

Representing a client in mediation

MEDIATION Month in Auckland has raised the profile of mediation. Early statistics indicate that over 100 mediations were initiated as a direct result of the Auckland District Law Society project. A number of practitioners who were unfamiliar with the process have now been exposed to mediation and its benefits. This article summarizes some of the main points which counsel in mediation may find useful in defining their role within the process. It is the writers' experience that the role of counsel in mediation is significant and that their performance in mediation directly affects the outcome achieved.

1 Preparation

The value of preparation by counsel and their clients for mediation cannot be over-estimated. One of the key features is selection of a mediator appropriate for the dispute and the parties. Different mediators have different styles and approaches. It is counsel's role to consider these differences and determine the type of mediation most appropriate to meet the needs and expectations of the parties in dispute. (For a discussion on mediator selection, see the writers' article in *LawTalk* 486, 55). Attending mediation unprepared may prolong the process unnecessarily for the participants. The checklist below may serve as a guide in preparation for mediation.

Preparation check list

- Advise on process.
- Negotiate on process and the appropriate mediator.
- Determine and agree with the other side who will attend mediation.
- Check whether there are any limitations on authority to settle.
- Advise on confidentiality of process. Are any limitations required e.g. media statements, reporting back?
- Advise on information/documentation available - is further discovery needed?
- Advise on without prejudice nature of mediation.
- Review and sign mediation agreement.
- Prepare issue statement for mediator (optional).
- Prepare opening statement for client party.
- Identify needs and interests of parties as opposed to stated positions.
- Consider possible solutions: how might the needs and interests of the parties be satisfied?
- Consider objections to possible solutions.
- Consider level of knowledge and expertise - is a legal opinion or an expert report necessary for informed decision-making at the mediation?
- Examine best, worst and most likely alternatives to a negotiated agreement.
- Develop a negotiation strategy.

2 Conciliatory tone

It is important to remember that this is a problem which you as counsel and the parties are working on together. Extreme positions which cannot be sustained are unhelpful. The language you use is important.

3 Trust the process

Mediation is a process which the parties themselves design to suit their needs. The mediator will provide a framework but the parties flesh out the basic structure. The parties are given latitude to express the issues in their own way and in their own time. The dialogue between the parties is permitted to develop at its own pace. Counsel who are confident in the process will often encourage their client to do most of the talking because of the powerful impact this has in mediation. It is our experience that common ground between the parties is often more readily revealed when the parties have the opportunity to communicate directly with each other. Similarly, settlement options or offers can have greater force and appeal when presented by a party. If the parties genuinely want to resolve the dispute, the process will

allow that to happen. However, it does take considerable energy for the parties to reach resolution. Do not be dismayed by impasse. It is a natural and inevitable part of the process. The mediator will help explore ways of working through or past such obstacles. Don't try to jump a step in the process - mediation takes the time it does in order to be truly effective.



Deborah Clapshaw

4 Watch and listen

Mediation works best where the parties and their counsel engage in active listening which essentially means being open, attentive and focused. Mediation offers parties to a dispute an opportunity to feel heard. Your attentiveness as counsel will convey that you are listening and taking what is said by the parties seriously. You might not agree with what you hear, but if you are willing to hear their perspective of the dispute, the other side is more likely to be receptive to yours.

Active listening allows the listener to gauge the emotional intensity of issues for the speaker and therefore what is really important. It enables conflict arising from miscommunication, lack of communication, misperceptions or differing views of the data to be picked up and dealt with. Simply by listening and clarifying facts and data, the problem may be considerably reduced, or new interests and different settlement options may be brought to light. Active listening may also reveal that the parties prioritise the issues differently so that there are areas where trade-offs and concessions are possible.

5 Acknowledgement

Through active listening you are acknowledging the other person and their point of view. This is powerful in itself.

Even more powerful can be a verbal acknowledgement and acceptance of what the other party is saying or an acknowledgement of a shortcoming on your own or your client's part. Acknowledgements from the parties themselves, where appropriate, are meaningful so counsel have a coaching role here. Given the without prejudice nature of mediation, there is a great deal to be gained and nothing to lose by making acknowledgements and encouraging your client to move towards a resolution.

6 Clarify and inform

The mediation process is designed to reveal any misconceptions between the parties at an early stage. Where factual differences are exposed it is counsel's role to clarify them. Perhaps the gaps can be overcome or the differences bridged. There is likely to be more common ground than witness statements or pleadings reveal. You may be surprised at how much clarification of the issues can achieve in mediation.

Similarly, by seeking information from the other party about their needs and interests, the range of options for resolution may be greatly increased.

7 Honest answers to open questions

Some questioning by the mediator/other side, particularly on the alternatives to a negotiated agreement, might be challenging. There is no advantage to be gained in a defensive approach. It is important that views on the merits or weaknesses of an argument be given honestly. The parties need to be informed of the likely court outcome as perceived by their own and the other side's counsel. They can then evaluate the options



David Hurley

10 golden rules

By Deborah Clapshaw and David Hurley*

generated in the mediation in the light of those potential outcomes.

If you believe your client's position is strong you need to say why to the other side. If your client's case has weaknesses these need to be understood by your client if he/she is to make an informed decision in mediation. Your client needs to know the real risks and advantages of pursuing litigation as against resolving the issues in mediation.

Trust your mediator. He/she will be asking questions to assist resolution, not to challenge you. Your mediator should be able to help you to save face, if that is at stake. You are in mediation to help your client resolve the dispute, so you need to back down from over-enthusiastic predictions of court outcomes. Your mediator can help you do this. Invite them to ask the hard questions if your client is intractable or has unrealistic expectations of a court outcome.

8 Think outside the square

Counsel in mediation can bring their problem-solving expertise to the process by generating options, building on options, combining options and modifying options for resolution. This involves thinking beyond the legal remedies available to the parties to their real needs and what might be the best outcome for them.

9 Role reversal

Counsel in mediation can encourage their clients to stand in the other side's shoes and consider the situation from their perspective through the role reversal technique. Why does the other party have those objectives? What is wrong with or missing from the proposed solution from their perspective? How can the proposal be modified to meet their needs or interests, or is there another solution which meets the needs of both parties better?

10 Careful evaluation of options

The process allows for the parties to make their own informed decisions. Counsel need to ensure that the settlement proposal is

workable, legal and that the client can live with it. Check that the parties have not been worn down by the process and that the proposed solution meets their identified needs.

The checklist below may assist counsel to define their role and assist their clients to achieve their goals in mediation.

Attendance at mediation check list

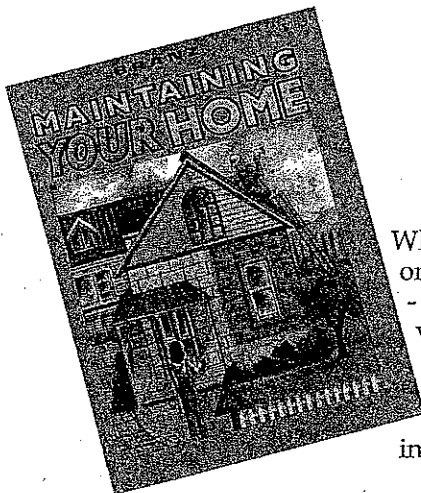
- Listen attentively.
- Clarify and inform.
- Trust the process.
- Recognise common ground where it exists.
- Make acknowledgements where appropriate.
- Think laterally.
- Try role reversal techniques to gain understanding.
- Focus on the objectives.
- Rely on the mediator to guide the process.
- Monitor fairness of the process and propose changes if necessary.
- Evaluate all options carefully.
- Modify and re-evaluate options in the light of new information.
- Seek the mediator's assistance to reality test alternatives to a negotiated agreement.
- Check that any proposed solution meets your client's needs and is workable.
- Review legality/implementation of any proposed agreement.
- Formalise agreement reached.

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