



## Clark & Associates Mediation Services

*Family Dispute Resolution | Property Settlement | Restorative Justice  
Care Complaints | Commercial | Workplace | Neighbour | Small Claims*

International Mediation Awareness Week (IMAW) 2024  
Mediation Institute Pty Ltd

### **Webinar: The Importance of Intakes**

Monday 4 November 2024 10:00am-11:00am

Presented by Kate Clark, Legal Director of Clark & Associates Mediation Services

#### **Conduct Intakes One to Two Weeks Before Mediation**

Intakes are a critical requirement under established standards and regulations; however, many mediators conduct them on the day of mediation, and some forego them altogether. I believe that conducting intakes on the day of mediation is inadequate.

Intakes serve a vital purpose in screening cases to determine their suitability for mediation. If a case is not suitable, the parties should be informed in advance and either issued a certificate or provided with alternative options.

It is essential to complete intakes at least one to two weeks prior to the scheduled mediation day. This advance preparation allows for a thorough assessment of the case, ensuring that the mediation process is appropriate for all parties involved.

Given the significant investment of time and resources that mediation requires, intakes represent a fundamental step in preparation. They also provide an opportunity to tailor the mediation process to meet the specific needs of the parties involved. Consider factors such as location, venue arrangements, layout, and arrival and departure times to maximize the chances of a successful mediation outcome.

#### **Build Rapport**

Some parties' express concerns about mediation either because of their past experiences with mediation, counselling, or legal processes, assumptions made by them, or because they have heard about negative experiences from others. This can create significant anxiety as they enter the mediation process.

I often start an intake by asking parties, "How did you go getting here today?" and "How are you feeling about the mediation?" Or if I sense that a party is particularly anxious, I might say, "What was it like coming here today?" or "How have you been feeling about today's intake?"



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It is not uncommon for a party to respond honestly, such as saying, "Awful!" "I'm so stressed" or "I'm really nervous." Follow up with a normalising phrase. "That's not the first time I have heard that" or "It would feel stressful, that makes sense, you are going through a lot." These questions and simple gestures can have a profound impact on building rapport and trust and provides reassurance for the process ahead.

Another important question to ask is "Have you been to mediation before? If yes, "What was that process like for you? If no, "What do you understand about the process ahead?" This line of questioning allows you to address any wrong information or assumptions that a party may be operating under. It also allows you to learn about any past experiences they may have had. Educate them about this mediation process and present options that cater to their individual needs or may assist address any past negative experiences.

Intakes should empower parties, giving them a chance to be heard by the mediator. When managed effectively, this initial interaction can leave parties feeling more comfortable, motivated, and ready to trust both the mediator and the process.

Encourage parties to view the intake as an opportunity to "interview" the mediator. They should feel confident in asking, "How will you mediate this matter?" This approach fosters a sense of ease, which is essential for building trust.

Invite each party to share their perspective on the conflict. Listen deeply to understand their narratives, interests, and emotional drivers. This understanding can promote greater openness and a collaborative mindset, enhancing the overall mediation experience. It also saves a lot of time on the day of mediation.

Before they leave, I make it a point to ask, "Have I answered your questions about the process ahead? How are you feeling about the upcoming mediation now?" It is not uncommon to hear responses like, "I'm actually looking forward to it" or other positive sentiments. This shift in attitude highlights a significant reduction in their anxiety levels.

By the end of the intake, parties should have a clearer understanding of what to expect on the day of mediation. They know where to go, what the process will look like, have a sense of my style as a mediator, and understand what will be required of them. This preparation not only alleviates their worries but also fosters a sense of confidence as they approach the mediation process.



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### **Build Trust, Consider Safety and Be Trauma Informed**

Trust is crucial in mediation, and without it, participants may be less open and more guarded in their communications. The key take away is: Do what you say you are going to do. Do not overpromise and underdeliver. Be honest, transparent and professional.

My absolute pet peeve is hearing other mediators in corridors of mediation venues moan about how difficult a party is being, or how awful their lawyer is, or moaning about yesterday's mediation. This behaviour is a breach of confidentiality and a terrible reflection on your professionalism. Even if the party does not hear you moaning about them and their matter, they will observe this behaviour and question your trustworthiness.

A task that I believe is grossly left unaddressed by many mediators is safety planning. It is fundamental to address safety head on in all matters with all parties. Safety should be highlighted at three levels: physical, psychological and emotional.

Discuss a safety plan with all parties, including actual and alleged perpetrators of violence/crime. Safety plans must be individual for each party, confidential and adhered to. Collaborate with them about what might feel safe for them. Use prompting questions and provide options.

Do not assume a process is or will be safe, for example mediation by phone or online. What if there are listening devices in that location (Domestic Violence)?

Ask the parties about their safety, domestic violence. Prompt them to think about how to ensure their safety before, during and after the mediation. How will they move to and from mediation?

For in person mediations consider separate entry/exit points, separate locations in the same building with security fob accessed doors, CCTV cameras, staggered arrival/departure times, meet people at a location away from the office and walk with them into the building, code word/code action to request a break, screens between parties.

For online mediations consider their background, confidentiality, use of headphones, how to get support if they become emotional/distressed - you are not there to support them, who is?



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Discuss who will be present at the mediation. Parties, lawyers, support people. Do not assume that you know what will feel safe for an individual. Recently a survivor of rape told me that the only person they were worried about seeing at the upcoming restorative justice mediation was the lawyer who had cross-examined them at trial. The defendant did not concern them.

Consider trauma. Post traumatic stress disorder/complex trauma impacts 1 in 4 Australian adults. Trauma is the brain in survival mode. Survivors feel unsafe/fearful/shame/guilt/doubt. Symptoms are different in individuals, can change over time, can occur immediately or later and often have pervasive effects. Importantly, recovery is relational. Positive, appropriate experiences are important. Trauma-informed practice is a strengths-based framework grounded in understanding and responsiveness. Focus on safety, trustworthiness, choice, collaboration, empowerment.

Be empathetic, not therapeutic. Listen, acknowledge, reframe, summarise. Validate emotions not content.

### **Gather Information**

During intake gather information about the context of the dispute from each party involved. This stage is critical, as it sets the groundwork for a more effective and tailored mediation experience.

Start by collecting essential details about the specific circumstances surrounding the conflict. Ask open-ended questions to encourage each party to articulate their perspectives, experiences, and emotions. This dialogue not only reveals the facts of the case but also sheds light on the underlying issues that may not be immediately apparent from material provided.

It is important to assess each party's level of understanding of their circumstances. Inquire about their needs and goals for the mediation, as well as the options they believe are available to them. This helps you gauge their expectations and preparedness for the process. Understanding where each party stands in terms of knowledge can guide you in providing appropriate information and support ahead of mediation and on the day.

Additionally, explore the history of prior attempts at resolution. What steps have they taken to address the conflict/issues in dispute? What methods have they tried, and what were the



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outcomes? This information is invaluable, as it highlights what has worked or not worked in the past and can inform your approach in the current mediation.

Identify the gaps in information. Can these be addressed at intake with general information/education? Or are there homework tasks that might need to be taken by each party prior to mediation? Referrals to other professionals between now and mediation?

### **Foster a commitment to participate well**

Mediation is an opportunity for parties but like most things, you get what you put in. Use the intake session to emphasise the importance of this opportunity, the investment being made and what is at stake if effort is not put in.

Explain the process, enhance and gain a commitment from each party to make a genuine effort on the day. Get some skin in the game. Assist parties to feel a sense of hope and enthusiasm that their hard work in preparation might resolve the matter.

Set ground rules for participation and emphasise the importance of a safe space for parties to communicate. These pointed conversations assist create a sense of structure and calm on the day.

### **Groundwork for Reality Testing**

Now that you have built rapport, established trust, tailored your approach, and considered the safety and trauma of the parties involved, it's time to lay the groundwork for reality testing.

Begin by clarifying the requirements of your role as a mediator. Emphasise that your purpose extends beyond merely validating emotions; you are there to help all parties shift their focus from individual grievances to the core issues at hand, and from past problems to future possibilities.

You cannot change a person's mind directly. Instead, focus on understanding their perspective. Ask them about their viewpoint: What is it? How did they arrive at this position? Once you have a clear understanding, gently introduce alternative ways of analysing the dispute. Avoid using scare tactics or applying pressure; these methods will only undermine



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your efforts and alienate the parties. Ultimately, this is their life, and they must feel empowered to explore different viewpoints.

Present alternative perspectives in a way that allows them to linger in the air, rather than forcing them down anyone's throat. Encourage open reflection and contemplation. Some effective questions to facilitate this process include: "What if you are wrong about that?" or "What if the Judge does not accept that that is an issue?" and "What will happen after the mediation if it does not resolve?" and "What are the potential long-term implications of this situation?" These questions invite parties to think critically about their circumstances and encourage them to consider new possibilities, fostering a more productive dialogue.

If you plant these seeds in intake the parties might contemplate at their own pace ahead of the mediation. People often say to me on the day of mediation "I've been thinking about what you said/what you asked."