

# Initial Separate Sessions

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*This paper was prepared and settled jointly by the members of ADRAC.*

## Preamble

Initial Intake Sessions are one of the meetings that can occur prior to mediation, along with Intake Sessions and Preliminary Conferences. Chronologically, an Intake Session is followed by an Initial Separate Session (ISS) which is followed by a Preliminary Conference. An Intake Session might be a first point of contact usually face-to-face but often electronic between the mediator and the parties; an ISS might be held to tailor-make the mediation to the circumstances and a Preliminary Conference is generally held after it is agreed that mediation will take place to pre-empt practicalities. None of these steps are compulsory and all may be varied by the style of one mediation to another. The purpose of this paper is to identify the types of meeting that can occur around mediation. It is more likely that the various types of pre-mediation conferring that is described in this paper will be found in sectors in which past and ongoing relationships are primary issues, they can be used in the resolution of any dispute.

This paper focuses mostly on ISSs. ISSs, conducted well, can change the course of a mediation. Holding a ISS with each of the participants contributes significantly to the preparation of all for the potential mediation. ISS provides the mediator as well as each of the participants and each of their professional and personal support people the opportunity to replace the usual reactionary 'entitlement' mindset with a more 'value added' approach. In addition, a ISS includes assessing circumstances for suitability for mediation, designing an appropriate mediation process and making appropriate referrals. Legislation, regulations, protocols and other guidelines of

mediation determine the extent to which each of these purposes is prioritised. Usually there is an element of each.

From a participant perspective, ISSs are designed to accomplish all that is necessary, if mediation goes ahead, to maximise the likelihood of participants, support people and the mediator being able to fulfil their roles during the mediation to the best of their ability. From the very practical to the philosophical, ISS are preparatory. For example, ISSs provide participants the opportunity to familiarise themselves with the location, the facilities of the mediation and to develop rapport with the mediator. While for some the setting may be 'all in a day's work', for others travel to a city or an unfamiliar destination can be as daunting as the mediation itself. The coaching during ISS in how mediation conceives disagreement prepares participants for the approach of the mediator. ISSs are also known as Pre-mediation Sessions. An advantage of using the term 'ISSs' is that it introduces the concept and experience of the Separate Sessions that take place during mediation.

## **Practice**

Each ISS is conducted as if it were the first. The mediator meets with the potential participant and their support people, preferably at the location of the planned mediation. A typical structure of a 1SS, following a welcome and informal conversation, is to: explain the purpose and the parameters of the meeting, including confidentiality; then address any questions that the participant has; then methodically ask open questions which provide the potential participant with a loose framework for explaining the background to the dispute, their concerns, the issues, their readiness and other details which may have a bearing on any mediation. Later during the ISS the mediator provides a clear exposition of the nature and principles of mediation.

Toward the end of the ISS, a brief discussion is held to ascertain the participants' and the mediator's inclination toward mediation. A decision regarding whether to offer mediation will be made by the mediator after conducting ISSs with each of the potential participants.

Throughout the ISS, underpinning the preparation, assessment, design and referrals is the opportunity for developing mediator-participant rapport.

## **ISS Participant purposes & preparation**

During the ISS participants

- have the full attention of the mediator
- become familiar with the location and access to the site of the proposed mediation
- ask 'what if' questions
- start to develop rapport
- start to become familiar with the mediation process
- start to become familiar with their roles and the roles of others
- start to identify materials to prepare
- start to decide on the suitability of the process, the mediator, the timing and other pertinent aspects.

## **ISS Practitioner purposes & preparation**

During the ISS practitioners

- have the full attention of the potential participant and possibly their support person
- start to develop rapport with the potential participant and possibly their support person
- start to identify participants and constituents
- assess each participant's willingness to attend
- assess each participant's emotional readiness to participate
- assess each participant's usual style of negotiation
- assess each participant's motivation to mediate
- assist each participant to identify their Alternatives To Negotiated Agreements (ATNA) and their current Best Alternative To Negotiated Agreements (BATNA)
- assess contraindications
- explore each participant's concerns and reservations regarding mediation
- establish each participant's authority to settle
- clarify each participant's understanding of reporting obligations

- clarify each participant's understanding of the Agreement to Mediate
- identify each participant's constraints, for example time, access.

## **Process**

Appointment length will vary from matter to matter. Typically in a dispute in which past and ongoing relationships are primary issues, the length of ISSs is ideally made for 1 to 1.5 hours.

Support people are encouraged to attend. A standard set of open questions conveys the transparency of the process and the even-handedness of the mediator. Risk areas in some matters - including and not limited to suicide, violence, child-abuse - are addressed in a series of graduated open questions which cease when two or more of the graduated questions draw a response of non-relevance.

The mediator provides a description of mediation, focussing on the purposes of each of the stages and on how the mediator will support each participant to fulfil the purpose of each stage. ISSs conclude with a brief discussion of the practicalities of mediation and preparation if it is to go ahead.

Following ISS, and having analysed responses of all participants to a series of questions relating to the aspects outlined above, the practitioner is well placed to decide upon the parameters of the process which will maximise the likelihood of participants being able to fulfil their roles during mediation. A decision will be made regarding the overall approach: whether to mediate face-to-face, in a shuttle process, online or in other configurations and through other modalities. The aim is to design a process which will maximise the opportunity of the practitioner to mediate well and the participants to participate well. Whether the mediation results in an agreement is the collective decision of each of the participants.

## **Practicalities**

Factors such as possible timing and location to suit each of the participants are discussed, to be decided after each ISS has been completed. Decisions are made by the mediator after all ISS are completed.

Referrals which have been discussed during the ISS are summarised toward the conclusion of the Session. Next steps are clarified before the Session is closed.

### **Advantages of mandating ISS**

Mediation is confidential and occurs behind closed doors. It follows that few people know what they can expect. Even less is known of the rate of reaching agreement quickly, efficiently and respectfully. A process that is unknown with a success rate that is even less known is unlikely to be at the forefront of people's minds during a dispute. Further marginalising mediation, when ISS are voluntary, potential participants often defensively see willingness to mediate as a sign of willingness to capitulate. When, however, ISSs are mandatory all participants 'maintain face' and each has an opportunity to make an informed decision regarding participation in mediation. Mediation, if it goes ahead, does so with participants on an even footing.

### **Other ISS Opportunities in ADR**

ISSs are largely seen as part of a process used in mediation. Except in an informal sense a ISS does not form part of the accepted or commonly used framework of other forms of ADR. There is no good reason why it should not be available for use in any form of facilitative or advisory ADR. There are plainly limitations in its use in determinative forms of ADR but the reasons for its use in other forms of ADR would be the same as those for its use in mediation.

### **Savoir c'est pouvoir**

Whatever the nature of the dispute there is a personal and therefore unique aspect that influences resolution. Even so, mediation mindset and skillset are similar. The rapport building, purposeful coaching and commitment that can take place in ISSs maximises the likelihood of participants reaching a robust, tailor-made and durable agreement.