will be to the people in the other room). Individually unattractive offers, when combined in twos or threes, may provide to the other participant with value that remains hidden to the maker of the offer. If, by the end of the day, the mediation has not succeeded, nothing will have been lost by making these offers. The law prevents them being repeated in court because, under the without prejudice principle, they are privileged from being disclosed to a judge. Contractual confidentiality also provides legal protection from disclosure to anyone else, such as the media or commercially interested third parties. There is therefore no reason not to talk to me freely when providing new information or answering my queries.

During this process you can expect me to play devil's advocate. I will challenge the effectiveness of a suggested offer before it is taken into the other room, which may enable you to refine it into something more attractive that the other participants are more likely to accept. If I ask you questions about your proposed offer, you do not have to answer. I am not

a judge or a policeman. But I will tend to avoid taking offers into the other room if I see a risk of them triggering a walk-out. An offer that is very far away from what is being sought often causes the other participant to say “they are not taking us seriously – let’s just give up and get out of here”). I will measure your offers against objective criteria, road-testing them before taking them to the other room. If I think some refinement of an offer to give is the necessary value, I will tell you and invite you to think more deeply about what the other participant would find valuable (remember that sources of value are not confined to money). Likewise, if you receive an offer from the other participant that is insufficient, my general response will be “give me a counteroffer to take back to them, and give me some reasoning that they will understand for why this is a more appropriate offer”.

During our private sessions I may ask you about:

- legal fees you have paid so far
 - legal advice that you have taken
 - legal advice that you are still considering
 - legal advice that you are reluctant to follow
 - risk assessments that have been conducted
 - estimates (percentages) of chances of success at any trial that is contemplated
 - matters that may not seem immediately relevant and may be sensitive
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- Patience and Stamina

The rate of travel towards settlement varies enormously during a mediation. Sometimes it races along and feels as though settlement is imminent. Later in the day it may feel as though an eternal stalemate will trap everyone in the building until the security team come to lock up.

When I am out of the room and progress is slow, it is tempting to treat this as downtime and to have a rest. Although taking some rest is a good idea, these are the times when so-called option generation should be cranked up to a higher gear. Keeping up momentum is critical in mediation, and there is a limit to how much of it I can provide myself without the participants full engagement. If progress is slow, NEVER take this as an indication that the mediation is failing. It is routine and normal. As I move between the private rooms, I can often see progress when participants cannot.

The important sibling of patience is stamina. Having spent long hours on my feet in civil and criminal courtrooms, I can confirm that mediation is just as tiring as a trial with a judge, jury and multiple witnesses. The human brain consumes large amounts of energy even at rest. When focused on multiple issues for extended periods, please remember your personal requirements of food and drink. I encourage participants to think ahead and to equip themselves with as much as they could possibly need of these. Venues will typically have a coffee machine but little else. Some participants anticipate that a proper lunch break with hot food at a nearby café will raise their prospects of settling. If so, a suitably located venue can be agreed. If so, bear in mind that separate tables (preferably out of each other’s view) will be needed and that I, being neutral, will make my own arrangements elsewhere.

Back in the mediation, I encourage participants to de-compress when the pressure rises. A brief walk in the fresh air can make a huge difference to one's will to keep going.

- Offers and counteroffers

These are the essence of negotiation and mediation. It is not my role to suggest what offers you should make or accept. If an offer is proposed during your private session (either by you or your lawyer) I will often ask for it to be written down to emphasise that you own it (and to safeguard against it being mistaken or inaccurately repeated). I will deliver it to the other participants who may ask me to leave the room so that they can discuss it in total privacy.

If you wish to deliver facts, statements or questions to the other participant, I may well write a verbatim note of these for myself, where the choice of words is critical to the response it will receive in the other room. I will read it back to you first before doing so. I may ask you to write it in my notebook yourself. If these facts, statements or questions seem to me likely to be harmful to the current rate of progress I will either encourage you to reconsider how they are worded, or reframe that wording myself in ways that are more likely to elicit a positive response.

- Time with each Participant

I find this to be the most common query by participants. "Where have you been? You didn't spend as long as that with us". Or "We are getting less attention than they are – you said you were neutral, but we are starting to doubt this". Or privately "Oh, at last he's back! I felt pretty abandoned in this room. I'm getting the feeling that the other side are getting too pally with that mediator. I think he might be trying to "fix" a settlement in their favour". Here are some explanations for why I might leave participants alone for longer than they expect:

Having taken your offer to the other room, I might have been asked to go away again to allow the other participant to consider it privately. I have chosen not to come back into your own room because I asked you to think hard about further offers on an obstinate issue that is coming up next on the agenda.

Or I might be needing to spell out to the other participant how your latest offer provides them with everything they have on the wish list in their position statement. Suddenly they have decided that they want more, and I know that this will put the prospect of settlement in jeopardy. Therefore I need to stay there and spell out the new problem they have introduced.

Or I might be sitting in that other room doing nothing at all, purposely choosing to sit in silence for a prolonged time, like a sphinx, listening to their logic as they discuss old and new options for settlement. If they need to be steered away from irrelevant factors, I will say "how relevant is that". If they are lost for ideas for making new offers, I might ask them what they think you might attach value to. This can take a long time.

To guard against worries about why a session in the other room is taking so long, I often say something like this before I go: "I am going to take these ideas down the corridor now. I'll probably be about 15 minutes, but if it looks like it'll take longer I will come back to put my head around the door to let you know."

When the mediation is finished I will destroy my notes to ensure that confidentiality is maintained. I will also return any papers to you or your lawyers, except the signed agreement to mediate (i.e. the mediation agreement, as opposed to the mediation settlement agreement).

- The documents in the bundle

Please assume that I have read and understood the papers sent to me. Feel free to draw to my attention any particular points contained in them. I will not review legal arguments at the meeting as this is not my role, and it would take up valuable negotiation time. Some participants opt to abandon the legal points available to them (for example if the competing arguments are too finely balanced, or because preserving a relationship is more important to them than “winning” in a contest).

- Settlement and drawing up the agreement

When an agreement is reached on each of the previously disputed points on the agenda (and others that may have arisen later) it will be critical to capture those agreements in writing. This is the purpose of the settlement agreement. It will contain the participants’ newly created obligations to each other. It fills the hole left behind by the dispute. By signing it the parties generate a contract on which one participant can sue if the other participant does not honour the promises contained in it. Drawing up this agreement is not my role. It is the role of the participants’ lawyers, and they have a critical role in ensuring that (a) it is enforceable and (b) there are no loopholes that a participant may take advantage of.

I am happy to comment on any draft while it is being prepared, but this will not amount to legal advice. As I have mentioned above, a great deal of time can be saved if the lawyers bring with them a basic framework for the agreement on a laptop so that the document does not need to be created from scratch.

- Leaving early

Mediation is an entirely voluntary process. A participant can leave at any time (this does not apply to individual lawyers who of course are engaged to stay with their client). If someone does express a wish to leave for whatever reason, I always speak to them privately for 5 minutes to identify why they want to leave and abandon the efforts to settle.

Sometimes the reason is that they feel antagonised (although the separate rooms are designed to guard against this). Sometimes the slow pace leads them to run out of energy and patience (which is unfortunate when there may have been significant expense in hiring a lawyer, the venue, service provider and me). Quite often all that is needed is to take a break by going for a walk, having a snack and resuming. This is my usual advice and it is invariably accepted (saving thousands of pounds for everyone by avoiding a later trial).

- Availability / Cut off time / overtime

On Mediation day I will generally be available on the phone during the hour before the start time (07887 905896). I aim to arrive about 20 minutes before the agreed start time to check that the necessary people are arriving and that agreed facilities (clean rooms, printer, coffee etc) are available. As long as the participants have done full preparation, the vast majority of mediations settle within the one day allowed i.e. by 6.00pm. At this time the building is often being shut down for the evening. If there is too little time to draft the settlement agreement before this time (for example if the basic draft was not prepared by the lawyers in advance) it is sometimes possible to carry on informally in another building until the settlement has been refined into a signed, binding contract or a draft court order has been finalized for sending to the court. I have set out elsewhere in this guidance my overtime charges.

- Feedback

Your anonymous comments on my conducting of the mediation are greatly valued. After the mediation I will send a short electronic form on which I will ask for your feedback. A prompt reply would be much appreciated, while the events of the day are still fresh.

- Continued assistance

It is common mediators' practice to stay in contact with you for 7 days after the mediation without further charge for calls and emails if the dispute does not settle. After 7 days, subject to my availability, I am happy to continue to help at an hourly rate of £125 incl. VAT per party.

I look forward to speaking with you during a pre-mediation conference on a date to be agreed prior to the mediation date.

Good preparation for successful mediations

The following are common preparation points arising in mediations. Many are likely to arise in yours.

It is sometimes possible to envisage an ultimate solution to a dispute before any detailed preparation is done at all. Mulling over those solutions beforehand remains valuable preparation. I certainly do this myself having read the papers, but can only do so if I am well briefed. Providing me with that briefing is a task for participants and their lawyers.

It is a common mistake to think that you must persuade the mediator that a particular settlement is the perfect solution. You do not need to persuade me of anything, as my role is purely facilitative. It is the other participants who must be persuaded. Whether this happens depends on the value that you provide to them in your offers. You own those offers and, likewise, when the settlement is reached, it is owned by both participants.

It helps me enormously to know how far advanced you are in considering possible solutions. Earlier in this document I asked you to send me a confidential note about this. Here are the typical points that it might contain. Please answer as many as you can in your confidential note:

1. What do you wish to get out of the mediation? It might be:

- to settle everything in full on the day for ever (recommended)
- to settle the claim, and maybe (if one exists) the counterclaim too
- to identify certain issues in an ordered agenda for a later attempt at settlement in the coming weeks or months

2. If you achieved one of the above goals, what would it mean for you personally?

3. What do you need to do before and during the mediation meeting to achieve this goal?

4. Is there anything that might interfere with your preparation? Is there a way around this?

5. What if anything do you need to say to the other participant to help the preparation?
6. What if anything do you need to hear from the other party which would help the preparation?
7. What if anything do you think the other party needs to hear from you which would help them and you achieve a successful mediation settlement by the time it is all over?
8. What are your main concerns at this stage?
9. What do you think are the other party's main concerns at this stage?
10. What are the points on which there is common agreed ground?
11. What are the points where it would only take some slight movement from either side to achieve common agreed ground?
12. What do you need to obtain from this mediation process?
13. What do you want to obtain from this mediation process? Consider whether there are differences between your needs and your wants.
14. Do you need or want to repair the relationship that you had with the other participant? If so what needs to be done to get that process underway?
15. Can you already envisage some realistic options for resolving the dispute? If so please put them into your confidential note to me.
16. What will you do if a settlement cannot be achieved in the mediation? What are your alternatives to settling?
17. Out of your alternatives to settling, which one would suit you the best?
18. Out of your alternatives to settling, which one would be the worst for you?
19. For the other participant, what are their best and worst alternatives to settling, as far as you can tell?
20. On the current, limited information available to you (which will expand during the mediation), what might you be prepared to offer or accept to bring about a settlement?
21. You hope, of course, to achieve a settlement on terms that you are happy with. You and your lawyers will push for a settlement that provides you with these. You may well choose to settle on terms which, while not exactly making you happy, are nonetheless terms that you can live with. On the current information, what would those terms be? This will enable me to start getting a feel for your highly confidential "bottom line" (the least you would accept, or the most you would give away).
22. Are there any circumstances in which you might go beyond this bottom line to achieve a settlement?
23. In what circumstances would you abandon the mediation and choose one of your alternatives to settling?

24. How much time and money have you spent so far on the dispute?
25. How much more time and money would be needed to take the dispute to trial? Please have a schedule ready so that we can talk about this at our private pre-mediation meeting.
26. To what extent have you carried out a risk assessment of the legal strengths and weaknesses of your case compared to the other participant's case? Your lawyer will provide you with this if they have not yet done so.
27. If you have had advice from a solicitor or counsel, what percentage chance of success have you been given? Note that if the prospects are very good, you may still be exposed to a risk of paying legal costs.
28. Is there anything else you would like to tell me about the dispute and how it might be settled? Disputes between humans are often made more complex by factors such as hurt feelings, injured pride, perceived disrespect, or breaching of "principles" that one side lives by.

You should think very carefully before coming to mediation if you are only prepared to:

- settle "on your own terms"
- get your "own way"
- teach the other side "a lesson"

You should relish the opportunity of mediation if you are prepared to:

- look for sources of value to the other side that you can pack into your offers
- go the "extra mile" in working hard to satisfy your interests as well as the other side's
- step out of your comfort zone to make offers that will be reciprocated. These might include a secret apology which costs you nothing but gives the other side closure and release
- suspend your disbelief that the person hates the conflict as much as you do, and shares your heartfelt wish to bring it to an end