

THE R3 MONTHLY



As covid numbers seem to be stabilising, there is a lot to be hopeful about this spring

Restrictions seem to be slowing winding back, borders are starting to reopen and many in the legal industry are embracing a new way of working. Certainly mediations of the future seem likely to be a mix of face to face, online and a new "hybrid" version - which sees some parties face to face and others joining virtually.

This edition of the R3 Monthly sees a new feature - a list of cases that may be of relevance to some of the disputes we commonly mediate; discusses some of the circumstances when you might press for a face to face mediation and outlines our expert conclave facilitation offering.

online mediation tips and tricks



Screen size - is making eye contact with the other parties important (and it often is for an apology)? It's easier to build rapport when each participant has their own screen



Lighting - having a light source shining on your face will avoid distracting shadows and feel more natural. Use a "cool" lightbulb and diffuse it with a lampshade, or even a sheet, if it causes reflections off glasses.

When might a face to face mediation be better?

In the Winter edition of the R3 Monthly, we discussed some of the benefits of online mediations. You can read our thoughts in full in the blog post, "[How covid-19 inducted "pivoting" has increased mediation effectiveness](#)".

We are **often asked** whether we have seen **any difference in the success rate of a face to face mediation as opposed to one done online**. While the answer to that may vary depending upon how comfortable the mediator is with the online platform, personally, we have found very little difference in success rates.

However, that is not to say that there are some circumstances in which a face to face mediation may have been, or was, preferable. While it will also be dependant upon the unique circumstances of each matter, **if any of the below factors exist, serious thought should be given to attempting to arrange a face to face mediation:**

Concerns about confidentiality

Confidentiality is one of the most important features of a mediation, the mediation agreement usually requires the party to agree that all discussions are confidential and the mediator often reiterates it in the opening session. While it is not possible to control what people will, in reality, discuss after the mediation, when face to face at least everyone can see who is privy to the confidential discussions. During online mediations the parties may be kept in separate virtual breakout rooms, or participants may be in the peripheral area outside of the video view, and it may be possible for unknown observers to be observing the mediation during a confidential session.

Less "sinister" may be a scenario where one participant does not have access to a totally private space - for example they are working from home in a share house, or they work in an open plan office. In either of these situations it may not be possible to ensure that no-one will walk past their screen and inadvertently become privy to confidential information.

Likelihood of Distractions

Mediation has a greater rate of success if parties are fully invested in the process and applying 100% of their attention to the issues and matters that arise on the day. Participants engaging in an online mediation may more easily become distracted by incoming texts, emails and outside noise.

more tips and tricks



Take up any offer to have a pre-mediation tech check. Not only can you use it to give the mediator a deeper understanding of the dispute and the parties; it goes a long way towards dissipating any anxiety about the technology which may be a distractor on the day.

A party may even self-distract to avoid a difficult issue and give themselves "permission" to disengage from the negotiations. A mediator will have greater prospects of detecting the disengagement in a face to face session.

If a key participant is likely to be distracted by other work, including phone calls and emails, then it may be in all parties interest to mediate be face to face to remove that potential distraction. Whilst mediations can be lengthy and opportunities may arise throughout the course of mediation to check emails or take a call - if a participant is likely "to duck out" to a directions hearing, or be tempted to double book themselves and attend to other work at the same time, best be face to face.

In a recent pre-mediation conference with an (uninsured) allied health practitioner, we became aware that the practitioner was participating in the conference on speaker phone at the same time as treating a client, not only did that mean that the practitioner was not participating fully in the conference, it also meant that the client's treatment may have been compromised.

Needless to say, we strongly recommended a face to face mediation.

High levels of volatility

The very fact that parties have reached the stage where they have "lawyered up" and/or commenced proceedings means that it is most likely that there will be some level of conflict or disagreement between the parties - an experienced mediator can generally manage that during an online mediation.

However it is the matters in which the participants' emotions can swing widely and unpredictably that thought should be given to a face to face mediation (provided there are no safety issues). When a party shows distress, sadness or anger it can be dealt with in two ways – naming and confronting it (eg "I can see how upsetting this has been for you"), or by glossing over it (eg "why don't we just take a break"). Addressing the emotion usually paves the way for more constructive negotiations.

By the very nature of face to face mediations, it is much harder for a mediator to gloss over an emotion and most will confront it, however clumsily that is done – sadness or grief may be responded to by simply handing a box of tissues or getting a glass of water, and anger could be quelled by reframing the comment made.

When mediating face to face there are more options available to a mediator to address the emotion and prevent it from derailing the discussions.

Bias arising from technology issues

2020 has meant many people have been faced with the need to quickly brush up on their technology skills - and there is no doubt that some are better at it than others. At the beginning of Covid restrictions most people were tolerant of the poor lighting and positioning of cameras, crackly headsets or the constant reminder to people to take themselves off mute.

However, as time has gone on, people are expecting a certain level of expertise. If you are aware that a participant is not confident with the technology, talk to your mediator about doing a trial run first, most will gladly accommodate the request.

If a trial run does not assist, and a parties participation in the mediation is likely to be compromised (and that can be due to a range of factors such as a disability, inability to grapple with the technology, hardware issues such as poor bandwidth or an inadequate device) be aware of the potential that those difficulties may create a bias against the participant. If that is a real possibility then a face to face mediation may be the better option. The last thing you want is for factors arising from the use of an online platform to get in the way of negotiations.

If any of these issues may arise, discuss them with your mediator and seek advice as to whether the mediation would be more suited to face to face or online

Facilitating expert conclaves

Increasingly the Courts are requiring parties are arrange for experts with a specialised knowledge on an issue to confer and produce a joint report that identifies their areas of agreement and narrow the issues in dispute. Done well, the reports assist the just, quick and effective disposal of proceedings and reduce the need for experts to attend Court to give evidence. Done poorly they can be a waste of time and money.

R3 Resolutions now provides services as an independent facilitator of expert conclaves.

Facilitators can add great benefit by chairing the expert conclave, managing the competing interests and personalities of the experts, encouraging discussions, explores areas of agreement and records the opinions of the experts on the questions asked in a written report.

As the time involved in each expert conclave, and production of the joint report, varies significantly, our services are provided at the **hourly rate of \$450 plus GST**, charged at 6 minute increments. In most cases the conclave and production of the joint report takes approximately 4 to 5 hours.

A snapshot of developments in the practice areas R3 commonly mediates

Personal injury

NSW Court of Appeal considers the definition of "recreational activity" in Section 5K of the Civil Liability Act 2002 (NSW) in **Carter v Hastings River Greyhound Racing Club**. The Court of Appeal determined that Barry Nilsson Lawyers prepared a helpful [casenote](#).

Medical negligence

While dealing with a procedural issue - in **Pearson v Nepean Blue Mountains Area Health Service**, the Supreme Court of NSW considered the principles relevant to the transfer of proceedings from the District Court to the Supreme Court

The Court of Appeal (WA) considered causation principles in a catastrophic birth injury claim in **East Metropolitan Health Service v Ellis**

Historical child abuse

The Victorian Supreme Court handed down its decision in **WCB v Roman Catholic Trusts Corporation** in which a previous settlement deed was set aside.

Wotton + Kearney has also prepared an [article](#) discussing a few recent cases dealing with limitation periods and quantification of damages which is also of interest

Professional indemnity

Property manager liability - In **Yeung v Santosa Realty Co Pty Ltd [No 2], [2020] VSCA 29**, the landlord obtained a complete indemnity for damages awarded to an injured tenant from a managing agent for failing to identify inherently defective stairs. Clyde & Co's [casenote](#) on the case provides a good summary.

Family provision claims

In **Robinson v Robinson** the Court of Appeal considered whether the Courts approval of a settlement should be set aside. The HWL Ebsworth [casenote](#) is a good summary.



A great blog to follow for regular updates on developments relating to tort law is Bill Madden's wordpress blog - [link here](#)

What's coming up?

Now ...

Since late March, I have conducted over 50 mediations online, via various platforms and in various combinations. Pleasingly the results are about the same. Many have said to me that they will continue to mediate some matters online, particularly those involving regional parties, as the costs are significantly lower. Over the past few weeks, as restrictions have eased (who knows for how long), it has been nice to be back to a few face to face mediations. However, the real benefit is that now parties have the choice, online or face to face. Some matters are more suited to one rather than the other, so call me if you would like to discuss suitability further.

The next three months ...

Who would have thought that Christmas is not far away. We are now about 12 weeks out from the end of 2020 and I am informed that Centrelink is taking between 8 to 12 weeks to issue clearances. If you have a personal injury matter which your client would like finalised before the end of the year, now is the time to arrange settlement discussions, whether informal or via mediation.

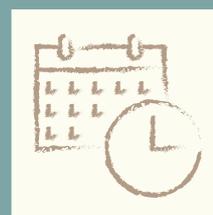
Bookings for half or full day mediations, face to face or online, can be made via the [R3 Resolutions website](#), or by contacting us directly on 0421 048 456 or by email, jsomerville@r3resolutions.com.au

Finally

Stay safe and keep in touch with one another. While this is a period of uncertainty and a new way of doing business, our profession is agile and we can continue to keep delivering great service to our clients.

If you have any questions on how online mediating works, or need assistance in preparing, just give me a call.

Click the calendar to check availability and book and online mediation



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