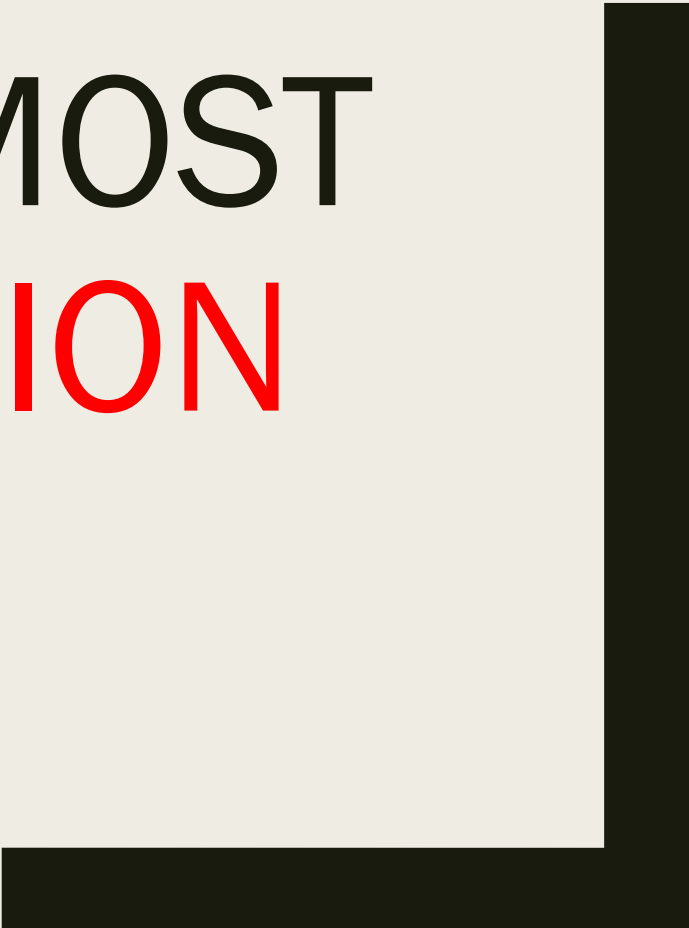




GETTING THE MOST FROM **MEDIATION**

Karen Stott, November 2025



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Solicitor & Nationally Accredited Mediator (NMAS)

- Admitted to practice 1996
- 1995 to 2016 – litigation in Sydney:
 - *Plaintiff medical negligence incl founding practice*
 - *Defendant areas of health, education, roads, police,*
 - *In-house workplace advocacy before Transport Appeals Board*
 - *Home Insulation Royal Commission 2013, Govt compensation scheme & class action*
- 2016 to present: full time mediations practice
 - *all personal injury, prof indemnity, commercial, leasing disputes, wills & estates, construction, historic child abuse matters*
 - *Panel mediator for ACT Magistrates & Supreme Court*
 - *Abuse matters NSW since 2017 and in multiple jurisdictions since 2020*
- My Approach as a Mediator:
 - *Understanding of different needs & approaches by each side*
 - *“Hands-on”, holistic approach (mediation not necessarily confined to the one day)*

Overview:

- Traditional Mediation “Model” and how it can (& should) be Flexible
- Common Factors in Successful Mediations
- Common Barriers to Settlement
- How the Mediator Can be Most Effective
- Position Papers
- Joint Openings
- Model Litigant and “Trauma Informed” considerations in applicable matters
- Mediator Tools for Overcoming an Impasse

Mediation – the basics

- Mediation is a confidential process under which a neutral and independent third party, the mediator, assists the parties to communicate with each other, assess their options and negotiate a resolution to their dispute.
- Compared to a judge imposing a decision on the parties, mediation is a flexible and a more cost effective and less time consuming way to resolve a dispute. Courts are bound by certain constraints in the way they determine disputes – whereas parties who resolve their dispute through mediation have almost infinite flexibility.

Mediation

- “Traditional” model in litigated matters:
 - *Timing of mediation may be following service of evidence each side & a nearing trial date*
 - *Mediation date set with pre service of mediation bundle, position papers & damages schedule*
 - *Parties (represented by solicitor & counsel) meet in person: Joint opening / parties break into separate rooms / shuttle negotiations through the mediator*
 - *Mediation terminates at the end of the day / impasse & mediator has no further involvement*
- As opposed to an Informal Settlement Conference (“ISC”)
- Mediation can also be:
 - *Not confined to one day; but with preparatory conferences as necessary with mediator before the main day; and mediation extended for as long as necessary & agreed with the mediator continuing to facilitate communications & negotiations through to settlement (or impasse)*
 - *Mediation in person, by AVL or both;*
 - *Case study examples*
 - *Wills & Estates matter between sisters re the family home & residence of one sister/“carer”; different time zones, complicated property agreement issues re buy-out or sale*
 - *Dispute Resolution Clause in commercial contract – meeting between execs without legal representation before resort to litigation*
 - *Trespass & property damage claim with 6 defendant parties – settling the “impossible” (cost effectively)*

Success Factors for Mediation

- Good client relationship and thorough preparation of evidence before mediation, with client on-board with the strategy and understanding what to expect at mediation – client will respect and follow advice b/c you have empowered them
- Collegiate relationship with opposing colleagues
- Service of a measured PP (makes concessions where appropriate) & damages schedule – and served in time for Defence to advise client, seek instructions & serve Defd PP in time for P's team to advise client before mediation day
- Respectful and collegiate joint opening with Plaintiff participating
 - *P speaks about issues that cause D to revise their assessment*
 - *D speaks empathically about P's plight / apology where appropriate*
- Each side work with the mediator, use the mediator and invite the mediator to be a sounding board for their strategy and its execution
- Negotiations based on evidence served, not evidence anticipated
- Absence of personal involvement by any legal team members in the dispute
- Key decision maker / properly authorised to settle, in attendance
- Being accepting and strategic about another party's final limit (use the mediator)
- Allowing the mediator into the room to speak with a party's client at crucial times (eg approaching an impasse, when choosing to settle)
- It's all about the preparation!

Common Barriers to Settlement

■ Re Plaintiffs

- *Late service of evidence / relevant docs*
- *Adversarial style (or plain lack) of communication with opponent colleague*
- *Position Paper & Schedule of Damages aggressive & unrealistic*
- *Time taken at start of mediation conferencing client*
- *Lack of cohesion between P and legal team (potential mistrust)*
- *Legal team member/s too emotionally involved*
- *Approaching mediation as if it were an Informal Settlement Conference – ie mere exchange of monetary offers with no sense of occasion or constructive dialogue*
- *Offers starting too high / ignoring risk factors / not justified by the evidence*
- *Legal costs disproportionate to the quantum of the claim*
- *A Plaintiff with “nothing to lose”*
- *Sidelining the Mediator*

■ Re Defendants

- *No attempt to agree apportionment beforehand where there are multiple D's*
- *Time taken at start of mediation negotiating apportionment*
- *Conduct in joint opening being unduly aggressive / speaking directly to P*
- *Offers in response being unrealistically low*
- *Legal advice to client too confident / claims manager not adopting the legal advice*
- *Key decision maker (claims officer) not present*
- *Sidelining the Mediator*

How the Mediator can be Most Effective:

- Mediator role is to facilitate constructive dialogue, diffuse tension, prevent or shift entrenchment, and: provide support & empowerment for a party to feel positive about their decision to settle on a compromised basis.
- Understand what the parties expect from the mediator – Facilitative? Evaluative? Mixture of both?
- Begin the “trouble-shooting” in advance of the day to set it up for success:
 - *Read the brief in advance*
 - *Identify any issues that need to be addressed at mediation, eg provision of an apology / acknowledgement, provision of information re system changes in response to a report,*
 - *Teleconference each party's legal rep in advance of the mediation:*
 - *Who's attending, expectations, approach, previous settlement attempts, litigation status, tone of PP & damages assessment – to get a real read on the situation*
 - *Have a pre-mediation conference with defence parties to agree apportionment, quantum, etc*
 - *When a mediator puts the work in the front end, it pays off on the day – builds rapport, trust, engagement with the process.*
- Best results are when the parties use the mediator to assist with the strategy & negotiations, ask for input, & are candid with the mediator.
- Mediator can monitor the parties' attitudes, incl in response to an offer or comment, recommend how best to respond to maintain goodwill with opponents, judge willingness to compromise, see what outcomes may be possible even when they don't tell the M directly, keep the negotiations going, know when there is a genuine impasse.
- Mediator should always trying to think a few steps ahead to steer parties away from impasse.
- Mediator is least effective when the extent of contact with the parties in the room is to convey an offer – but respectful if that is the preferred approach.

Position Papers:

- Approach to the use of PP's can vary in different jurisdictions
 - *Vic: no PP's but a lengthy joint opening between legal reps*
 - *Cth, NSW & ACT: customary to serve PP's & P to serve a damages schedule*
 - *Tas - variable*
- Position Papers can be an important tool in setting the tone and managing expectations.
 - *PP's can be telling. To be avoided: perfunctory, lengthy, forceful, one-sided, aggressive, criticise the other lawyers, make settlement appear unlikely.*
 - *Recommended: Litigation status, key factual & legal issues, what's agreed and what's in dispute, overview of expert evidence, liability & quantum issues, commentary re opposing evidence, any outstanding discovery requests, previous offers made, legal costs incurred to date & estimate for trial prep & hearing, acknowledgement of litigation risk, and attendance in good faith & willingness to settle.*
- Damages Assessments
 - *P's should think: how will the damages schedule be perceived? (unrealistic expectations? Failure to appreciate real risks / legal issues in the case?)*

Joint Openings:

- Whether or not to have a joint opening or how this is configured, is an important part of the Mediator's assistance with the constructive communications between the parties.
- Ideally, considerable thought and planning will have gone into this before the day of the mediation; ie during separate teleconferencing of the parties.
- On Arrival:
 - *Parties settling in, establishing rapport, plan the joint opening or secure an agreement not to have one & why*
 - *Secure all parties' buy-in or else acceptance of the most constructive way to proceed*
- The Joint Opening – options:
 - *No joint opening – if will further entrench the parties, issues already set out in PP's, role of the mediator to conduct shuttle discussions / act as buffer*
 - *Joint opening but without the Plaintiff's / clients' attendance – concerns re trauma, further entrenchment, need for joint focus on legal issues*
 - *Joint opening with Plaintiff's attendance and active participation / speaking re key issues*
 - *Managing communications – eg opponent's counsel addressing P directly, hostility, interruption, repetition*
 - *Openings by Counsel done well & not done well - examples*

Model Litigant & Trauma-Informed Considerations

■ Prefacing statements:

- *Acknowledgement that there is a conflict between the adversarial model of litigation and adopting a trauma-informed approach to dispute resolution.*
- *The Goal: Minimising the harm to traumatised Claimants whilst protecting the Respondent Institution's interests, regardless of fault.*
- *Guidelines for the Conduct of Civil Claims & Model Litigant Guidelines.*

■ Position Papers - signal the approach being taken to the claim

- *Indicates prior to a mediation what will be said and what the Claimant can expect – gives the Claimant time to digest – Assists with resolution generally.*
- *Communicates the party's legal position in a trauma-informed manner, so that a more empathic approach may be taken in mediation joint sessions*
- *Examples of specific wording of prefacing statements can be given*

■ Joint Opening – work best when Respondent takes a co-operative approach in response to Mediator's guidance as to what will best serve the Claimant; ie whether to have one; who participates; tone of the communications

■ Concessions

- *Very constructive where appropriate*
- *ranges from acknowledging the bravery of the Claimant in making the Claim*
- *Making concessions regarding components of the claim and articulating them (rather than omitting or ignoring in their opening).*
 - *Eg Emphasising (where appropriate) that the issue is not whether the Claimant is believed or the abuse occurred but centres on legal arguments eg vicarious liability, apportionment / causation, or future economic loss.*
 - *An apology for the abuse and acknowledgment that they were not protected and the abuse should not have occurred.*

Model Litigant & Trauma-Informed Considerations

■ Negotiations – recommended approach:

- *A Respondent Institution should have a clear and expected way of negotiating.*
- *Ideally it will have a reputation for making offers that are within the advice settlement range.*
- *Avoid a low first offer out of settlement range. The Claimant interprets this negatively and often becomes anxious.*
- *Consider 3 to 4 offers and get to your final offer quickly – be guided by the mediator.*
- *Resist the inclination to make counter-offers that mirror the negotiation style of the Claimant*
- *The first offer should indicate where you will end up. (not large ranges bw offers). This will assist the Claimant rep and mediator prepare the Claimant for a likely final offer and what can be achieved.*

■ Provision of and timing of apologies / DPR

Tips for Breaking an Impasse:

- Mediator needs to ascertain the reason & decide whether impasse can be overcome.
- Features of a genuine impasse:
 - *Parties have shut the mediator out and figures are miles apart*
 - *Further supportive evidence is planned or anticipated*
 - *Further discovery reveals another party needs to be joined /pleadings amended*
 - *Unrealistic or specific expectations*
 - *Multiple defence parties disagreeing on quantum and/or apportionment*
- Often, a mediation needs more time for the party to adjust and land on their decision to compromise further than they feel is ideal.
- Ask one side to leave offer & mediation open, with Mediator able to follow up with each party in the period afterwards;
- Parties to disclose to mediator confidentially, their respective client limits;
- Last resort: “mediator bid”.

Thank You

