

Mediation: Information for Lawyers

“Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser: in fees, expenses and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good person.” - Abraham Lincoln

Case Suitability for Mediation

To assist your clients in formulating and achieving their goals and objectives, there are many cases where mediation is appropriate. Whilst this list is not exhaustive, common circumstances when mediation is most effective include the following:

- Client wants to avoid setting a legal precedent;
- Confidentiality is a concern and client wants to settle the matter in private;
- Other side is unresponsive (e.g. to settlement offers) or is not evaluating the case pragmatically;
- Controllable number of disputed issues or agreement has already been reached on some matters;
- Current or possibility of an ongoing relationship;
- Limited number of parties;
- Multiparty situations that are difficult or impossible to negotiate;
- Complexity of issues are complicating negotiation or making it unworkable;
- Parties have previously been able to resolve issues amongst themselves or are deadlocked in settlement negotiations;
- Credibility is an issue or the other party is in denial about it;
- Where the value of the claim is disproportionate to the cost of litigation;
- Where there is a low to moderate level of resentment and hostility between the parties;
- External pressures (e.g. time, diminishing benefits, unpredictable outcomes, financial considerations, etc) are accelerating the need for settlement between the parties;
- Where it is proving difficult to get an assessment or demand from the other party;
- There are factors other than legal ones that need to be considered (e.g. risk to reputation; impact of publicity; health or age issues; etc);
- Where legal complexities and/or fact/relations are expected to protract proceedings;
- Where there is a suspected breakdown in communication between the parties;
- Parties are not disputing the data but differ in their interpretations of it;
- Sensitive issues are at stake or would require the disclosure of sensitive evidence in court proceedings;
- The dispute is a result of negligence, decision made in error, poor performance etc rather than due to fraud or deliberate deception;
- Problem-solving options can be generated to resolve the issues and meet the interests of the parties;
- Where a company or organisation has an enduring relationship with the claimant and is willing to establish their good faith and responsiveness;
- Settlement is being recommended but this appears improbable due to a lack of current information;
- A pre-trial has not been helpful.

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Cases not suitable for mediation include those where:

- publicity is desired or where wider potential public interest demands more formal processes;
- mediation could be abused if used as a delay tactic - if mediation is proposed late in the day, it may have the effect of delaying the action of the trial;
- the goal of a party is to have an important point of law resolved or tested by the courts or it is considered a binding legal or commercial precedent needs to be set;
- the weaker party needs to be protected;
- one of the parties is bankrupt or is functioning under some form of legal constraint;
- the parties need emergency injunctive or protective relief (underlying issues could be mediated later on);
- there are a large number of third party objectors;
- there is a risk of physical violence;
- the realistic prospect of success at mediation is severely affected by the attitude of one or more parties.

Mediation Timing

- Mediation can take place as soon as you have sufficient information to evaluate your client's case for settlement. We are able to assist in obtaining information from the other side as a pre-condition to mediation if this is required.
- Once an assessment of what information is needed to settle the case has been completed (such as witness statements, police and investigation reports, contract documentation, important correspondence, medical and business records etc), this should be disclosed wherever possible *prior* to the mediation session to enable the other parties to properly assess the impact of the information.
- Mediation may be very successful early in the litigation process before discovery and other litigation costs are incurred, when you already know what information formal discovery is likely to produce.
- The risk of mediating too early is that another session may be required later on. The mediator can provide valuable assistance however, focusing the parties on the issues and establishing what information should be exchanged and when, and often provides a cost saving benefit to the parties.
- If mediation takes place *after* the parties have finalised discovery and are in a pre-trial situation, negotiating can be difficult and frustrating. By this point, parties have typically outlaid considerable funds, time and energy preparing for trial, and are usually not in a mindset conducive to willingly sitting down and discussing settlement options. The cost of litigation, hostility between the parties and/or counsel may have escalated during the process of discovery, creating inflexibility in negotiating positions. However, even at this stage with the assistance of a skilful mediator, parties can often be re-focused on collaborative problem-solving, culminating in successful settlement.

Lawyer's Role in Mediation

There are a number of roles for lawyer participation prior to, during and after mediation:

Pre-mediation:

- Advise client about the mediation process.
- Prepare client for mediation and decide on level of participation.
- Select mediator.

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During mediation:

- Advisor-only: Lawyer is present or available by phone, but does not participate directly in joint mediation sessions. Consultation takes place between lawyer and client during breaks in the mediation process.
- Participant-Advisor: Lawyer provides legal advice during joint mediation sessions on legal issues through an exchange of views with the other lawyer.
- Spokesperson: Lawyer participates as a spokesperson on behalf of their client where their client is not able to engage in the mediation process.
- Participation: Cooperation with mediator and assistance in drafting of settlement agreement.

Post-mediation:

- Follow up settlement enforcement with client.

Involving Experts and Consultants at Mediation

Occasionally, input from experts or consultants in specialist fields is required to ensure a thorough evaluation of a case from one party's side or the other. Time and the expense of expert depositions can be avoided by early involvement of experts in the mediation process and can be of great assistance in exchanging information. Engaging experts or consultants in face-to-face discussions pre-mediation encourages cooperation and amicable relations, clarification and resolution of issues in dispute and assists efficiency. If however, the experts take polarised positions and it is obvious their participation in mediation will be unproductive, it may be helpful for parties to retain an independent expert to provide an advisory opinion.

“You cannot simultaneously prevent and prepare for war.” - Albert Einstein

Mediation Benefits

Mediation offers significant benefits for both you and your clients:

- Can take place at your convenience, prior to or during litigation, or after judgment is rendered;
- You can actively take part in the process and provide advice to your client;
- Less stressful for both you and your client;
- You can prepare your client for mediation;
- No urgent motions to prepare for;
- Clients have greater degree of control and increased certainty of achieving a satisfactory outcome;
- Clients directly involved in the resolution of their dispute and negotiating their own settlement are more appreciative and satisfied and likely to voluntarily comply with the terms of a settlement agreement;
- Reduced emotional and financial costs for client;
- Proactive, cost-effective approach to solve client's problem;
- Process maintains privacy and confidentiality, preserving integrity of the case;
- Assists in reducing hostility and enhancing understanding between parties and allows clients to 'tell their story,' increasing likelihood of successful settlement;
- Moves parties from taking adversarial positions to focusing on interests, mutual understanding and finding common ground;
- Facilitates the identification and exploration of all issues in the dispute;

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- Increased flexibility in handling a case without the standard courtroom rules and protocol;
- Environment conducive for clients to apologize for a mistake or acknowledge a misunderstanding which may be enough to move a case toward settlement;
- Meets the interests and needs of clients representing a competitive advantage;
- Clients more willing to pay fees;
- Faster case resolution and closure of files resulting in earlier compensation;
- Develops your legal firm's reputation as 'problem-solvers';
- Satisfied clients provide repeat business and more referrals;
- Clears difficult files when case is lost and fees not collected;
- Increases your satisfaction;
- You retain control and mediation eliminates risk of losing the case;
- No time wasted sitting in court;
- Often results in clarification of the issues and promotes continued negotiation, even if agreement is not reached initially;
- If mediation is unsuccessful, parties still have other options, including legal action to resolve the dispute;
- Parties likely benefit from refined discovery, early witness evaluation and simplified preparation for trial, significantly reducing litigation costs;
- Provides opportunity to examine how clients and the other parties handle themselves if case goes to trial.

Court Benefits

- Reduces backlog of cases;
- Expedition of proceedings;
- Enhances public confidence in court system;
- Frees up judges to focus on complex legal cases unsuitable for mediation;
- Promotes an atmosphere of resolution rather than confrontation and adversarialism.

In Summary

Mediation offers a cost-effective and practical solution to resolving a wide variety of disputes and provides clients with the opportunity to avoid the public nature and costs involved in a court case. Resolution can be achieved in a short time frame and significantly reduces the negative side effects of protracted disputes. Court judgements result in 'winners' and 'losers'; mediation offers 'win-win' outcomes. Mediation provides the parties with confidence knowing their lawyer can continue to provide advice and/or be present during the process and affords them the flexibility to have greater control and certainty over the outcome, whilst keeping their future options open.

Lawyers and mediators who work collaboratively for the joint benefit of the parties involved have the satisfaction of successful outcomes in a high percentage of cases. Clients are appreciative of their lawyers' advice and support and upon reaching settlement, feel a high degree of satisfaction. This in turn, enhances the lawyer's reputation as a problem-solver, regardless of the extent to which they were involved in the mediation process. Providing closure and achieving a successful resolution is a 'win-win' for all concerned – clients, lawyers and mediators.