

Mediated Settlement Conference [MSC] preparation notes.

The purpose of the MSC is to try and find the specific agreement which is acceptable to all parties, and which settles the dispute. The most common reason for failing is that one or other or both of the parties has failed to prepare sufficiently.

The MSC involves a discussion of the case – not a presentation of evidence as occurs in a trial or in Arbitration. Preparation is therefore much easier as it is not necessary to organise witnesses or evidence and there are no formal preliminaries.

The MSC is scheduled for three hours so it is very important that you come prepared to negotiate effectively. The mediator will have talked with you prior to the session, in confidence, and you will probably have briefed the mediator on the background to the dispute as well as the current position. The mediator will also ask you to decide how you would like to see the case settled and how that settlement could be achieved.

The following points are designed to help you prepare your case and present it at the mediation session:

Know your case.

Confirm that you have all the information necessary to evaluate the case. If something is missing or you need further information from the other party please contact the mediator immediately.

List the facts. You will be discussing them at the conference.

Identify and analyse the important and/or contested legal issues involved.

List the strengths and weaknesses of your case and, if you can, of the other sides as well. You will want the mediator to develop tough questions to ask the other side.

Confirm that all necessary parties will be present, a case cannot settle otherwise. [See section on authority]

Ensure you have details or estimates of costs.

Avoid putting limitations on the mediation process. Keep an open mind. No one can force you to offer or accept any settlement.

Develop a settlement strategy.

Remember that the goal of the MSC is to obtain a settlement and cut off further costs and time. Most cases settle out of court eventually anyway. Your settlement strategy should include a consideration of the following:

Determine your settlement positions on liability and damages. Identify the issues that might cause you to change your mind, such as new or clarified information or the abilities of the other side.

Develop a negotiation plan, including where you want to settle and how you plan to get there.

Plan to offer or demand during the private meetings what you will eventually be prepared to settle for.

At the mediation session don't insist that the mediator simply act as a messenger, merely shuttling offers

back and forth. Allow the mediator some leeway in developing possible settlements. One of the great advantages that mediation has over traditional negotiation techniques is that each side has the ability to test offers without having to disclose a specific amount.

Be candid with the mediator. Assist him in determining the best method of persuading the other side of your position.

Determine if there are any facts that you don't want to disclose to the other side. If so, either keep them to yourself or tell them to the mediator in confidence. But remember that you are trying to convince the other side that your settlement position is reasonable. If there are facts that the other side will become aware of later and may influence the outcome, you have very little to lose by disclosing them now. It may make a difference as to whether the case settles now or later.

Authority who should attend the mediation session.

Authority can be a very touchy issue in the mediation setting. The give and take and movement that can take place on both sides of the table can be lost if one side lacks the necessary authority to settle. It is thus essential that all sides come to the mediation session with sufficient authority to settle. This means the parties themselves and not just their professional advisers.

ALL persons who need to approve the settlement should be present at the mediation session.

The opening session. [optional]

After his own opening remarks, the mediator may sometimes ask each side to make a short opening statement – usually 4-5 minutes – explaining the current position, alternatively the mediator may outline his understanding of the current position and check with you that this understanding is correct. If you have decided to make an opening statement, prepare it before the session. Your statement might include the following:

Introduce yourself and perhaps indicate that it is your wish to work towards a settlement. (This gives a very positive impression.)

Go over the facts of the case. If the other side has gone first, indicate any agreement or disagreement with their statement of facts.

Explain your analysis of liability and damages based on the facts of the case.

Be realistic. While you want to present your case in the most favourable way by emphasising your strengths, do not ignore any weaknesses.

Avoid specific settlement figures and emotive language.

Miscellaneous preparation.

Confirm the time and location of the session, and be on time. Arriving late sends the wrong message.

If the case settles before the mediation, please contact the mediator.

Take your files, copies of any documents you plan to give the mediator and the other side, and writing materials. Consider making graphs, charts, or summaries to help make your points.

Prepare an opening statement if needed.

Calculate within what range would you like to settle this case. What offers/demands could you make that might get you to your settlement range?

Remember the mediation is scheduled for three hours so be prepared to help the mediator assist you in reaching settlement.

If you need any help, please do not hesitate to ask the mediator.