

WHAT THE MEDIATOR LOOKS FOR IN LAWYERS

Generally

In a commercial mediation the Mediator has a responsibility to give the parties the best chance of doing a deal. This includes creating the right atmosphere and environment and building trust with, and between, the Parties.

It is the Parties', and their advisors', responsibility to make the best of the opportunity provided by the Mediator. The dispute is their problem, and their solution, and the way the (limited) time in the mediation is used is critical to its outcome. It requires a different strategy and the use of different skills to those in other dispute resolution arenas.

Key to the effective use of the time is the principle that all discussions are 'without prejudice' and there need be no commitment to a solution until both Parties are able to say 'yes' and then set it down in writing. Once signed the Parties are committed to the settlement as with any other written contract, but until that time they can try anything in the cause of settlement, without being committed, and reject it if it does not work.

Given these circumstances it is clear that the lawyer has a special role in helping a client achieve a solution to a dispute in mediation by:

- Adopting a supportive rather than leading role
- Encouraging the client to speak
- Negotiating co-operatively rather than being confrontational
- Being creative in constructing solutions
- Thinking (and acting) beyond legal issues

whilst still keeping the client aware of the strengths (and weaknesses) of the legal arguments and regularly reviewing the risk analysis. In short, the Mediator seeks lawyers to be:

- Supportive
- Co-operative
- Creative

This can be a challenge, both personally and professionally. Egos are rarely massaged for 'winning' does not mean beating the opponent. There is little time for great oration and in mediation 'leading cases' have no place. Interpretation of the law fades away as clients seek commercial solutions and 'rights' become replaced by 'needs'.

BUT. Solutions to disputes achieved through mediation almost always result in satisfied clients and satisfied clients offer a big opportunity for repeat business and/or enhanced reputations..

Stages of Mediation

Most mediations follow a pattern. Although there is no clear distinction from one to another, the pattern normally follows five stages:

1. Preparing
2. Presenting
3. Exploring
4. Negotiating
5. Concluding

1. Preparing

The mantra for effective litigation, negotiation and mediation is “Prepare, prepare, prepare”. The more you know about your case, and the more you know about your opponents case, the more confident and effective you will be and therefore the better chance your client will have in achieving an acceptable solution. As the mediation nears there are three crucial areas of preparation to be carried out by the lawyer:

- Written summary of key issues. Ideally a 5/10 A4 statement covering:
 - Key players in the dispute
 - Brief history/chronology of the dispute
 - Issues in dispute (including financial claims)
 - Issues in agreement
 - Previous settlement negotiations/offers
 - Suggestions for progressing settlement (“for the purposes of the mediation”)
 - Participants in the mediation (and their titles/authority)together with a “For mediator’s eyes only” supplement (if appropriate).
- Preparing the mediation team by:
 - Ensuring each member has a clear role and purpose.
 - Ensuring the levels (and conditions) of authority for settlement are clear (and sensible)
 - Having a ‘dry run’, particularly of the opening statements
 - Imagining the other side’s arguments, strengths and weaknesses and trying to see the facts and events through their eyes. The more you understand their case, the more likely you are to construct a settlement to which everyone can say ‘yes’
 - Being clear about the ‘uniqueness’ of the mediation forum, the difference in process and procedure compared with arbitration and the courts, and the emphasis on it being an assisted commercial negotiation.
- Identifying the ‘walk-away’ point where a better solution can be found outside the mediation. This gives strength and confidence to the negotiators. It can, of course, be reviewed during the mediation to take account of information and developments on the day.

2. Presenting

There are two assumptions often made by most lawyers when the opening presentations are made in the first joint meeting of a mediation:

- It is the lawyer's responsibility
- It is positional and often confrontational.

It is worth asking the question in both cases "Why?". Often the best presentations are made by the Party for it is their problem/money/loss and they can often present with much more force and conviction. So what if they get emotional about it? It could be so much more convincing to the other Parties than a reasoned and dispassionate presentation of the legal arguments. In any case, a good mediator will ensure that everyone has an opportunity to add to the opening statements, so if legal points need to be made they can always follow the Party's statement.

Opening presentations are generally restating and summarising the previously written position statements. They generally emphasise the best position of each party (hence the term 'positional') and draw the battle lines for the day. That usually affects the progress (or lack of progress) in the mediation for several hours. It is therefore refreshing for the Mediator to hear openings that are constructive and pick up the opportunity for co-operation that is offered by the mediation forum. The key point to always remember is that this is a 'without prejudice' and confidential forum and Parties are not committed to anything until it is set down in writing and signed. The sooner Parties co-operate the sooner the opportunity to settle will arise. It is not a sign of weakness, just making the best of a unique opportunity to negotiate a deal. Picking up the earlier point that understanding the other Party's case is vital to constructing a settlement, the opening joint session provides an opportunity to ask questions and explore their position (and even to demonstrate acceptance that their position is genuine. You don't have to accept and be changed by it.....although you might be!).

The purpose of the opening joint session is to clarify the issues to be resolved and to prepare the ground for successful negotiations. Tempting though it may be, it is not a forum for points-scoring or highlighting the inadequacies of the 'opposition'. The lawyer's role in mediation is to assist the Party to reach a settlement. The question that should be constantly asked (and will be by the Mediator) is " does this move us nearer to settlement?". If it does not, then forget it and think of something that does.

3. Exploring

Following the opening joint session, the Mediator will probably break into a series of private meetings with each of the Parties. The purpose of these is for the Mediator to 'get below the surface' of the presented arguments, to understand what drives the Party and identify their needs (as opposed to their presented 'wants'). This is a totally confidential forum and the lawyer should encourage the Party to be frank and open. This becomes easier if the Mediator is able to build rapport and trust with everyone.

The temptation is to reveal important information gradually (if at all) and to 'play cards close to the chest'. The question that needs asking is "Why?; what purpose does it serve?. Does it help towards settlement?". Of course, if the Mediator has not been able to build rapport and trust, it is more difficult to reveal sensitive information but the lawyer is in control of that situation and will be the ultimate judge of what information should be given and when it is given.

One of the disadvantages of private meetings is the idle time when the Mediator is not with you. It is unreasonable to expect the Mediator to set tasks that will occupy all the idle time so it is the lawyer's responsibility to keep the assembled mediation team occupied and engaged. Boredom can be dangerous, particularly if the Party sees expensive advisors reading the paper. This is a time for creativity and imagination, to use the time reassessing your risk analysis, of reviewing what the Mediator and Parties have said, of seeing the facts and events through their eyes and of floating possibilities for settlement, particularly non-financial ingredients.

It is also the time to get some fresh air and exercise so that all the team are fresh and keen throughout the day, particularly if the mediation creeps into the evening/night. Of course it is important to keep the Mediator aware of your disappearance (and the reason) so that it is not interpreted as a 'walk-out'!

4. Negotiating

Most negotiators prefer positional bargaining; that is, to start high (or low) and give little, gradually (called 'salami-slicing'). Most Mediators hate being the vehicle for this 'performance', knowing that much of it is posturing and so, in the mediation forum, unnecessary. The challenge is for the Mediator to get the Parties into a zone of negotiation that is likely to achieve settlement and the lawyer can be a huge influence in enabling that to happen. The Mediator should by this stage have sufficient information to know where the negotiating zone should be. Without giving away any confidential information, the Mediator is likely to be able to comment how an offer is likely to be received and if it is in the zone. It is generally accepted that the first offer to hit the zone has the advantage as it controls all subsequent offers. So the best negotiating strategy in mediation is to cut the 'salami-slicing' and hit the zone.

One comment on negotiation strategy: the opposite of 'salami-slicing' is to table the best offer first and (knowing that it will be seen as being reasonable) stick to it. The trouble is, no matter how reasonable it might be, it will never be seen as the final offer and, if you stick to it you will be seen as being 'unreasonable'! Always have something more to give, no matter how little it may be.

Usually the best negotiators are the decision-makers, not least because it is their problem and the solution needs to be theirs also. Sometimes the lawyers are better placed to be the negotiators. Whoever takes that responsibility, a good negotiator needs to see the eyes, read the body language and gauge the reactions. That means meeting them! Most Mediators will ensure that this happens but, if they do not, it is appropriate for the lawyer to suggest that this should happen and probably that it happens before the negotiations reach their final phase. There is little point if the negotiations are almost over. However, as with all that is written here, there is no firm rule to follow except to try it!

5 Concluding

When the deal is done it needs to be written up. The Mediator will expect the lawyers to take responsibility for this and it could save time if a template is available and some time has been spent thinking about the items to be covered and the key wording that may be necessary. If court proceedings have commenced the form of Consent or Tomlin Order may need to be agreed.

A real challenge is how simple/detailed the Settlement Agreement should be. The principle of Heads of Agreement may be sensible, given that most people in the

mediation will be tired and probably not at their best when the settlement is being written. However, there may be a need to record the agreement in some detail to ensure that there no disputes arise subsequent to the mediation. If the lawyers from all Parties can participate in the writing of the agreement it may save time but be prepared for a minimum two hours of drafting before the Agreement is ready for signature.

Conclusion

Although it may be different to litigation, or even face to face negotiations, the lawyer's role in mediation is crucial. Most Mediators of commercial disputes find the presence of lawyers a real asset and force towards settlement. It is a relatively new role but also an opportunity to use different skills and have a very significant effect on the outcome. A Mediator seeks an ally, a professional who can make the best of the opportunity provided for their client to achieve a satisfactory settlement...and in so doing receive their (client and Mediator's) appreciation of a job well done.

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