

HOW TO ACHIEVE A BETTER OUTCOME

What are the key considerations that will give your mediation the best chance of success?

In most litigated matters, mediation is a compulsory part of the litigation process. Either before or after discovery, parties will be directed by the court to attend mediation in an attempt to resolve the dispute. For many clients this may be seen as just an additional expense with little likely benefit. I often see parties or lawyers rebelling against the idea of mediation. Key considerations that will help to make your mediation experience as fruitful as possible are outlined here.

Choose your mediator wisely

It may be that you are allocated a mediator through the courts – either a registrar or perhaps the judge. In most cases however, it will be up to the lawyers to agree on a private mediator.

From my own research, lawyers generally nominate a mediator they have used before or follow the recommendation of other lawyers in their network. This seems to result in a relatively small number of busy mediators and often lengthy waits to get an available date. There are many well qualified mediators who can assist. Here are some key due diligence questions to ask in selecting a mediator.

Mediator style

For complex legal issues rather than factual issues, choosing a retired judge or a QC as a mediator might make sense if cost is not an issue. They are likely to adopt a more evaluative style (provided all the parties agree to that process in advance) which may be helpful. It may also be helpful to choose a highly qualified lawyer mediator (such as an LIV accredited specialist in mediation) where you have been advising a client to settle but they have resisted your advice. The gravitas of the mediator may help in working towards a settlement.

In cases where it is more of a factual dispute or the legal issues are simple, a more facilitative mediation style may assist. Choosing a mediator who is deeply skilled in negotiation and has strong empathy can guide the clients to a resolution that will leave them feeling empowered and satisfied.

Process

You want your mediator to have a simplified pre-mediation process which is likely to deliver the best chance of a result. For example, are you able to easily book dates online? Does the mediator use pre-mediation conferences which, as seen below, could have an important role in reaching settlement?

Cost

While cost should not necessarily be the determinative issue, it is worth asking if your mediator charges a fixed rate or if they take a more “value-based” approach to charging. For example, I will vary my rates dependent on the number of parties, the jurisdiction of the matter and the value in dispute.

Pre-mediation conferences

Pre-mediation discussions with the parties and lawyers can be extremely helpful in giving the mediation the best chance of success. They allow the mediator to ensure any information required for a settlement to be reached has been exchanged.

In a mediation last year, a creditor told me the other side had not provided key metric reports and without those, the creditor would be unwilling to compromise the debt. It turned out this was due to a misunderstanding of what was being asked for. When I clarified the request with the debtor, they shared the necessary documents immediately. Without the pre-mediation conference, the document exchange would not have occurred and the mediation would have been doomed or at the very least required a second session.

The pre-mediation conference also allows the mediator to prime the parties to be ready for movement at the mediation. When mediating, I ask the parties questions they need to have considered before the mediation. Giving them time to think about this before mediation means they can begin moving towards a settlement mindset. If these discussions are left until the mediation day itself, there is a greater chance that the distance between current positions and possible resolutions will be too great to be bridged in the mediation session.

Use your mediator wisely

As a completely neutral party, the mediator is in the best position to recognise when psychological biases take hold of the mediation participants and to help them to consider blockages that arise. The mediator will also be able to advise how to disclose information.

These are just a few of the key considerations to deliver your clients the best chances of an acceptable settlement in mediation. ■

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