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# Pre-mediation for mediators

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## ADR practice note

# Pre-mediation for mediators

Helen Shurven

## Introduction

This practice note arises out of 17 years experience in dispute resolution, including mediating family disputes and native title issues, mediating and conciliating conflicts relating to health and disability care and treatment issues, and conciliating workplace issues.

## What is pre-mediation?

### *What would someone who is watching see? What would someone who is listening hear?*

Pre-mediation can also be called a 'first separate session', a 'single party mediation' or other descriptors, depending on the jurisdiction. For purposes of this practice note, I will refer to the process as pre-mediation. Pre-mediation is distinct from preliminary conferences. The latter are sometimes used in a commercial environment to bring all participants together to discuss issues and the method of proceeding, before the formal all-party mediation commences.

Pre-mediation is where participants meet individually with the mediator. In general terms, pre-mediation enables the mediator to bring control to the mediation process, and commence assisting conflicted participants to work toward resolution.<sup>1</sup> In pre-mediation, the mediator meets with a participant on their own, or with the participant and/or their support person (such as a friend or family member), representative (such as a lawyer or advocate) and/or advisor (such as an accountant, anthropologist or social worker). Where a participant brings along a support person, representative and/or advisor, it is important for the mediator to clarify the role of each of these attendees, so that everyone is clear as to the nature and extent of their involvement. For purposes of this

practice note, where I refer to 'participants' this can also include a support person, representative and/or advisor.

The mediator uses open questions to establish the following:

- whether the conflict is suitable for mediation
- whether participants have capacity to participate in the mediation process, usually from their own assessment or self-reporting, and occasionally also from reports of others such as a social worker or psychologist<sup>2</sup>
- whether the circumstances as a whole are suitable for mediation.

Pre-mediation will often be held in the same place as the subsequent all-party mediation process. This encourages familiarity with the environment and may assist participants to feel more at ease in the all-party meeting(s).

The mediator will be an impartial third party who listens, engages and hears participants in an endeavour to tease out the underlying issues that will assist or impede them in reaching agreement.

At the end of each pre-mediation session, it can be useful for a mediator to summarise a participant's understanding of the process they have just engaged in, confirm any homework they may have to do before the all-party mediation proceeds (if it has been established that a mediation will proceed), and reality test how such homework will be undertaken and in what form it may be presented at the mediation session (unless it is just for the individual's benefit alone). A mutually agreeable time and date will then be set for the all-party mediation, with confirmation as to who will be attending, and their respective roles. An all-party mediation can run aground at the outset if a surprise participant turns up without the agreement or prior



knowledge of other participants. Careful preparation and thought put in at the early stage of a mediation process will yield dividends throughout the rest of the process.

Pre-mediation can be useful where participants are being represented or supported (whether by a lawyer or other professional person, or a friend or family member) and clarity is required about the extent of the authority of the representative, support person or advisor. Mediation can be derailed when an agreement has been reached at the end of a process, if it then becomes apparent that the participants who have reached agreement did not have the authority to do so.

## When to use pre-mediation

### *What precedes it? What follows it?*

A pre-mediation meeting is arranged between a mediator and each participant. Often there will be two participants to a mediation and, therefore, two separate pre-mediation sessions—one for each participant. In multi-party mediations, a number of pre-mediation sessions will need to be held. This can be seen as a disincentive to going forward with pre-mediations, given the time and cost of organising such meetings, and it can be tempting to go directly to an all-party mediation, or all-party preliminary conference. However, in my experience, time spent organising and attending each individual participant pre-mediation appears to streamline the all-party meeting, with participants being generally at ease, and prepared. Anecdotally, it appears that fewer all-party mediations may be required to bring the matter to resolution where pre-mediations have been conducted, therefore saving time and cost at that end of the process.

Pre-mediation assists a mediator to understand what type of mediation will have the best chance of leading to resolution of the conflict. For example, in high-conflict family mediation, particularly where there may have been violence by one participant against another, a shuttle process, including one where participants attend on separate days, may be more

appropriate than an all-party mediation where participants are in the same room at the same time.

Pre-mediation is also important in multi-party mediations, such as in:

- extended family disputes or elder care issues, where there may be two or more families and their expert representatives (such as social workers) involved
- native title mediations, where traditional owners, pastoralists, miners/exploration companies, government bodies, and their representatives, may be involved
- complex health or disability complaints involving participants and their carers or representatives.

## Purpose and rationale of pre-mediation

There are many definitions of mediation. Most focus on the elements of the mediator as a neutral or impartial third party, assisting participants to hear each other, identify issues, then generate options and come to a mutually agreeable resolution of a conflict.

As well as bringing initial control to the mediation process, pre-mediation can also be used for:

- establishing guidelines for the mediation—for example, confidentiality, the voluntary nature of the process, courtesy expectations
- choosing whether mediation, or some other resolution process,<sup>3</sup> is the best way to resolve the matter
- explaining the process to participants individually, which is reinforced within the all-party mediation through the mediator's opening statement
- giving time for a participant to air any concerns or issues about either process or substantive issues
- raising issues which may require a participant to do some homework to be better prepared for the all-party mediation
- developing a chronology of events or an issues statement
- establishing rapport between the mediator and each participant identifying all relevant participants.

In terms of its rationale, pre-mediation occurs at the beginning of the mediation process, where the

mediator takes control of the process and encourages interest-based bargaining, and where participants start moving toward resolution; the longer a conflict continues, the more likely is it that participants will become positional and move away from interest-based bargaining.

## Issues that can arise regarding pre-mediation

### *If I have more than two participants to a conflict, is it worthwhile spending time organising a number of pre-mediation meetings?*

It can sometimes be tempting to leap into a preliminary conference with all participants, to 'air issues' and 'get to the heart of a matter quickly'. It can appear to be logistically easier to organise an all-party preliminary conference or mediation, than a series of individual pre-mediations. In my experience, taking the time to organise and hold pre-mediations usually means participants are prepared, more familiar and comfortable with the mediation process, and have some rapport with the mediator in the all-party meeting, which all goes to increasing the possibility of a mutually agreeable settlement or outcome.

### *Is there a risk in having an individual repeat their version of events in a pre-mediation session?*

Generally the longer a conflict has existed, the more positional participants will become—repeating their version of the conflict and moving away from their interests. Pre-mediation is a useful tool to have participants outline their version of events, and then move to reality test each element of any positions, and re-focus participants on looking at their interests.

### *Do I always have to do a pre-mediation session with each participant?*

Pre-mediation is not a 'mandatory' part of the mediation process. However, in my experience the more heavily conflicted participants are



with each other, or the more complex a matter (whether in terms of its substance or the number of parties), the more useful a pre-mediation session with each participant will be.

***What if someone discloses something significant and relevant in a pre-mediation session that the other participant does not know?***

This will often happen in a pre-mediation session. It is important to work with the participant who has disclosed the information to find a way for that information to be disclosed in the all-party mediation, or prior to the all-party mediation, for example by circulating a document to other participants if that is appropriate. It is important that a mediator not collude with a participant to keep such information from other participants; in some cases this may even be illegal.

***Should I take notes in a pre-mediation, or use pre-scripted questions?***

It is often useful to take notes in pre-mediation. Where you intend to take notes, it is appropriate to advise participants of what you will be doing, and why—for example, as a memory prompt for the all-party mediation. Sometimes it is possible to jot down important points on an electronic whiteboard, and give the participant a copy for them to take away, particularly where some homework has been agreed upon. If you are conducting the pre-mediation with a colleague as a co-mediator, you can work with your colleague so that one mediator takes notes and one asks questions, or both take notes and both ask questions—whatever is appropriate in the circumstances. Again, it is important to inform participants of your method, which also models appropriate and inclusive communication. Similarly, if you intend to use pre-scripted questions, let participants know what you are doing and why. It may be that the organisation you are working for has a series of standard questions to be used in pre-mediation—if that is the case, it is useful for participants to know this.

**Some core elements of pre-mediation**

Each participant receives the same process information from the mediator.

Open-ended questions are part of the mechanism by which a mediator will move a participant from a position about their version of the conflict, towards interest-based bargaining. It is important for the mediator to ask open-ended questions, and avoid making statements or asking closed questions.

Identify the needs and interests of each participant.

**Some optional elements of pre-mediation**

It is preferable that the pre-mediation be held at the same venue as the mediation. However, it may not always be possible for the same venue to be used, particularly in rural and remote conflicts where the pre-mediation may have been done by telephone or videoconference.

Where a mediation is to be conducted by way of co-mediation, it is preferable for both mediators to be present at pre-mediations. This is not always possible, particularly in multi-party mediations.

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**Footnotes**

1. See more detail in the section 'Purpose and rationale of pre-mediation'.
2. For example, it may be as simple as a participant reporting that they have just been diagnosed with an illness unrelated to the conflict and they are unable to proceed at that time, or as complex as an elder care or disability issue where participants may not have capacity to participate without appropriate support or representation.
3. For example, it may become apparent that participants are able to resolve the matter between them using simple negotiation without the assistance of a mediator, or it may be that there is a contract in place that mandates a certain process to be used, such as commercial arbitration.