

MATA

Mediation and Training Alternatives

THE GOVERNMENT LAWYERS ROLE IN MEDIATION

Introduction

Mediation challenges the traditional role of all lawyers, both internal and external, in resolving disputes. To some it is a threat, to others it is an interesting opportunity to extend their skills and influence. This paper attempts to address both reactions.

The Threat

Mediation is an assisted negotiation. Settlement is not achieved through detailed argument on legal points, nor on the advocate's oratory skills. No judge, jury or arbitrator sits in judgement, so there is no-one to be persuaded other than the disputing parties themselves. With no legal forum and no-one to persuade, this could place the lawyer into unfamiliar territory.

A further challenge is that mediation is a flexible process and so not every one is the same. It also requires flexibility in negotiation and this may challenge the culture of settlements being subjected to detailed audit. Indeed there may be many challenges to the traditional ways of resolving disputes that take the government lawyer out of the accepted 'comfort zones'. The key message, however, is that this is a process which is cost-effective and provides better outcomes and therefore can be seen to be in the public interest.

Lawyers normally assume the role of leader and advisor in litigation and are therefore challenged by the concept of being in a supporting role in a mediation. It is the parties who are key. They are the decision-makers and the lawyer is the supporter. Government lawyers may be more accustomed to filling this supporting role, or even being the party in a dispute, and so the transition may not be so challenging.

But if any of this is seen as a threat, it is a temporary one. With experience of mediation, a lawyer will adapt and embrace the opportunities provided by mediation. It is, after all, a common-sense process and its suitability for resolving many cases will become self-evident once the process and roles are understood and confidence is gained through experience.

The Opportunity

What follows separates the lawyers role in mediation into three phases:

- Before
- During
- After

First, and perhaps most important, is the role of the lawyer in identifying cases where mediation may be appropriate, and raising with clients the possibility of its use. A change of approach from “is this suitable for mediation?” to “why is this not suitable for mediation?” can have a dramatic effect upon the number of cases selected for mediation.

Assuming mediation is then being taken forward, much preparation will be required. Preparation is vital if the mediation process is to be used to maximum effect, not least of all because most mediations last one day and so it is important to use that time well.

Preparation will include some or all of the following:

- Advising the decision-maker on the mediation process.
- Advising on who should attend the mediation.
- Appointing and briefing external lawyers.
- Advising on who should present the case (and perhaps do a ‘dry run’).
- Choosing the mediator.
- Preparing the case summaries (usually 5-10 A4 sheets) and other documents including an agreed bundle of supporting papers and, possibly, a confidential briefing sheet ‘for mediator’s eyes only’.
- Carrying out a risk analysis and a realistic assessment of the strengths and weaknesses of the case.
- Being sure of your BATNA (best alternative to a negotiated agreement) so that you know when to walk away rather than do a poor deal.

During the mediation the lawyer will:

- Present the case, or support the decision-maker if they present first.
- Support and advise the decision-maker throughout, particularly in assessing legal issues as they arise in the mediation.
- Be creative in finding solutions and ways to overcome deadlocks.
- Avoid getting into an entrenched position or situations where ‘face’ may be lost.
- Encourage the team to use idle time (when the mediator is not with them) creatively.
- Sometimes lead the settlement negotiations.
- Be a friend and supporter of the decision-maker, particularly when times get tough (which they do in every mediation).

After the mediation the lawyer will:

- Draft, or assist in the drafting of, the settlement agreement.
- Be clear about the practicalities of implementing the agreement ‘back at the office’.
- Oversee the implementation of the agreement and ensure that late ‘blockages’ do not sabotage the deal.

It is clear from the above that the lawyer has a key role in mediation. The mediator provides the best opportunity for a deal to be agreed by managing the process effectively and creating the right environment. It is up to the parties to make the best of that opportunity and lawyers can be the linchpin to the assisted negotiation being a success.

© David Richbell
July 2002