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# ESSENTIALS INTENSIVE

WEDNESDAY 4 - THURSDAY 5 MARCH 2026

ACT LAW SOCIETY



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# Preparing for Mediation

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ESSENTIALS INTENSIVE | WEDNESDAY 4 MARCH 2026



# Where Is This Presentation Going

1. What is the difference between preparing a case, and preparing for a mediation - change of focus and emphasis
2. What documents will I need for a mediation
3. What can I do to prepare the client for a mediation
4. What other things need to be prepared

# Preparing a Case

In working up a case for your client, you have -

Worked out the key legal issues based on your instructions

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***All aimed at presenting the whole of your case in court for a judge to decide***

# What Is Mediation

A **guided** approach to settling a dispute

A **confidential** negotiation where you can say things that you might not reveal in court

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A negotiation where the outcome will be a **compromise** between competing positions

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A negotiation where the outcome will be a **compromise** between competing positions

**Sometimes** it might be an opportunity to explain your issues to the other side

# The Role Of The Mediator

A mediator -

Asks questions so the parties can explain their case more clearly

Suggests processes to help parties resolve their differences

# The Role Of The Mediator

A Mediator does NOT -

Give advice about the strength of a case

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# The Role Of The Mediator

A Mediator does NOT -

Give advice about the strength of a case

Decide who is right and wrong about an issue

Tell the parties what agreement they should reach

# Therefore, in a mediation -

1. There will not a decision about competing arguments
2. The result will not be exactly what one side wants

# Preparing for a Mediation vs Preparing a Case

*Worked out the key legal issues based on your instructions*

This hasn't changed in preparing for a mediation

# Preparing for a Mediation vs Preparing a Case

*Worked out the key legal issues based on your instructions*

This hasn't changed in preparing for a mediation

*Searched out evidence to support the claim*

This hasn't changed in preparing for a mediation

# Preparing for a Mediation vs Preparing a Case

*Worked out the key legal issues based on your instructions*

This hasn't changed in preparing for a mediation

*Searched out evidence to support the claim*

This hasn't changed in preparing for a mediation

**Set up the best possible outcome for the client**

***But this can't be achieved if the outcome is going to be a compromise***

# Focusing attention on compromise

Compromise requires changing the mindset of yourself and your client -

*Instead of looking at the highest and best outcome, you have to look at the **lowest and worst** outcome and discuss objectively how likely that might be*

# Focusing attention on compromise

What are the weaknesses in my case?

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# Focusing attention on compromise

What are the weaknesses in my case?

There is no such thing as an unlosable case in litigation -

What happens if the judge doesn't accept key evidence on my side?

Judges don't always accept evidence you think is compelling

What happens if the judge accepts key evidence on the other side?

Opponents have evidence and issues you don't know about

# Focusing attention on compromise

In every case,

***there is a real chance you might lose!***

# Preparing For A Mediation - Documents

## 1. Pleadings

*Absolutely essential*

## 2. Evidence

*Not so essential - you won't be proving your case at a mediation*

## 3. Position paper

*Usually required in litigation mediation*

# What does the Mediator need?

*(Assuming the Mediator has not asked for anything in particular)*

- Pleadings
- Position paper setting out a summary of the case

# What does the Mediator need?

## Evidence?

- Some mediators want all the evidence, but not all do
- The mediator needs to understand the case
- But the mediator is not going to decide the case or give detailed advice
- Once negotiation starts, the focus is on compromise, which is not directly tied to issues in the case but on what clients will accept, so evidence becomes less important as a mediation progresses
- *If in doubt, ask the Mediator what they would like to see*

# Preparing For A Mediation - Position Paper

A summary of your position for the mediation -

1. A succinct summary of your case from the pleadings and the evidence –

enough detail to explain, not so much detail that you distract attention

*These are not opening or closing submissions for court!*

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useful to show what negotiation has already happened
3. If necessary, an explanation of why your current negotiating position might have changed from previous offers
4. An opening offer for the mediation  
*This will usually be for the plaintiff, but if negotiations are recent, the opening offer will be from the other side?*

*An opening offer is not always presented in a position paper, but often is, and helps to get parties focused early on negotiating*

# Preparing For A Mediation - Position Paper

In some mediations (eg Federal Court in the ACT), a mediator sometimes asks for a **confidential additional** position paper setting out -

- strengths and weaknesses from your perspective
- a range of possible outcomes that might be acceptable
- an estimate of costs to date, and costs if the case goes to trial

This, of course, is confidential between you and the mediator, and is not for the other side!

# Preparing for mediation - the client

It is essential to have a good interview with the client before a mediation

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You need to –

1. Explain how a mediation works, including confidentiality  
- the emphasis on *negotiation*, not *arguing*

# Preparing for mediation - the client

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You need to –

1. Explain how a mediation works, including confidentiality
2. Have a frank discussion about **weaknesses** in the case as well as strengths
  - why is compromise a good thing

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You need to –

1. Explain how a mediation works, including confidentiality
2. Have a frank discussion about weaknesses in the case as well as strengths
3. Have a frank discussion about the uncertainties of litigation
  - clients often have naive ideas about judges always finding in their favour
  - clients sometimes don't understand that they might be vigorously cross examined and accused of lying or being unreliable

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You need to –

1. Explain how a mediation works, including confidentiality
2. Have a frank discussion about weaknesses in the case as well as strengths
3. Have a frank discussion about the uncertainties of litigation
4. Have a frank discussion about the cost of litigation
  - if it doesn't settle, how much more will be spent
  - if it doesn't settle and I lose, how much might the costs order be

# Preparing for mediation - the client

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You need to –

1. Explain how a mediation works, including confidentiality
2. Have a frank discussion about weaknesses in the case as well as strengths
3. Have a frank discussion about the uncertainties of litigation
4. Have a frank discussion about the cost of litigation
5. Have a discussion about moving on after the litigation  
- what could the client do if they weren't focusing on the case

# Preparing for mediation - the client

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Essentially, you need to explain about **compromise**

# Preparing for mediation - the client

It is essential to have a good interview with the client before a mediation

you need to explain that the **opening offer** is not the expected outcome  
- the opening offers set the **boundaries** of negotiating, but it is almost impossible that your opening position will prevail

# Preparing for mediation - the client

It is essential to have a good interview with the client before a mediation

Sometimes it is good to explore potential bottom lines  
- what outcome might the client **not** accept, and why

# Preparing for mediation - the client

It is essential to have a good interview with the client before a mediation

In some cases, the relationship between the parties personally might be **toxic**

- will the client be comfortable in the same room as the other party when the mediation starts

*e.g. sexual abuse, marital breakdown*

# Preparing for mediation - the client

It is essential to have a good interview with the client before a mediation

If you are acting for a company, an organisation, a government

**- *who has authority to settle????***

Courts are getting antsy about representatives of organisations at mediations not having authority to settle

# Preparing for mediation - the agreement

It is not tempting fate before a mediation to think about how an agreement will be recorded

*- the invariable rule is that if the parties agree at a mediation, the deal needs to be recorded and signed then and there*

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- *the invariable rule is that if the parties agree at a mediation, the deal needs to be recorded and signed then and there*

*Do you have a template for an agreement on your system?*

*Do you have a laptop or a tablet to fill in the template at the mediation?*

*How will it be printed so it can be signed - e.g. is your office nearby, or do you have a portable printer with paper?*

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*- the invariable rule is that if the parties agree at a mediation, the deal needs to be recorded and signed then and there*

Not every detail of an agreement might be able to be worked out at the end of a mediation -

*Masters v Cameron [1954] HCA 72 at [9] -*

1st category - parties are bound, but want to set out their agreement more fully in a written document to be prepared - agreement is immediately enforceable but a more detailed written document will be drawn up soon

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1st category - parties are bound, but want to set out their agreement more fully in a written document to be prepared - agreement is immediately enforceable

*Terms to be set out more fully might be e.g. payment methods, mutual releases, etc - but the essential agreement is not affected*



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