5 Key Things About Mediation

1	Mediation is:	• A voluntary process where the parties meet informally to try to resolve the disputed matter, assisted by a mediator. • "Time Out"; mediation is a step away from the Court process. *WHY choose Mediation? Because a negotiated agreement at mediation enables the parties to maintain control over the process and the outcome, rather than face the risks of going to Court, where a decision is imposed on the parties by a Judge.*
2	Process:	1. Joint opening (optional): where the parties meet in the same room at the start of the mediation for introductions and initial discussions about key issues and what the parties would like to achieve. 2. Break-out into separate rooms for each party. A series of discussions (eg about key matters that clarify each side's understanding of matters in dispute) and settlement negotiations then occur for the rest of the mediation, until an agreement is reached or until it is apparent to the mediator that the parties just cannot agree. It is important this process not be rushed. *WHEN to mediate: This will vary, depending on the nature of the matter and what the parties want. Preparation is generally required on both sides, RE their arguments and supporting evidence, and mediation is agreed to when they are both ready to enter into settlement negotiations.*
3	Ground Rules:	1. That the parties agree to participate in **good faith**; to be genuine in their discussions and attempts to reach an agreement. 2. **Confidentiality**: the outcome, all discussions, negotiations and any written documents prepared specifically for the purpose of mediation or notes taken at mediation – cannot be repeated outside the mediation. This enables the parties to talk freely about the real issues in dispute, without fear of repercussion, eg if the matter doesn't settle and goes to Court. Some exceptions to confidentiality include where disclosure is required by law, eg notifying Court and Govt agencies (Medicare, Centrelink etc) of settlement outcome.

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4	Roles:	1. **The central parties to the dispute**: to express how they feel about the matter and what they want to achieve (optional). To consider the legal advice provided. To make a rational and informed decision about whether to settle the matter at the end of the negotiations. 2. **The legal representatives**: to advise their clients about the merits of the dispute, prospects of success, potential value, legal costs, all reimbursements owing, risks of going to Court, and recommendations for settlement. To represent their clients in the discussions and negotiations. 3. **The mediator**: to guide the process. To evaluate the case, the arguments, points of contention and potential for agreement - and use that to assist the discussions and negotiations so that they are constructive. To anticipate any "roadblocks" and navigate the parties around them. Importantly, a mediator does not take sides, impose any decision on the parties, or give legal advice. ALSO: • The parties may wish to bring a support person; particularly if that person has shared and been affected by the events giving rise to the dispute and/or its management. • If the lawyers are polite to each other – that's a good thing. Professional courtesy gets the best results and should not be seen as a "closed club". Your lawyers are 100% behind you. • The atmosphere at mediation is generally very different to Court – which always comes with a risk of losing and is very formal, constrained, and can be highly stressful, aggressive and expensive. • The parties are not trying to convince a judge at mediation – the goal is to talk to each other in the spirit of co-operation and resolve the matter together.

5	Compromise: No winners and no losers.	• Without compromise on both sides, the matter will not settle and a Judge in Court will impose a decision which no side can control. • You will never agree with the other side and you don't have to. BUT: do be prepared to consider that the way they see the case may be valid – just like the way you see the case is valid.

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Certainty. Control. Finality.	• A negotiated settlement at mediation is not about "winning", or even obtaining an "ideal outcome". It is about striking a deal for something each party can live with. In return, everyone gets their own certainty and all the benefits that come with the matter being finished. Neither side has to risk losing in Court and all of the further stress, time and expense that is involved. That in itself is a "successful outcome" worth pursuing at mediation.

And some important considerations to keep in mind:

- **Be prepared**. Know your case. Mediation allows the parties to express and process how they feel about the matter and the process should not be rushed.

- The **key drivers of human behaviour** include: Fairness – a sense of justice. Community – a sense of belonging. Status. Autonomy. Certainty. The need for certainty is so strong that the human motivation to avoid the risk of danger or uncertainty takes precedence over the motivation to pursue the chance of a reward or financial gain. This tends to explain how many disputes originate. Being mindful of these drivers in understanding our own behaviour and how we treat our opponents at mediation will go a long way in helping to resolve the matter.

- **Keep calm** during the negotiations. Neuro studies have revealed that low or moderate levels of emotion can prepare us for challenges and opportunities by providing us with information about our goals and our progress towards them. Uncontrolled emotion, however, can cause us to go into "fight or flight" mode and the there is a literal disconnect in the brain from our ability to think rationally.

- Prepare to **keep an open mind** regarding what you are prepared to settle for. Having a rigid bottom line may mean you lose a valuable opportunity to settle. Know what your next best alternatives are – as well as the worst-case scenario.

- All parties should be aware of "**the law of diminishing returns**". For a plaintiff: a settlement for the same or more money down the track may not end up putting more money in their pocket than the mediation offer, because of the greatly increased legal costs that will have

to be paid by that time. For a defendant: a settlement for the same or more money down the track will cost considerably more money than the mediation offer because of the greatly increased legal costs (on both sides) that will have been incurred by that time. The upshot: it usually makes sense for a plaintiff to settle for less and for a defendant to pay more than they would like at mediation – to get a better result earlier.

"No matter your side, there are 4 things you can count on in just every negotiation:

1. The other side will be worried whether or not you agree.
2. The other side will be deliberately hiding things from you.
3. There will be people the other side talk to away from the table that will influence their decisions.
4. The other side wants to get value from what they agree to."

Christopher Voss, former FBI Hostage Negotiator and author, "Never Split the Difference" 2018

"Imagine a wall that's blue on one side and red on the other.
You stand on one side and only see blue. I stand on the other side and only see red.
We'll both be right about the colour we see, even though we disagree on what colour the wall is.
Being able to realise that the other person has a valid point, even if you disagree with it, that's the first step towards maturity." – Oliver Gaspirtz

Think of Compromise not as a weakness, but as a rational, strategic approach to managing the risk of litigation and resolving the matter.

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