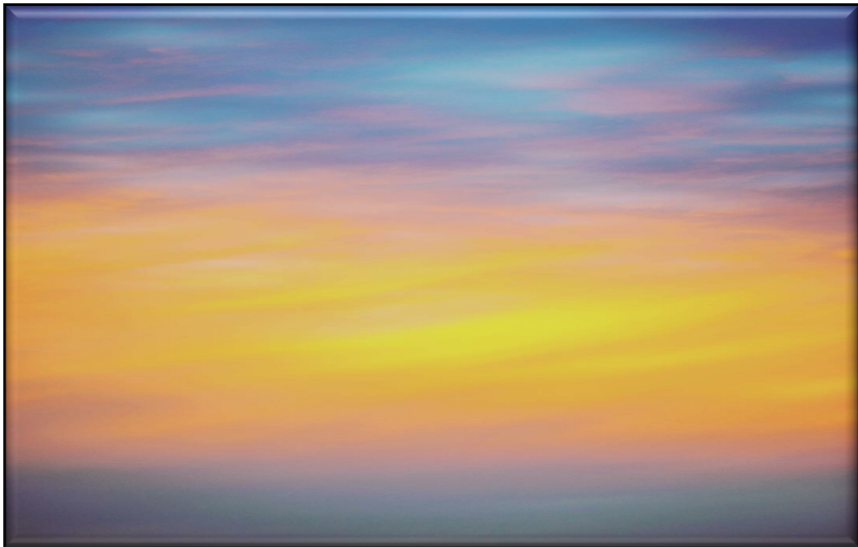




Mediation Handbook



A helpful resource for plaintiffs embarking on
mediation of their litigated dispute



Karen Stott BA.LLB.

Solicitor and Nationally Accredited Mediator (NMAS)

ADR & Mediation Services

Karen@ADRmediation.com.au

5/82 Elizabeth Street

Sydney NSW 2000

Tel 02 9223 2362

Mob 0418 292 283

Law Society NSW Sole Practice 32180

ABN 72 114 844 939

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"We cannot change the dispute but we can change our attitude towards it".

Or put another way:

"If we change the way we look at things, the things we look at change"
- an ancient Tao observation

About Mediation

Mediation is a **voluntary process** during which the parties, with the assistance and guidance of the Mediator, explore the issues which led to the subject claim for compensation, and to develop options for the resolution of those issues with the aim of reaching an agreement that accommodates the interests and needs of the parties.

The parties reach the outcome, not the Mediator.

In a litigated dispute, the goal is to reach an agreement about Terms of Settlement that may then be filed in Court, to bring an end to the proceedings.

With the support of a mediator (who is **neutral and independent**), the mediation process will facilitate or assist the participants to:

- communicate with each other
- exchange information and seek understanding of each other's point of view
- identify, clarify and explore interests, issues and underlying needs
- consider their alternatives
- generate and evaluate options as to how the dispute may be resolved
- negotiate with each other and
- arrive at an agreed settlement of the case – or else resolve to continue towards the **formal** dispute resolution process: a **court trial**.

Mediated agreements are more likely to be practical and robust, because the **parties themselves** have determined the outcome – ie **not the courtroom judge**.



"Many disputes are a result of people feeling that no one is listening; that they have no proper voice, and they simply have not been heard. Consequently, the only option that invariably appears available to them is to enter into 'dispute mode'.

A mediator's communication skills are important in building trust and establishing rapport, but they are vital in allowing each party to feel properly listened to and heard."

Paul Randolph, "The Psychology of Conflict – Mediating in a Diverse World", (Bloomsbury 2016)

Process

Mediation typically occurs over a full day or half day.

It is conducted at a venue that has enough room for each of the parties, their support people and legal representatives to sit around a boardroom table for joint sessions, as well as separate rooms for each of the parties to base themselves when not in joint session.

The usual format for mediation in a litigated dispute is for an Opening and initial joint session which is convened by the mediator who invites the parties to introduce themselves and perhaps say a little bit about what brings them to the mediation and what they would like to achieve.

The parties then retreat to their separate rooms. Arguments, positions, expectations and settlement offers are exchanged between the parties for the remainder of the mediation, with the assistance of the parties' legal representatives and facilitated by the mediator.

A Mediation can go for as long as it takes for the parties to reach an agreement or to arrive at a deadlock. There is no legal obligation to arrive at a settlement at the Mediation and the Mediator cannot impose any decision or outcome on the parties, save from calling an end to the Mediation if it is deemed not appropriate to continue.

Participation

Participation is voluntary (unless ordered by the Court). Even if ordered by the Court, however, the Mediation process in every way is **voluntary** through to the end of the Mediation.

At all times, the parties must participate in **good faith** and be **genuine** in their attempts to resolve the dispute.

*"The desire to be heard is not merely a wish to be listened to,
but also a craving to be understood, and – ideally –
to be agreed with and vindicated."*

Paul Randolph, "The Psychology of Conflict – Mediating in a Diverse
World", (Bloomsbury 2016) – 93

*"People listen better if they feel that you have understood them.
They tend to think that those who understand them
are intelligent and sympathetic people
whose own opinions may be worth listening to.*

*So if you want the other side to appreciate **your** interests,
begin by demonstrating that you appreciate **theirs**."*

Roger Fisher and William Ury,
"Getting to Yes – Negotiating an Agreement Without Giving In",
(RH Business Books, updated 2011) - 52

Why Mediation?

Mediation is a very effective form of alternative dispute resolution because it allows the parties:

- To remain in control of the dispute and its outcome, (as opposed to a Court-imposed judgement);
- To discuss and negotiate all aspects of the dispute on a confidential basis that will not adversely effect the parties' interests if the case is not resolved at mediation and is required to proceed to Trial; and
- To settle the matter cost-effectively.

In recent years, because Mediation is so effective, various mechanisms (such as the Courts in litigated cases), require compulsory participation in a Mediation before the cases is allowed to go to Trial.

Trial is a very formal, time-consuming and expensive means of dispute resolution.

Mediation is an invaluable process in narrowing the issues in dispute and in focusing the parties on resolving their dispute.

In many cases when an agreement cannot be reached at the Mediation itself, a dispute often ends up being resolved soon after.



If the matter can be settled through Mediation, this saves the parties from the worst-case scenario of having to take the matter to Trial in Court:

Time	- Waiting a further period of weeks, months or even years until the case is listed for hearing; - Factual witness recollections become more imprecise with the passage of time since the incident in dispute; - The extent of the damage can often worsen in the absence of financial and emotional remedies that a settlement of the case can bring.
Financial Cost	- Legal costs of investigating and preparing the matter, including solicitors, barristers and expert witness reports; - Further legal costs involved in the intensive preparation of the matter for hearing – including the proofing of witnesses, preparation of statements, obtaining further expert evidence, etc - Further legal costs again for every day that the matter runs in Court, as well as personal costs involved in attending Court every day, (accommodation, travel, childcare, time off work etc); - Additional costs in considering the Trial Judge's judgement and any prospects of appeal. - Such costs can often outweigh the value of the claim.
Formality	- A hearing is a very formal and rigid process in terms of set and limited sitting times every day; - The requirement to comply with Court etiquette such as dress code, rising on entry and exit from the Court by the Judge, bowing to the Judge on entry and exit from the Courtroom, how to address the Judge, no eating or drinking in court, etc; - The rules of evidence that apply at Trial mean that questioning and evidence may be objected to and interrupts the smooth running of argument.

Stress Factors

- Rumination over the grounds of the dispute;
- Being subjected to public court proceedings and possible media interest;
- Giving evidence under oath in the witness box at Trial in a way that best explains what happened and what the consequences have been;
- Being cross examined by the other side's barrister in Court, risking your evidence and credibility being called into question or even criticised by the Court;
- The emotional roller-coaster of ruminating over how each day's evidence has played out in Court, trying to anticipate whether the Judge is favouring your case or not and hoping that tomorrow's evidence will improve your position;
- Worry for what the future holds if the case is lost.

Lack of Control

- By the time the matter goes to Trial, it is a judge who will be ruling in favour of one party or the other; someone has to lose;
- Despite the best preparation, Court proceedings can often be a "gamble" in that you may draw an "unfavourable" Judge, witnesses don't perform as well as anticipated, interlocutory disputes may result in important evidence being excluded or the case adjourned,
as well as the risk of losing the case.



Getting Started

Mediation begins with the parties to a dispute agreeing to mediate, (or being ordered by the Court to do so), determining a mutually convenient date and other logistics, and selecting a mediator.

The costs of the Mediation (Mediator's fee and any venue hire costs) are usually divided equally between the parties. Neither party can be made to pay the costs of the other party.

When a date is booked, the mediator will then ask the parties whether they would like to confer beforehand, either together or separately. Such meetings can be useful for discussion of the background and primary issues regarding the dispute, and to settle on the logistics for the mediation itself.

Ideally, before the mediation day, each of the parties will:

- Prepare a **brief of key documents** for the mediator in advance of the mediation; or a joint brief of agreed documents; and
- **Exchange position statements** about the dispute, the purpose being to focus the issues to be addressed throughout the course of the mediation and negotiations.

Who Should Attend

All persons with a **legitimate interest** in the resolution of the dispute and who can assist the parties to reach a resolution should attend the mediation.

For the claimant: It is important that the individual claimant/plaintiff attend and participate on the day of the Mediation, together with their legal team (solicitor and/or barrister). Additional people in attendance at a Mediation is essentially a matter of choice and will usually include the claimant's spouse and/or a family member.

For the defence: Attending on behalf of the defendant/s to the claim should be a senior executive / representative with full authority to negotiate and settle the matter, together with their legal team. In respect of a

defendant institution, corporation or government authority, in addition to a senior officer with full authority, other professional personnel involved in the claim may also be in attendance; for example the relevant insurance company executive officer and/or claims manager.

In respect of an individual defendant (eg a doctor, driver, priest, etc depending on the nature of the claim), it is not usual for that individual to attend the mediation. It is generally considered that in respect of the conveyance of apologies / expressions of regret which are of extreme importance to most claimants - such sentiments are more constructively conveyed by a more suitable key representative.

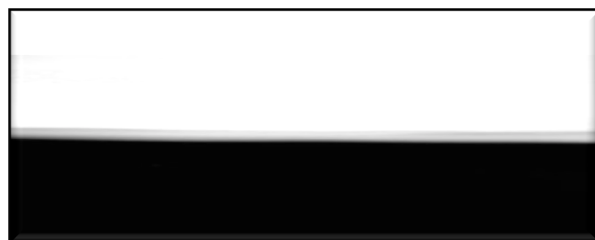
For example, in claims such as medical negligence alleged against an individual doctor, it is usually a senior executive from the doctor's medical defence organisation who will attend, in place of the doctor.

In some circumstances, the participation of other third parties at the Mediation may be of assistance: such as experts, support persons or interpreters. Attendance by experts and the proposed purpose, should be discussed between and agreed by the parties in advance of the Mediation.

On the Day

As stated previously, the usual format for mediation in a litigated dispute is for an initial joint session which is convened by the mediator who will firstly give an **opening address** to explain the process, as well as some important **ground rules**.

The Mediator will then invite the parties to **introduce themselves** and explain briefly their key concerns and what they would **like to achieve** through the mediation. This is aimed at establishing the **channel of communication** between the parties.



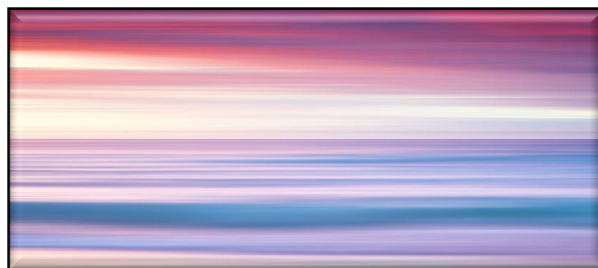
The parties then retreat to their separate rooms for the next stage/s of the Mediation, which are focused on exploring the **key issues** in dispute and the emergence of a **negotiated settlement**.

These next stages of Mediation involve private discussions between each party individually and the Mediator, on a totally **confidential** basis. The Mediator will also facilitate further **communication and balanced interaction** between the parties, through their legal representatives or in further joint sessions, depending on what may tend to work best on the day.

Through this phase of the process there is often an **Uncovering of Interests** – Exchanging of information – Discussion and **Understanding** of what is important to each side – Developing an understanding between the parties of **each other's perceptions** of the dispute and their respective strengths and weaknesses.

The Mediator facilitates **constructive** communication, aiming to **focus the parties on** clarifying what is negotiable, exchanging information and identifying and exploring possible solutions.

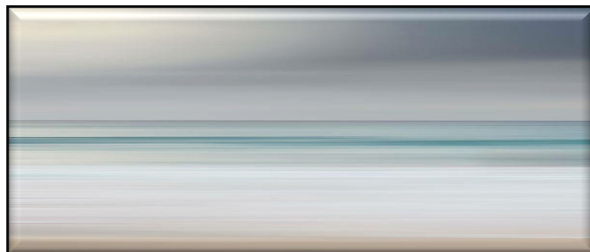
Throughout this process, **offers of compromise** are usually exchanged. Offers may be conveyed though the parties' legal representatives and facilitated by the Mediator.



*"Imagine a wall that's green on one side
and red on the other.
You stand on one side and only see green.
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 realize that the other person has a valid point, even if you disagree with it, that's the first step towards maturity." – Oliver Gaspirtz

The Mediator works to help **Overcome** any potential deadlock, by reality testing the parties individually. A robust reality testing of the reasonableness of a party's refusal to move from their position, examining what a worst case scenario outcome will mean for each of the parties as opposed to what they can each live with by settling, often leads to the – **Emergence** of a negotiated resolution of the dispute.



During Mediation, no participant will be bound by anything they agree to until a written settlement agreement is completed and signed by the parties.

If an agreed settlement is reached, it is often typed up on the day or soon afterwards by the parties' legal representatives in the form of Terms of Settlement that can be filed in Court.

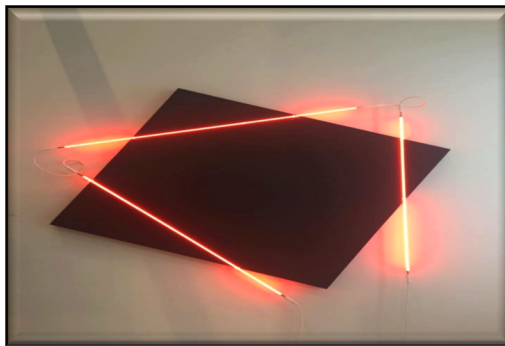
A mediation can go for as long as it takes for the parties to reach an agreement or a deadlock.

The Role of the Mediator

The **role of the Mediator** is to chair and guide the course of the negotiations in a neutral and non-biased way; to **serve all of the parties jointly** and **each of them separately**.

Mediators do not advise upon, evaluate or determine disputes. They assist in managing the process of dispute and conflict resolution whereby the participants agree upon and therefore determine their own outcomes. In doing so, the role of the Mediator is:

- To be truly **independent**: the mediator must have no stake in the outcome of the dispute and no conflict of interests in conducting the mediation.
- To help the parties identify and **focus on the key issues** of the dispute.
- To help the parties **understand each other's interests** and position better.
- To encourage the parties to **look at options** around how they might resolve the dispute and hopefully, to **reach an agreement**.



It is NOT the role of a Mediator to provide legal or other advice to the parties about the dispute, to determine any facts in dispute, or to make any judgements about the respective merits of the dispute.

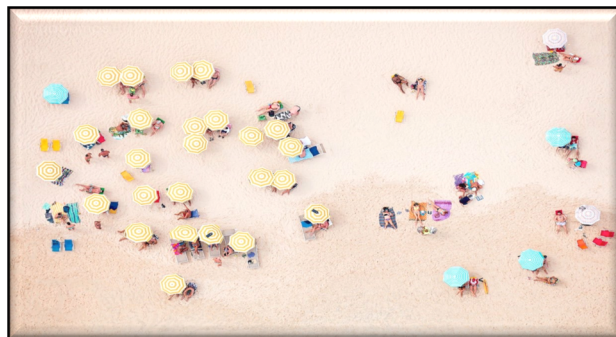
Similarly, the Mediator will not make decisions for or impose solutions on the parties, and will not bind the parties by any comments, suggestions or statements made during the course of the Mediation or otherwise.

A skilled Mediator will:

- Explain the process clearly
- Be neutral and balanced at all times
- Be sensitive and cognisant of the parties who are often under a great deal of stress and are apprehensive about the dispute and the Mediation process itself

- Facilitate the parties to communicate openly, to explore the issues in detail and to behave in a respectful manner
- Facilitate the parties to be and to feel heard and understood, so that there can be a functional shifting from the past, towards a focus on the present and the future – and an agreed outcome
- Manage any power imbalances and threatened deadlocks, to keep the process moving constructively
- Not improperly encourage the parties to continue negotiations if there is a deadlock, but acknowledge when the parties have expressly exhausted their negotiations and are thereafter prepared to take the matter to hearing

The most fundamental aspect of the mediator's objective is **to secure an attitude shift** on the part of one or more of the parties. Without this, the parties are likely to remain in the same entrenched positions as when they entered the conflict, creating little prospect of settling their dispute.



“The world is an arena where things represent things. It is a stage where the same thing is seen from different lenses as a different thing.”

– Ernest Yeboah

“You can’t solve problems until you understand the other side.” – Jeffrey Manber

The Role of the parties' legal representatives

This will vary in accordance with the respective party's wishes. However the role of legal representatives (barristers and/or solicitors) is essentially:

- To advise and assist their client in the course of the Mediation;
- To discuss with the Mediator, with each other and with their respective clients, such legal, procedural or practical matters as the Mediator might suggest, or as their clients might wish; and
- To prepare the terms of settlement or heads of agreement recording the agreement reached at the end of the Mediation for signature by the parties prior to departure.

Important Ground Rules of Mediation

Confidentiality

The parties to Mediation and all participants will be required to sign a Mediation Confidentiality Agreement before the process commences.

Confidentiality in mediations is important because an open and free-ranging discussion is most conducive to reaching an agreement. This essentially means that all discussions throughout the Mediation are **"without prejudice"** – nothing that is said by either party can be used or referred to in any later proceedings (ie at Trial).



Confidentiality extends to:

- All discussions during the Mediation in joint session;
- All discussions during the Mediation in the respective private sessions with the Mediator;
- All documents created for the purpose of the Mediation, (eg position statements).

There are some exceptions to the confidentiality rule, (eg if the Mediator is required to confirm the parties' participation to the Court in a Court-ordered mediation; if a criminal act is disclosed by one of the parties during the course of the mediation).

It is natural and considered as generally acceptable for a party to confide in someone close, or "within the party's legitimate field of intimacy" (family or close friends) about aspects of the Mediation.

However, the confidentiality rule means that the participants **MUST NOT** disclose to any non-party beyond their "legitimate field of intimacy" (eg wider circle of friends, work colleagues, the media, etc) what is talked about in the mediation, **including the details of any settlement.**

To do so can risk the preparedness of the parties to speak freely at the Mediation and resolve the dispute.

Comments such as,

- *"I settled my case through Mediation on favourable terms and I am glad that I can now put the litigation behind me and look forward to the future"; or*
- *"I tried to settle my claim through Mediation but couldn't reach an agreement with the other side"*

will not be in breach of the confidentiality rule.

Voluntary Participation

Either party is free at any time to end the Mediation. This does not involve any adverse consequences such as having to pay for the other side's costs of the mediation, or being prejudiced by anything that may have been said or tentatively agreed during the course of the Mediation process.

Participation in Good Faith

Whilst there is no obligation on any party to reach an agreement during the course of a Mediation, once the process commences, the parties must agree to co-operate in good faith with each other and the mediator in a **genuine attempt** to reach agreement.

The parties are expected to agree to acknowledge the rights of each participant to be heard, and agree to behave in a courteous and respectful manner.

This includes that there should be no interrupting while any other person is speaking and that no person shall ridicule or make derogatory, degrading or insulting remarks to another person during the course of any joint session between the parties.

Procedural Fairness

A Mediator will conduct the process in a procedurally fair manner, including by the following means:

- to support the participants to reach an agreement freely, voluntarily, without undue influence, and on the basis of informed consent
- to provide each participant with an opportunity to speak and be heard in the Mediation, and to articulate the individual party's own needs, interests and concerns, if they wish to do so
- to encourage and support balanced negotiations and to manage any power imbalances, manipulative or intimidating negotiation tactics
- to enable negotiations to proceed in a fair and orderly manner or for an agreement to be reached, if a participant needs either additional information or assistance, the Mediator must ensure that participants have sufficient time and opportunity to access sources of advice or information
- to suspend or terminate the Mediation if the Mediator believes that a participant is unable or unwilling to participate in the process; or if the Mediator believes that continuation of the process might harm or prejudice one or more of the participants

It is a fundamental principle of the Mediation process that competent and informed participants (ie those who are legally represented on all sides) can reach an agreement which may differ from litigated outcomes.

The Mediator, however, should support the participants in assessing the feasibility and practicality of any proposed agreement in both the long and short term, in accordance with the participant's own subjective criteria of fairness.

The primary responsibility for the resolution of a dispute rests with the participants. The Mediator will not pressure participants into an agreement or make a substantive decision on behalf of any participant.



The magical power of mediation lies in the ability of the mediator to allow parties to feel truly heard. In many instances, the party at the mediation table will experience for the very first time in his or her life, the true nature and value of really being listened to.

A party who feels heard can rarely sustain that anger for any length of time: the concentrated listening skills of the mediator will defuse the anger.

The party in dispute who feels he or she has been undervalued, taken for granted, or ignored will blissfully appreciate the fact that, at last, the mediator is respecting them and taking them seriously. There can be no greater catalyst to the creation of trust and rapport than to allow a person to feel thoroughly and empathically heard.

Paul Randolph, "The Psychology of Conflict – Mediating in a Diverse World", (Bloomsbury 2016)

Standard Confidentiality Agreement to be signed by all parties attending a mediation:

ACKNOWLEDGEMENT and UNDERTAKING

Parties to the Dispute: "The Parties"	1.
	2.
	Title and number of any related legal proceedings
Mediator	Karen Stott, (Lawyer and Nationally Accredited Mediator – NMAS)

The abovenamed have entered into a Mediation Agreement dated _____ 2017 in accordance with which the Mediator will conduct a Mediation.

1. The undersigned acknowledge by their signatures that they attend the mediation on the basis of their agreement to the terms of clauses 2, 3 and 4 below.
2. Each of the undersigned undertakes to the Parties and the Mediator:
 - (i) to keep confidential to themselves and any persons to whom by reason of the terms of their employment or any contract of insurance they may properly communicate it, all information disclosed during the Mediation including the preliminary steps ("**confidential information**");
 - (ii) not to act contrary to the undertaking in sub-paragraph (a) unless compelled by law to do so or with the consent of the Party who disclosed the confidential information;
 - (iii) not to use confidential information for a purpose other than the Mediation.
3. Each of the undersigned undertakes to the Parties and the Mediator that the following will be privileged and will not be disclosed in or

relied upon or be the subject of any subpoena to give evidence or to produce documents in any arbitral or judicial proceedings between the Parties to the Mediation:

- (i) any settlement proposal;
 - (ii) the willingness of a Party to consider any such proposal;
 - (iii) any admission or concession made by a Party;
 - (iv) any statement or document made by the Mediator.
4. No statements or comments, whether written or oral, made or used by the Parties or their representatives or the Mediator within the mediation shall be relied upon to found or maintain any action for defamation, libel, slander or any related complaint, and this document may be pleaded as a bar to any such action.

Signed by the Parties and attendees of the Mediation on x date:

Name	Role	Signature
Karen Stott	Mediator	



My Professional Philosophy:

I am a strong and committed believer in the effectiveness of mediation.

Mediation and other forms of ADR provide the parties with maximum autonomy in determining the outcome of their dispute, as well as the opportunity to minimise the adverse factors associated with any dispute: time, effort, stress and cost.

As a lawyer with 20 years of litigation experience in a wide range of areas, I have successfully represented both plaintiffs and defendants. Resolving disputes as opposed to litigating them is consistent with the approach I have taken throughout my career. As such, I attained national accreditation as a mediator (NMAS).

Having acted on both sides, I have acquired unique insight to numerous aspects of the dispute resolution process, crucial to which is an understanding of the psychological aspects involved in successful negotiation. This understanding allows me to provide constructive, sensitive and effective guidance of the parties throughout the mediation process.

To witness the “shift” between the parties towards a mutual understanding and intent to map out a practical way ahead, when at the start of the mediation they were diametrically opposed: is to appreciate the true utility of mediation.

The provision of a supportive environment that facilitates the “victims” to a dispute to feel heard and validated, in turn allows for a robust reality testing of the various options for dispute resolution, so that both parties are able to reach an agreement that they can live with. The claimant can move on with their life and the respondent can minimise and close off on the legal spend on the claim.

From the commencement of my legal career in the mid 1990’s, I was fortunate enough to participate in a great number of mediations conducted by the great Sir Laurence Street, where I learned how powerful a tool Mediation can be.

Sir Laurence brought a humbling empathy to his mediations. Although the legal teams on each side were aware and duly respectful of his stellar achievements in the law - as former Chief Justice of the Supreme Court of NSW to name but a few

– Sir Laurence’s gentle, kind and empathic manner with the parties on both sides earned their faith and trust in him in fundamental terms. It was the ability to relate to all parties on a human level that made his mediations so effective.

For many years, Sir Laurence published a booklet “Mediation – A Practical Outline”, which was a staple for lawyers to provide to their clients ahead of the big day. I still have my copy. To my knowledge, no one has published anything similar since that time – and so I have taken the liberty of doing so, putting my own emphasis on the details that a plaintiff embarking on this process would benefit to know.

In publishing this Mediation Handbook, I would like to acknowledge the wonderful influence that Sir Laurence has had on me as a lawyer and mediator.

Reference from Sir Laurence Street, dated 6 August 2004:

“Altogether I have conducted about 20 mediations in which Karen Stott has (participated)... I have thus come to know her well on a personal as well as professional basis and I write this reference to attest both her fine professional qualities and her excellent personal character...

As well as her pursuit of the best interests of her client, Karen brings to bear mature and practically oriented judgement in pressing those interests in the course of mediations – a process in the psychology of which she is well versed. Her preparation is meticulous, thorough and well directed...

I can unreservedly and enthusiastically commend Karen as a woman of total integrity, high professional competence and ethical standards and dedication to the protection and promotion of her client’s best interests. In addition to these qualities she has a personality that has earned her the warm goodwill and friendship with those with whom she works...”

For more information including a full CV and testimonials, please see my website ADRmediation.com.au or contact me directly.

Karen Stott – ADR & Mediation Services
Karen@ADRmediation.com.au
Tel 02 9223 2362
0418 292 283
5/82 Elizabeth Street Sydney NSW 2000



Karen Stott BA.LLB.

Solicitor and Nationally Accredited Mediator (NMAS)

ABN 72 114 844 939

Karen@ADRmediation.com.au

Tel 02 9223 2362

0418 292 283

5/82 Elizabeth Street Sydney NSW 2000

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