

The Subversive Lawyer's Guide to Mediation

by David Richbell

Mediation is 'sold' on the basis that it is quick, cost effective, confidential and puts the power back with the client. The Mediator, an independent and impartial third party, helps the parties to negotiate their deal in a forum that is flexible, informal and private. The effective lawyer has an active role, supporting and advising when required, and a quiet but influential role in the back seat when the client is ready to take control. It takes great skill to know when to activate the appropriate role.

Over fifteen years mediating civil and commercial cases I have encountered many lawyers with as many different styles in their approach to mediation. With some notable exceptions, most have rarely made the best of the opportunity and some have simply played foul making settlement more difficult. Training lawyers in using mediation in their client's best interests is a rational step but in the meantime this article proposes that if you are going to do it badly, you might as well do a first rate job of doing it badly. So here is the *Subversive Lawyer's Guide to Mediation*.

Introduction

Mediation poses many challenges to the subversive lawyer, not least the fact that no self-respecting fee earner wants a quick and cost effective process leading to early settlement, let alone having the power and control wrested away and given to the person least equipped to handle them – the client! After all, everyone knows that ADR means Alarming Drop in Revenue.

Mediation looms...

The other side will probably suggest the mediation – a subversive lawyer definitely would not. Unfortunately the courts are expecting you to consider mediation but *Halsey v Milton Keynes General NHS Trust* has muddied the waters sufficiently to give you ways to avoid mediation. Your case is so certain that adding another and unnecessary layer of cost by going to mediation is usually the best reason, and it has the added advantage of getting the other side even more worried. However, if the other side persist in wanting the case to go to mediation, playing the date game is usually the first ploy. To play this properly, you need to do some research:

>Find out when the other side's lawyer is on holiday or committed to being in court. Insisting on these dates will show the other side as being the difficult ones when they turn the offered dates down, not you.

>Similarly, if the Mediator has been chosen, find out when s/he is definitely NOT available and insist that these are the only dates when you definitely ARE.

>Alternatively, if the mediation cannot be avoided, insist on arranging one at short notice because it is the only time that you can get your team together and in one place. Seven days should be the maximum notice, ensuring that the other side come to the mediation weary from all the late nights of preparation, and worried that they are still

ill-prepared. Of course, the subversive lawyer should never prepare, so you will arrive on the day fresh and cheerful.

>One other thing – it is best if your client has to fly in or travel by Virgin rail to get to the mediation. The chances are that they will be late, keeping everyone else hanging around. Also, you should reassure your client that most mediations settle quickly and that they should book their return for around 4pm.

>Even better, offer a date that your client definitely cannot make. We all know how much less effective mediation is when important decision-makers participate by phone or even better, not at all.

In addition to playing the date game there is a lot that the subversive lawyer can do before the mediation. Choosing the Mediator offers lots of opportunity for mischief-making. The basic rules are:

>Reject all names of Mediators submitted by the other side. They are bound to be biased.

>If you have to choose someone, make sure it is a lawyer who is a specialist in your area and enjoys wallowing in the detail; preferably someone who will give a favourable opinion of your case and work on your behalf to weaken the other side's case. The chances are that the mediation will get so bogged down that everyone will give up.....or the other side will be so unhappy with the Mediator that they will leave anyway.

If, despite your best creative efforts, a Mediator is appointed and a date agreed, it is likely that s/he will want to make contact before the mediation starts:

>Don't take the call. S/he only wants to get your trust.

>If you simply can't avoid returning the call, make sure it is after hours when the Mediator is likely to have gone home.

>If, by some fluke, s/he does get through to you, take the opportunity to explain what a hard job the Mediator is going to have in getting the other side to be reasonable and that you will nevertheless do your best to support the Mediator in getting you a good deal.

>It is also worth explaining to the Mediator that you have done many mediations and so you will be happy to advise and guide him/her whenever you feel appropriate. The fact that none of these mediations have settled is probably a fact not to be shared.

The Mediator will ask you for a written summary of the issues to be resolved together with supporting documents:

>Don't bother. It is important to keep the Mediator in happy ignorance.

>Alternatively, a copy of the full pleadings will suffice. Even better, copy all your papers and let the Mediator decide what is relevant.

>Remember, Mediators particularly like copies of time sheets. Of course, the best time for delivery of documents is 6pm the day before the mediation. They should preferably include issues/documents of which the other side are completely unaware.

Finally, the venue. It is best to use your own offices. That way you can do some useful work on other jobs during the mediation. With a bit of luck, they will take you away when the Mediator comes looking for you. Of course, the other side should certainly be put in the basement room where there is no light and space is cramped. Anything to make them want to end the mediation quickly.

Food is important, so book a table at the local pub for lunch....your lunch that is. Your office can find a few sandwiches for the other side and the Mediator.

On the day

You will, of course have briefed your client for the day...that is, given directions to the venue. If your client has taken your advice, they will be late. When they do arrive, it will be necessary for you to brief them for at least an hour before the mediation can start. Try to get people to turn up who have not been notified to the other side. A past employee or business partner is a good choice. Better still a former lover. If none of these is possible then a private investigator should wrong-foot the other side. They might even walk out.

The Mediator will probably want a private meeting with you before the opening joint session:

- >Resist it. Tell the Mediator to get negotiating.
- >Question the need for an open joint session anyway. You know as much of the other side's case as you need and they should know about yours by now. Tell the Mediator to get negotiating.

If the Mediator ignores your advice and insists on having an opening joint meeting, you will of course concede gracefully but making it clear that an experienced Mediator would know that it will be a waste of time. If the mediator agrees that a joint meeting would not be a good idea because a party on the other side is likely to have a nervous breakdown, attempt grievous bodily harm or leave, then you should also concede gracefully and complain caustically at the end of the mediation that you didn't get an opening session and the mediator should have known that this was essential to success..

>Call the Mediator 'sir/madam' throughout. It is important to keep a sense of professionalism and propriety

>Insist on presenting first. After all, when the other side have heard what you have to say they will find it difficult to say anything in response that is of use.

>Keep the focus entirely on legal merits. Your own presentation should last not less than an hour, be delivered standing up and you should take every opportunity to make the other party aware of the incompetence of their own lawyer.

>Sometimes Counsel will be present and assume the role of presenter. Briefing them is expensive and time-consuming, so don't bother. They are used to sounding convincing without reading their papers anyway.

>If the other side insist on responding to your convincing legal arguments, show how much of a waste of time this is by constantly looking at your watch and yawning. The last thing you want them to feel is that you are listening and even understanding what they are trying to say.

>If the other side manage to get some momentum to their opening statement, insist on a comfort break. Having a client with a weak bladder is a great asset.

>As soon as the opening statements are over, return to your room and tell the Mediator to get negotiating.

The Mediator will shuttle between the parties, holding private meetings:

>Tell the Mediator your bottom line immediately and offer a success fee if s/he betters it.

>Suggest that the Mediator is not being even-handed if s/he is spending more time with the other side.

>Suggest that the Mediator is not being even-handed if s/he is spending more time with you. After all, it is the other side that needs to be convinced of the reasonableness of your case.

>The time that the Mediator is with the other side is an opportunity for you to go for walks or to the pub (or both). It is a good idea to take your coats and bags with you so that the other side start worrying that you might have walked out.

>Don't let the Mediator speak with your party alone. Better still, insist that all conversation with your party be through you.

At the end

Of course, if all goes to plan, the end will come quickly and everyone can have an early night. However, if settlement is reached (and such a serious situation must question your clients wisdom and indeed whether you want to continue to represent them), explain to the Mediator that it is beyond your client's authority and that further authority will need to be obtained over the next few days. That will give you time to help your client see sense.

Whatever the outcome, write a letter to the Mediator listing areas of potential negligence:

- >not being even-handed (more time with the other side....or with you)
- >showing bias and favouritism (calling others by first name)
- >gagging you (not allowing you sufficient time to properly present your case)
- >trying to separate you from your client (especially if the Mediator followed your client into the toilet)
- >prolonging time to get more fees (by insisting on the initial opening session / not getting down to negotiating right away)
- >undue pressure to obtain a settlement (not giving your client time to go away and reconsider the deal).

At the very least this will make the Mediator wary and ensure that s/he does not support any efforts by the other side to suggest that you did not enter the mediation in good faith.

Conclusion

It is a sad fact that I have experienced all of the above in my time as a commercial mediator. Except, I hasten to add, the last paragraph about threats of negligence and the suggestion of a success fee. These are bound to come: the subversive lawyer is not fiction and her/his tactics are getting ever more 'sophisticated'. It keeps us Mediators on our toes...hones their skills....and results in some entertaining stories! And 80% or more of mediations settle.

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