# Mediation: The Most Definitive Guide Ever

The word 'mediate' derives its meaning from the Latin *mediatus*, past participle of the word *mediare* meaning 'to halve' or 'be in the middle'. Unsurprisingly this is a matter that is often lost in the modern mediatory setting, most likely because the adversarial ambience of modern dispute resolution provides little room for any perceived weaknesses such as civility and common-sense.

Perhaps also it is because, being the conservative creatures we are, we have not yet adapted to the dynamics at play within the mediation setting in the mere 38 years since *Getting to Yes* (or was it the *Art of the Deal*?) popularised splitting disputes in half.[1] Accordingly, and despite the veritable industry around papers making this claim, this article provides the definitive guide to mediation. It should become canon for any and all practitioners. Read nothing else.

**A. Mediators**

Mediators will tell you choosing them is important. It probably is, but not because they bring any great skill or nuance to the role. They are literally splitting the dispute in half after reading a script, a skill that can be performed by anyone with a calculator and basic literacy.

Rather, parties should choose someone they can tolerate for an extended period. You are going to be spending a long time with that person in a stuffy room going round and round in circles (both figuratively and perhaps literally). Just as good love stories never have endings, neither do bad war stories, particularly those told by mediators who have left the poverty of the bench for the remunerative retirement of reading a script and performing division.

Find a mediator you like, and who is able to keep war stories short.[2]

**B. Barristers**

Nope. Not useful. Skilled at arguing. No good at division. Unable to listen. Also prone to war stories.

In fact, nothing better exemplifies the failings of barristers at mediation than a quick examination of their propensity for problems with cash and divorce (which are unlikely to be mutually exclusive). Nothing screams 'I literally cannot negotiate, listen or be responsible' than overspending and not listening to a loved one. Sure, you can blame stress, long hours and families that think you don't exist, but being unable to count or listen must also be in the mix.

Another problem is that a successful mediation represents the evaporation of hearing and preparation fees and is not caught by advocates' immunity. Who in their right mind would then take along as a representative the one person who not only has no economic interest in resolving the matter, but can potentially, and in fact particularly, expose themselves by advising you to do so?[3]

There is then the whole craving to be the centre of attention and the concept they are being paid by the word. First problem, clashing with the mediator who (particularly if a former barrister) will want to be the centre of attention. The next is the opening. No one, literally no one, has even been persuaded to contribute more or ask for less because of an opening. In fact, the opposite is true – it just makes the parties more entrenched. It's like people who stand up on the plane before the doors open – how on earth do you think you are going to leave the pressurised locked flying cylinder simply by standing? No one in the history of commercial aviation has ever beaten the plane to the gate. All you're doing is annoying people – who then stand to stop you.

Accordingly, taking a barrister to a mediation is like standing up before the plane is at the gate. It's stupid. Avoid.

**C. Solicitors**

Depends. Philosophically any civil case can and should be settled. It is a one of the ancient Gee QC laws that one can never beat a settlement. So provided that is the solicitorial approach, then they are absolutely fine.

However, there are solicitors that are like dust, they never settle. Rather, they are content to float about making everything rather unpleasant, including the air. Typical presentation is the representative that gets stuck on ensuring contributions to settlement are paid in set proportions. Why? The balance sheet doesn't care, nor does a bordereau. Cash is the currency of disappointment and cash alone can set it free. How the cake was cut is irrelevant to whether it was served and eaten.

Perhaps most dangerous are those solicitors who, safe in the knowledge that they will never actually have to stand on their hind legs and run the case, behave like small dogs behind a big fence. It's a real shame that only dogs can be ordered to wear muzzles.

Accordingly, pick the solicitor wisely. And perhaps also pick one with a fancy office with one of those coffee waiter buttons. Those things are cool.

**D. Venue**

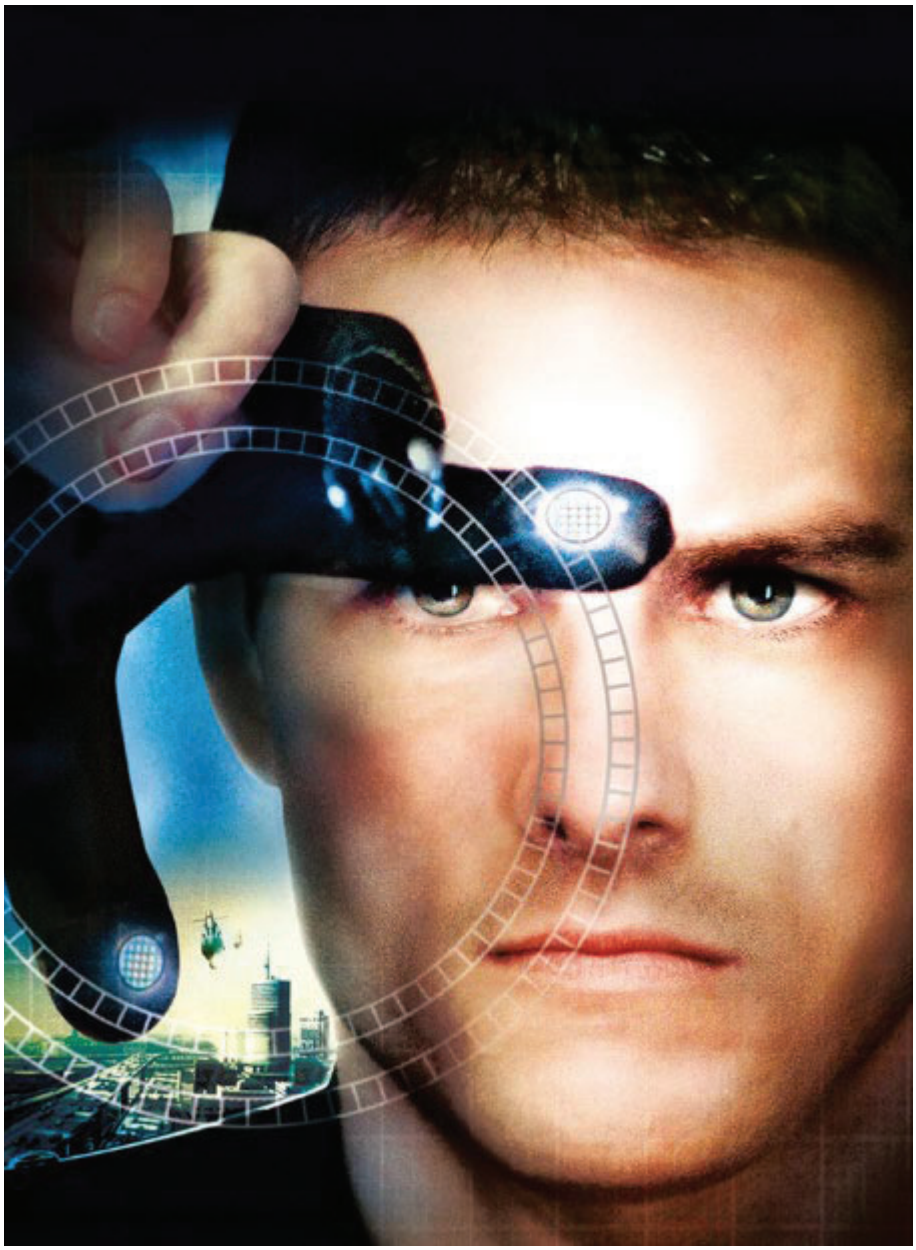
That brings me to venue. Here is perhaps the biggest secret. It doesn't matter. There is no such thing as 'home ground advantage' or 'neutral ground'. This is not a football game, there is no crowd, there is no advantage to be gained. In fact, going to a new place allows you to dissect very important matters such as interior design and taste – a bonding experience for anyone.

So pick somewhere comfortable, maybe with a view, or at the very least some decent art to help trigger inane small talk while awaiting an offer. And perhaps also pick a venue with one of those fancy coffee waiter buttons. Those things are cool.

**E. Clients**

Ideally any dispute would not involve a client at all. They get in the way of perfect cases, with their human fallibility and all. I assume that the absence of clients is the attraction for people who run large airline cases or international tax disputes etc because paper is paper, it does not cry, swoon or defer.

However, in the long run clients are reasonably important. They make decisions and pay bills. But preparing them for mediation is perhaps more important. They need a copy of this article. They also need to be ready to give something up. Ego probably, but what would a barrister know about that?



They may have become trite but there are series of platitudes that routinely get wheeled out at mediation about the risks of litigation. These include the inherent peccability of witnesses, the covetousness of opposing clients and the interminable process of trial, retrial and appeal. So why not mix it up? Reverse psychology for example. Start talking about how you want the trial to run because your workers in the Tuscan Villa have discovered an ancient Madonna fresco and it's going to cost a truckload to restore, or how you have always backed winners before discussing each and every bet that almost won but was pipped at the post at Randwick on the weekend. Shake the client to the core. Behind lust and greed (neither of which is advisable if you want to avoid a visit from your friendly PCC), fear is probably your next best motivator.

Even better than 'one off' clients are the frequent flyers such as claims managers, institutional in-house clients and property developers. They don't need preparation; this is not their first rodeo. They really just need entertainment, maybe some inane discussion about art, food or sport, and most importantly for you to know when to get out of the way.

**F. Cash**

Yep – for client to bring or receive. 10 out of 10 importance.

**G. Caffeine**

The lifeblood of being able to stick it out all day. Mobile devices have helped to some extent, although it is quite obvious if you're playing Candy Crush. The US Food and Drug Administration has published a significant amount of material on the use and risks of caffeine. They include:

(1) a direct stimulating effect that promotes alertness, temporarily relieves drowsiness, improves mood and relieves fatigue – what a wonderful thing;

(2) decreased suicide risk due to the mood enhancing effect – bonus;

(3) confusion – isn't that just the modern state of being?;

(4) irritability – perfect if you want to be left alone; and

(5) increased urination – perfect if you want to leave the little bolt hole you've been allocated to sit in.

In fact the only downside to caffeine is that it provides no nutritional value on its own, so you can't live on it (despite many valiant attempts). Nonetheless, caffeinate hard and often. The upside clearly outweighs the downside.

**H. Offers**

Finally, it is not a mediation unless efforts are made to actually mediate. It may sound quaint to some, but the general concept is that one side makes an offer to settle and then the other responds by either accepting or making a counter offer. See my comments above re: barristers and solicitors for why this sometimes does not occur.

People love playing games but the truth of the matter is that matters settle where they settle, or they do not. Once a settlement has been reached, the settlement figure becomes the point at which the matter settled: what will be will be.

If it helps to know, there is now a huge market of AI tools that are focussed on predictive analytics. One 'app' (no free ads) claims it can predict settlement to within 1% accuracy after the input of three offers (ummm – yeah – half – see above). Another can do even better by generating a series of outcomes along with the probability of each (that was once our job). Another still, by a process of monitoring digital chatter (creepy), can predict issues within a company, or in relation to that company's dealings with another, before they emerge so as to avoid disputation altogether (I saw that film – it had Tom Cruise and those weird precog things).

Don't be alarmed, this should all be quite comforting. It essentially means that the whole process (indeed our whole lives) are wonderfully predictable so it really is just a matter of getting through it to the end (which will come), and ending up somewhere in the middle. BN

## ENDNOTES

1 This is surprising given problems, such as children (generally), have been split in half since King Solomon.

2 There is no such thing as a mediator without war stories – that is a unicorn.

3 The irony being that running the case poorly is still protected, for now…