PREPARING FOR
COMMERCIAL MEDIATION

PETER TRAVIS
HEMMANT'S LIST MEDIATION CENTRE

Liability is limited by a scheme approved under professional standards legislation.

TABLE OF CONTENTS

4 About this Guide

7 What is Mediation?

8 Why Mediation?

9 The Cast

10 Getting Ready

12 Winning the Mind Game

14 What is a Good Settlement?

16 Reality Check

18 Pre-Mediation Steps

19 The Position Paper

20 Preliminary Conference

21 Cone of Silence

22 Mediation Conference

23 Mediation Stages

24 Negotiation Strategy

27 Common Questions

My first mediation was over 20 years ago. Back then, commercial mediation was still a novelty. The partners at my firm were among California's pre-eminent trial counsel. They taught me to be a courtroom advocate. They could offer little to prepare me for my first mediation.

Luckily for me, the mediator was the legendary Judge Enrique Romero. A pioneer in the mediation of legal disputes. I'll never forget his energy, determination, optimism and intellect. The mediation started at 10am and finished with a signed settlement deed at 10am - the next morning.

Two decades later, mediation is an accepted part of the litigation landscape. But just as my first mediation was a mystery for me, the mediation process is a mystery for most parties who find themselves in a legal dispute.

I've written this guide for parties who are heading to their first mediation. It covers the basics of the mediation process and some ideas on preparing for a successful mediation.

This guide is general in nature. ***Importantly***, this does not give legal advice. I'm a lawyer, but I'm likely not your lawyer. If you have any questions, be sure to raise them directly with your legal representatives.

If I happen to be appointed to mediate your dispute, I look forward to talking to you soon.

Kindest regards

Peter Travis

Peter Travis
Mediator (AMDRAS)
Hemmant's List and Gibbs Chambers

Liability is limited by a scheme approved under professional standards legislation.

WHAT IS **MEDIATION?**

Mediation is a negotiation assisted by an impartial and trusted third party (**mediator**) in a confidential, without-prejudice, off-the-record setting. The mediator encourages parties to communicate constructively, focus on their real interests, and question unhelpful positions or assumptions that might be needlessly fuelling the conflict.

The chief goal of the commercial mediation process is to reach a voluntary agreement setting out the terms on which the parties will end their dispute. No one can force you to end your legal dispute. A court may order parties to attend mediation. But whether mediation results in an agreement is up to you and the other parties.

Businesses are increasingly using mediation as an alternative to litigation

Mediation's voluntary nature means you sit in the driver's seat. You'll be advised by your lawyers and helped by the mediator throughout the process, but your role remains central.

WHY **MEDIATE?**

When it comes to resolving commercial disputes, mediation has four main advantages over traditional litigation.

COST EFFECTIVE

Most mediations end in a settlement. Studies suggest commercial mediation has about a 70% success rate. The cost of mediation is usually about 3 to 5% of the total cost of litigating to trial. These statistics make a compelling commercial case for trying mediation.

TIME EFFICIENT

Businesses value time. Whether it's time to market or the time of senior executives - *time is money*. Litigation is an 18- to 36-month time suck. And then there are appeals. Mediation offers the chance to avoid the delays and distraction of litigation, and get you back to what you do best.

CONFIDENTIAL

Businesses protect their reputations and safeguard their trade secrets, financial records, and business strategies from prying competitors. Mediation's private and confidential process offers the chance to end your dispute away from the spotlight and the risk of a damaging judicial rebuke.

FLEXIBLE

The courts don't negotiate the law. At trial, there'll be a winner and a loser. Your lawyers don't guarantee success. If they did, you'd fire them. Business people price and hedge uncertainty. Mediation lets parties negotiate a settlement on terms that make commercial sense for all parties.

THE CAST

Commercial mediation involves the parties to the dispute, the legal representatives of the parties, and the mediator. Each has an important role to play during the mediation process.

THE ROLE OF THE PARTIES

As a party, your role is central. You'll share insights with your lawyers on the other side's real interests, develop and approve proposals, evaluate new information, specify deal breakers, and assess offers. If you represent a company, you'll need its authority to settle. ***You do not have to speak,*** although you're entitled to do so.

THE ROLE OF THE LAWYERS

Your lawyers represent you and advise you on legal matters. Your solicitor will also help draft settlement documents. The lawyer who you choose to be lead negotiator will speak for you and deal with the other party's lawyers.

THE ROLE OF THE MEDIATOR

The mediator's role is to impartially and even-handedly encourage the parties to constructively explore an informal settlement of their dispute. They'll use various techniques to focus the parties on their real interests, but they won't advise you on the law, the merits of your case, or whether you should accept an offer.

GETTING **READY**

Preparing a mediation strategy will require your team to think hard about your case and the other side's case, and to face some tough commercial realities.

EASY PART

Your lawyers will work with you to develop persuasive reasons for the other party to make concessions to resolve the dispute. They will also work with you on ways to firmly but diplomatically communicate your strength to the other personalities at the mediation.

HARD PART

At mediation, your lawyers should be better at stating the **strengths of the *other* party's position** than the other side's lawyers. Understanding the other side's best points and how they justify their feelings about the dispute will help your lawyers negotiate with tact and confidence.

PAINFUL PART

Informed by all perspectives, you can set realistic expectations for the mediation. Best not to wait until mediation to figure out what a good settlement looks like. Bitter pills will need to be swallowed. A sober reality check before mediation will help you make well-informed commercial decisions at mediation.

Hope is not a strategy

- Chris Voss

WINNING THE **MIND GAME**

Even experienced commercial people should prepare for the mind games that commonly threaten to derail mediation. Here are the most common.

OH NO, EGO

You don't believe you're dishonest, unintelligent, naive, stubborn, rash or weak. Neither do the other parties. Try to find a negotiation strategy that lets the other side move closer to your position while maintaining their self-respect.

ANCHORING TO KITCHEN SINKS

Parties to court battles sometimes throw the kitchen sink at each other by making needless allegations, inflating damages claims, and making retaliatory counterclaims. The problem is that parties tend to anchor to those sinks. Try to figure out how to deal with extreme positions before the mediation.

THE F WORD

People sometimes assume that the other party is a fraud, even though there's a simpler and less malicious explanation. Throwing around the 'F' word - whether or not accurately - often just increases the odds of the other side continuing to intrude into your life and business affairs.

THAT'S SUSPICIOUS

Reactive devaluation is the gut reaction that says '*they're up to something*' when you're presented with an acceptable settlement proposal by the other side. If your first reaction is '*that's suspicious*', your mind might be playing a common trick. Your lawyers will warn you if it really is too good to be true.

KANGAROO IN HEADLIGHTS

Strong emotions often threaten a successful mediation. It's hard to make rational concessions when your amygdala is fired up. Skilled negotiators explain key points with minimal provocation. Making your opponent a kangaroo in headlights risks them freezing, jumping irrationally, and damaging both of you.

DRINKING KOOL-AID

We feel conflicted when our actions and beliefs don't match. This makes us add new details to our beliefs (rationalisation) to explain our actions or ignore facts that threaten to create internal conflict (confirmation bias). Putting down the Kool-Aid and truly understanding the strength of the other side's case better than they do is a superpower in mediation.

WHAT'S A GOOD **SETTLEMENT?**

A critical step when preparing for commercial mediation is estimating the value of what everyone is fighting about.

That step requires a series of predictions about the future. But butterfly wings and black swans remind us that only *The Simpsons* can predict the future. So unless Matt Groening has foretold the outcome of your legal dispute, there's enough risk for all parties to think twice about going to trial.

But uncertainty doesn't mean randomness. The tools used to value assets and develop business plans can also value legal claims.

Figuring out what is a *good* settlement requires commercial litigants to ***think about six factors*** that affect the value of a legal claim.

It is difficult to make predictions, especially about the future.

- Danish Proverb

1 CHANCE OF SUCCESS

What is the chance that you will succeed at trial? If your lawyers have estimated your odds of success at 65%, remember they're predicting you'll ***lose*** 35% of the time.

2 LIKELY MONEY JUDGMENT

Findings of fact, expert opinions and legal arguments make estimating the amount of a money judgment tricky, even if the plaintiff succeeds.

3 ESTIMATED LEGAL COSTS

You and the other side have incurred legal costs and will incur costs going to trial. Court orders to pay costs might have already been made and future orders are likely to be made.

4 OTHER COSTS AND RISKS

Litigation ties up resources better used elsewhere, risks harm to reputation and relationships, and threatens exposure of sensitive information.

5 RISK YOU CANNOT RECOVER

Even if you succeed, there might be a risk that the losing party does not have enough assets to pay. You might only discover this after incurring even more costs.

6 HUMAN TOLL

Litigation can take a toll on staff morale, complicate business planning, and stress commercial relationships.

REALITY
CHECK

After working with your lawyers on the ***six factors*** relevant to valuing the claims in dispute, you're ready to answer the following questions.

Your answers to the following eight questions will help guide your negotiation strategy.

Special Note: As you work through the questions, watch out for a tendency to 'revisit' the six factors to get a more acceptable valuation of the claims. If you find yourself 'tweaking' the chances of success or likely money judgment, you might be losing the mind game.

1. What is the best possible outcome and worst possible outcome at a trial? Can you live with the worst outcome?

2. Can you or the other party financially survive a worst-case scenario?

3. Even if the court orders the other side to pay your costs, what are your estimated unrecoverable legal costs?

4. What are the best settlement terms you could realistically hope to get the other side to agree to at mediation?

5. What are the most important non-financial terms to you and the other party?

6. Is there any way that you and the other party can cooperate to create value, rather than just transfer value?

7. What value do you place on your time and not being distracted from your business?

8. If the other side's offer is just $X away from your final *walk-away* position, what might make you split the difference?

PRE-MEDIATION
FINAL STEPS

After completing the groundwork for mediation, you'll be ready to put together a **mediation bundle**.

The mediation bundle is ideally one or two folders of indexed and tabbed documents delivered to the mediator before the mediation conference.

The mediation bundle usually includes the pleadings, key contracts, critical correspondence, and any documents that a party wants to refer to at the mediation.

If the parties cannot agree on the content of a mediation bundle, they can deliver separate bundles.

Sometimes parties will deliver a **position paper** (also called a mediation statement) with the mediation bundle. A position paper can be an important first step towards persuading the other party that it's better to negotiate a settlement than to keep litigating.

Some parties provide the mediator with a separate **confidential statement** for the mediator's eyes only. This document lets you raise sensitive issues you might prefer not to raise with the other side.

PREPARING YOUR **POSITION PAPER**

1 EXPECTATIONS

The position paper is typically 4 to 8 pages long and is usually given to the other parties and the mediator within a few days before the mediation conference.

2 THE PARTIES

The paper introduces the parties and key personnel to the mediator and explains the relationships between everyone.

3 THE BACKGROUND

The paper focuses on the dispute's key events. A separate chronology might help if a complex series of events is important to the mediation.

4 THE AGENDA

The paper sets out the main issues for mediation, as well as any common ground or issues that won't be raised at mediation.

5 YOUR POSITION

The paper gives your view on factors relevant to valuing the claim, such as the merits, likely damages, risk of non-recovery, and other costs.

6 ATTENDANCE

The paper will state the names and capacities of people who will be attending the mediation for you, including your lawyers.

PRELIMINARY **CONFERENCE**

A preliminary conference (or pre-mediation conference) gives you and your lawyers an opportunity to meet privately with the mediator before the mediation conference.

This conference lets you ask questions, put a face or voice to the mediator's name, and confidentially raise issues that might otherwise go into a *mediator's eyes-only* position paper.

Many parties find that the conference reduces stress ahead of the main mediation conference.

The preliminary conference is typically held close to the mediation and lasts for less than an hour. Sometimes the conference is in person but is usually held remotely by videoconference or telephone.

If the mediator wants to discuss anything in particular, they will let you know before the meeting. Generally, the mediator will want to hear your perspective, what you see as obstacles to the other side agreeing to settle, and tidy up any administrative matters.

ENTERING THE CONE OF **SILENCE**

The next step is the mediation conference. Whether or not your dispute is resolved, ***what happens in the mediation session stays in the mediation***. You cannot repeat anything said during the mediation conference outside the mediation, including to the court. This rule has limited exceptions. If you have any questions about whether something might be repeated, ask your legal representative for advice.

THE MEDIATION CONFERENCE

After meeting with your lawyers, you'll head over to the mediation facility. The facility will likely be a neutral purpose-built centre or the offices of the lawyers for one of the parties. In nearly all cases, the facility will have a conference room for joint sessions and smaller private meeting rooms for the parties.

SETTLING IN

When you arrive at the mediation conference facility, you'll be greeted by the receptionist, who will show you to your team's room. You'll be shown where the facilities are located and how to get a tea or coffee. Settle in and make yourself comfortable. This room will be your place to privately discuss issues with your lawyers and the mediator.

MEETING THE MEDIATOR

When you arrive, there's a good chance the mediator will be there. After you've settled in, the mediator will stop in and introduce themselves. The mediator will make small talk, go over the basic ground rules, attend to any housekeeping (eg getting missing signatures on the mediation agreement), and answer any questions about the process.

STAGES

1 OPENING SESSION

There is often a joint meeting in the boardroom. Everyone is introduced, ground rules repeated, and lawyers take turns speaking to the group. The mediator might ask questions.

2 EXPLORATION

The parties return to their private rooms to confidentially discuss what took place. The mediator visits each room to privately listen to concerns and explore settlement ideas.

3 OFFER EXCHANGE

The parties communicate offers, often through the mediator. Offers are considered privately and counteroffers are made. This can continue for multiple rounds.

4 NEGOTIATION

The mediator moves between rooms, answers questions, identifies common ground, suggests lawyer-only chats and deploys mediator techniques to move past roadblocks.

5 SETTLEMENT

If the parties reach an agreement, the solicitors draft the documents for execution before anyone leaves the mediation. If they don't reach an agreement, the mediation ends.

NEGOTIATION **STRATEGY**

CONFIDENT

Preparation brings confidence. Litigators live in conflict. They know insecure people make ultimatums, threaten walkouts, raise voices and make great cross-examination targets. Project quiet confidence.

TACTICAL

Experienced negotiators make tactical concessions for a strategic win. If you see a chance to build rapport and remove an obstacle, talk to your lawyers. Giving up a pawn to get to the queen is a great deal.

FLEXIBLE

Mediation can raise complex issues needing quick analysis. This can lead to a reactive ‘no’. If the unexpected happens, let your lawyers earn their fee by advising you before you respond. Success might depend on staying flexible.

FOCUSED ON INTERESTS

Courts care about the law, not your preferences. Mediation offers a tailor-made resolution where both parties can focus on self-interest rather than legal rights to get more than they would in their best alternative to a negotiated settlement.

TACTICAL USE OF OFFERS

GOING FIRST

No rules or even hard expectations dictate who makes the first offer. Plaintiffs usually do, but savvy defendants might seize the initiative to anchor expectations, establish a framework, or set the tone.

THE EARLY OFFERS

The first offers should be ambitious but realistic. But they're usually more of the former than the latter. Early offers often play out like the opening act of a highly stylised Kabuki. After the opening act, negotiations begin in earnest.

GATHER INFORMATION

Consider how you might use offers to test resistance ('*we could agree to this, if you could agree to that*') or get more information from the other party ('*we might agree to this if we knew more about that*').

WITHOUT PREJUDICE

Consider any *without prejudice* communications. How have things changed since then? The parties should be thinking about the terms of a *without prejudice save as to costs* offer if mediation fails. Why save your best offer for that letter?

ONE GOOD DEED ...

... *deserves another*. See whether you can encourage good faith by making a concession. Consider what is easy for you but valuable to the other party, what strings will be attached, and the sequence in which you'll give any concessions.

THE OTHER F WORD

Carefully consider whether you'll call any offer a *final* offer. Unlike bartering for a souvenir, an offer isn't said to be *final* unless it really is. Before making a final offer, discuss this with your lawyers and the mediator.

It is wise to persuade people to do things and make them think it was their own idea.

- Nelson Mandela

COMMONLY ASKED **QUESTIONS**

WHO PAYS FOR MEDIATION?

Each party typically pays their own costs of the mediation. This means you pay your legal team's fees and a proportionate share of the mediator's fee and conference facility hire. The mediation agreement will specify your share of the mediation costs.

HOW DO YOU INITIATE MEDIATION?

Start by talking with your solicitor. If your solicitor advises that you're ready to mediate, they can propose mediation to the other party. You don't need to worry about 'looking weak'. Your lawyer knows how to suggest mediation without any hint of weakness.

WHEN SHOULD MEDIATION TAKE PLACE?

It's said that about 80% of legal costs in litigation are incurred trying to eliminate just 10% of the uncertainty around the likely outcome at a trial. Mediation should take place as soon as you can value the claims and assess the value of your best alternative to a negotiated settlement.

WHAT IF YOU DO NOT SETTLE?

Most cases settle at mediation. Mediation is your single best opportunity to avoid the costs of more litigation. If you don't settle at mediation, you can continue negotiating informally or use the court rules to make offers to settle that put costs pressure on the other side if they reject your offer.

PETER TRAVIS

HEMMANT'S LIST MEDIATION CENTRE

Liability is limited by a scheme approved under professional standards legislation.