

HOW TO ...

Do away with a mediation summary (and why)

Rebecca Clark believes there may be better ways to begin proceedings

Whether you call them mediation statements, summaries or position papers – as a client-user of mediation turned mediator, I remain confused about the purpose of a mediation summary. Often, this ill-defined document will comprise a précis of the written pleadings, a section on why that party is almost certain to win at trial, followed by: ‘nevertheless we are approaching the mediation in the spirit of settlement’. But if mediation is all about the power of discussion, face-to-face meetings and compromise, why do we produce a document more suited to the courtroom? I’d like to suggest there are other options.

TAKE TO THE TELEPHONE

Briefing the mediator is critical, but how to achieve that is up for debate. I much prefer to be briefed on the telephone (by the solicitors and their clients) before I read the documents. For me, mediation is about the people attending, their sensitivities, wants and needs – things that are rarely articulated in writing. Bearing that information in mind when subsequently reading through the documents is a valuable part of my preparation.

HIT THE HIGHLIGHTS

A properly prepared client is key to a successful mediation. However, from a psychological perspective I question whether a mediation summary assists with this. If we follow the theories of Dr Robert Cialdini, the “godfather of influence”, writing a dry, formal recitation of the facts should serve only to entrench the client’s position further. In my experience, reading how good your own case is does not put you, or those



mandating, in the best frame of mind to compromise. If the aim is client briefing, far better to prepare a document highlighting strengths, weaknesses and key negotiating strategies than one designed to be exchanged with the opposing party.

PRESS YOUR IMPORTANT POINT

One really useful function of a statement is the opportunity it can provide to speak directly to the client on the other side. You can guarantee that if the client-party reads any documents at all, it will be its opponent’s statement. But you can also be sure that that client will not be persuaded by a restatement of the pleaded case – it is too heavily invested in its

own pleaded position. Instead, is there something particular that you think the counterparty does not understand? Is there a point that it would be really beneficial for it to consider before the mediation – in particular if you suspect it might affect the mandate process?

CHANCE FOR FLEXIBILITY

Mediation preparation is key, but the steps undertaken must be both useful and cost-effective. So rather than automatically assuming the need for a mediation statement, perhaps we need to be smarter at embracing the flexibility of mediation by asking whether one is needed – and if it is, who it is needed by.



ABOUT THE AUTHOR

Rebecca Clark
MCI Arb is a full-time mediator at In Place of Strife.