



VICTORIAN BAR

MEDIATIONS – COMMON QUESTIONS ANSWERED

1. WHAT IS MEDIATION?

Mediation is a process where a trained and accredited mediator assists two or more people who are in dispute to **negotiate a mutually satisfactory resolution** to their dispute. It is a form of “assisted” or “facilitated” negotiation.

Mediation **introduces a third neutral person** (the mediator) into the discussion to assist the parties reach common ground. The mediator helps the parties to explore their issues and concerns and helps them to identify and explore options to resolve their dispute.

- (a) **Neutrality** – The mediator is trained, nationally accredited and is neutral. This means that they have no interest in the outcome and do not know either party. Mediators have a Family Law legal background.
- (b) **Confidentiality** – Mediations are covered by the **principle of confidentiality** and all parties, the mediator and the legal representatives and any third party support people, are bound by confidentiality preventing them from disclosing the contents of discussions and proposals canvassed during the mediation, without the consent of both parties and the mediator.

THE ROLE OF THE MEDIATOR

The mediator’s role includes controlling the mediation, facilitating discussion and generally assisting the parties to reach an acceptable agreement.

The mediator:

- is not a judge and will not decide any issues in dispute; and
- is not there to offer legal advice to either party.

However, given the experience of the mediator, it may be of assistance in the negotiating process for the mediator to express an opinion, if asked, about the merits of the parties’ proposals in the context of considering what the outcome might be in the event that the matter proceeds to court. Any opinion expressed is not legal advice. The parties should always take advice from their legal advisors.

THE ROLE OF THE PARTIES

The parties should involve themselves in the mediation to make a **genuine effort to resolve matters** in dispute. The parties have the right to be **fully informed** and **fully involved** in the mediation.

The parties have the right to terminate the mediation at any time.

LEGAL REPRESENTATIVES

Your legal advisor, if you have one, is there to protect your interests and to inform you of your entitlements at law. They may also help you identify the issues that are important to you, ensure that they are dealt with in the mediation, will assist you in the development of options and help you **“reality test”** proposals to ensure that you are comfortable with them and understand their implications. Your lawyer will also assist you in the negotiations between you and the other party and can draw up any agreement if one is reached.

The mediator will likely point out the **risk of taking the matter to court** and the benefits of resolution in the mediation.

The mediator and your lawyer are likely to discuss with you your **“best- and worst-case scenarios”** and the possible cost of achieving either.

WHAT EVENTS PRECEDE MEDIATION?

Typically (though every mediation can be different), mediation involves the following steps:

- The mediator is approached by a party, their lawyer or appointed by a third party such as a nominee of a professional body such as the Victorian Bar.
- The mediator sends to each of the parties (through their lawyers or directly) information about costs and a Mediation Agreement.
- A suitable time and place for the mediation is arranged.

Most commonly mediators will meet with each party and their lawyer separately prior to the mediation. This is called an intake or pre-mediation session. These sessions assist the mediator in understanding what each party considers **important**, why negotiations may not have been successful to date and what each party is expecting from the process. It also allows the parties to **ask questions about the process** itself. Each party may also discuss matters with the mediator in the intake session, and advise which matters are to remain confidential from the other party and their lawyer.

Mediators will have had been provided with the relevant court documents so will be familiar with your case.

Everything that is discussed in any **private meeting including the pre-mediation or intake is confidential** and will not be disclosed by the mediator to the other party unless the mediator is specifically permitted by you to do so.

HOW IS THE MEDIATION CONDUCTED?

Generally, the parties attend a **joint session** where the process is explained, and the parties have the opportunity to tell the mediator and the other party what the mediation is about for them, and what they want to achieve.

Some mediations are conducted by **separate sessions** (sometimes referred to as “shuttle mediation”). These are normally conducted where there are safety issues, or one party does not want to be in the same room as the other party. In a shuttle mediation, the mediator will seek to have each party, through their lawyers, continue negotiations and seek an agreeable solution.

Often the matter simply proceeds through negotiation, by **offer and counter-offer**. Each of the parties is encouraged to propose possible ways to resolve each issue. An agreement may be pieced together, like a jigsaw puzzle.

CAN I TALK ABOUT THE MEDIATION SESSIONS WITH FRIENDS OR PROFESSIONAL ADVISERS?

During the mediation, you will have ample time to speak to your lawyer or support person with or without the mediator present. There will also be planned times for you to discuss matters privately with your lawyer and advisers.

Mediations are not coercive. This is in stark contrast to the manner by which a case is determined by a judge in court. In a mediation, you have the ability to discuss matters you think are relevant and have some control over outcome. A court is a structured hearing directed by a judge who makes a decision binding on both parties.

ARE AGREEMENTS REACHED AT THE MEDIATION BINDING AT LAW?

If **agreement is reached** the parties will be expected to sign either a **Heads of Agreement document** or **Final Consent Orders** to be approved by the Court.

Agreements reached at mediation in Family Law are generally only binding once the Court approves the Agreement and makes formal Orders.

WHAT IF I FEEL UNCOMFORTABLE WITH THE MEDIATION?

You can have a break at any time – no reason is needed. You will find that dealing with some issues will be confronting. **You may ask to speak to the mediator alone.** You may ask for the mediation to be adjourned until a later date. It is your mediation and you are in control. All that is asked is that you be open to resolution if possible.

One of the mediator's tasks is to try to balance the negotiating strengths of each party and to eliminate any feelings of intimidation.

WHAT DOES IT COST?

Mediators usually charge a "per day" or per "half-day" rate and then an hourly rate for matters that go past normal finishing time (usually 5:00pm).

WHAT NEXT IF WE DON'T RESOLVE?

The mediator will report to the Court, and further directions may be given about the further conduct of your matter.
