

BEYOND SETTLEMENT ON THE DAY

Success in mediation is often wrongly equated with the immediate execution of settlement terms.



It is important to recognise that success is not solely measured by whether a settlement is achieved during a mediation session. In many jurisdictions, alternative dispute resolution, often mediation, is a mandatory step before formal proceedings can start. Mediation may also be required before a case can proceed to trial or a tribunal. In such cases, even if a mediation doesn't immediately result in a settlement, it can still be considered a success in many ways.

In a 2022 survey undertaken by The Centre for Effective Dispute Resolution in the UK, a 72 per cent settlement rate in mediation was noted, with 20 per cent of matters resolving soon after mediation was held. Overall, a 92 per cent resolution rate was recorded within three months of mediation. It would be challenging for a mediator to follow up with parties or their solicitors about outcomes at the end of say three months, but in several cases I have done that and discovered many matters had in fact been resolved or claims abandoned.

What does success look like in the aftermath of mediation? Here are outcomes that can constitute success or at least partial success following what might initially seem like a failed mediation.

Delayed settlement: Sometimes, conditions created during mediation may lead to a resolution several months later. The mediator's interventions and information exchanges during mediation can trigger parties to rethink and settle the dispute soon after mediation.

Issue clarification: If mediation doesn't immediately resolve the matter it can lead to a crystallisation or narrowing of the disputed issues, reducing the length and cost of subsequent legal proceedings.

Re-evaluation: A party may realise during mediation their claim isn't as strong as initially believed, making the pursuit of the claim stressful and costly and the potential of a positive outcome too risky. In such cases, they might choose to abandon their claim.

Low-cost attempt: Sometimes a party might initiate mediation aware they may not continue the legal process if the mediation fails – but decides to just “have a go”. This often happens when the basis of the claim is doubtful, and the cost of mediation is relatively low. A settlement on any terms might be acceptable to the claimant but these claims frequently fail because of the steadfastness by the other party that they have no claim to answer.

Factors influencing resolution

The success of mediation on the day can be influenced by factors that may be beyond the mediator's control. It is worth considering generally what factors might impact on possible resolution.

Inadequate preparation: Parties or their lawyers sometimes fail to adequately prepare for mediation, leading to difficulties in evaluating proposals. That results in time wasted by parties in the limited time available for a mediation struggling to obtain the required information from a third party who has that information. When those details are exchanged after mediation, disputes frequently resolve.

Limited authority: When representatives attend mediation with limited or no authority to make decisions and rely on remote decision makers, or board approval, the chances of resolution diminish. The decision maker/s would not have experienced the

impact of the discussions and may only focus on a dollar amount without understanding how a proposal was arrived at. Worse still is the situation where a party has said that the ultimate decision maker will be at the end of a phone but the call goes to voicemail.

Unrepresented parties: Unrepresented parties may not understand legal matters well. I have occasionally mediated matters where the party has had a lawyer “on tap” but to save costs the lawyer hasn't attended but has given some advice to their client. Where the advice conveyed did not sound quite right, I have phoned the lawyer only to be informed that what their client had conveyed was in fact not the advice the lawyer had provided to the client.

Compulsory mediation: Parties may find themselves in a place that they don't want to be purely because of potential cost consequences if they do not attend mediation. The result is a lack of genuine effort to resolve the dispute with no intention of settling. In these circumstances they might go through the motion of mediating only because a certificate is required to proceed to a hearing.

Timing: Some disputes are scheduled for mediation before parties feel the financial impact of legal costs, or the exchange of sufficient information, making them less inclined to settle. In other words, before the matter is “ripe” for mediation.

Unrealistic expectations: Parties sometimes attend mediation having unrealistic expectations and with no desire to be commercial and clinging on to some belief that they will win in court. These parties are usually consumed by fear – fear of losing. Ultimately when they fail to resolve the matter, they will find someone else to blame.

Toxic relationships: Toxic relationships and deep-seated issues between parties that go beyond financial matters can hinder settlement.

Power imbalance: Power imbalances can impact the mediation process. Whether it's an institutional landlord and a tenant or a franchisor and a franchisee there could be some power imbalance. From a mediator's perspective a power imbalance is problematic because frequently one party has deeper pockets and is able to fund litigation without limitation if the matter doesn't resolve at mediation.

Time constraints: Mediations scheduled for too short a duration can result in premature termination. If parties engage a mediator for a half day mediation when a full day should have been reserved, a difficulty arises where the negotiations are continuing but the time allocated for the mediation has expired. Rescheduling is costly and momentum is inevitably lost, making settlement that much more challenging at a later stage.

The post-COVID landscape, marked by high interest rates, increased costs, labour shortages and mental health issues, has made resolving disputes more challenging. Failure to resolve at mediation may not necessarily reflect on the skills of the mediator, nor is it just one factor impacting the resolution rate. But if the parties attend with a genuine desire to mediate and want a mutually satisfactory outcome, the chances of a resolution are significantly boosted. ■

Jonathan Kaplan AccS(Med) is a solicitor (www.kaplanlaw.com.au) and former chair of the LIV Litigation Lawyers Section ADR Committee and a member of the LIV Mediation Specialisation Advisory Committee.