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Mediation principles

Seven principles for successfully advising a party in a mediation

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As a result of mediating many commercial disputes over the past five years, I have distilled certain principles that lawyers advising a party in a mediation can usefully consider in order to achieve a mediated solution, if one is possible, in the particular circumstances. They are by no means prescriptive but they cover most of the essential areas.

1. Be familiar with the mediation process

As a mediator, I find I am always greatly assisted when the lawyers for both or all of the parties have had mediation experience and understand the dynamics of the process. The techniques used in a courtroom or tribunal are seldom appropriate in a mediation conference. Little is gained by long formal openings for instance. An adaptation of courtroom techniques assists greatly in creating an atmosphere where a mediated solution can more easily be nurtured.

Obviously there must be a first time for lawyers to advise a party in a mediation. All I can suggest here is that lawyers undertaking their first mediation should read widely about the process or talk to other practitioners who have been involved in mediations to better understand how it works and what techniques are most appropriate. There is also value in talking to the mediator to see what he or she expects from the process and the optimal role for the lawyers participating.

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2. Be prepared

Lawyers in a mediation should not be less prepared than they would be for a court appearance although the preparation may be a little different. For instance, it is not a forum for reading prepared addresses but there is no substitute for a thorough knowledge of your client's case and pertinent law in support of it. It sometimes surprises me in a mediation to have a client say something of great significance, which their lawyer has obviously not heard before. This can be an indication that the preparation for the mediation has been less than thorough.

It is also of assistance if the advising lawyer is familiar with his or her client's personal circumstances and what they are really concerned about. There are times in a dispute when one party seeks relief because of hurt inflicted by the other party. If the lawyer advising is aware of this, he or she can play a useful role in helping to fashion a solution which addresses all of the concerns of the parties.

I once mediated a Testators Family Maintenance (TFM) dispute where it did not emerge until late in proceedings that the underlying cause for the claim was not any desire for material gain but rather the wish on the part of the claimants to punish the primary beneficiary who had refused to make a family photo album of the deceased available to the TFM claimants. If that issue had surfaced at an earlier time, there may have been no ➢

need for the expensive legal proceedings which the parties had engaged in prior to the mediation being ordered which absorbed a significant portion of a very modest estate.

Another aspect of preparation which assists in arriving at a solution is the time spent by the lawyer for one party considering the merits of the opposing case; assessing the worth of the various parties as witnesses and so on. Given that the dispute is likely to go to court if a mediated solution is not found, thought needs to be given as to what will be the likely court result and the attendant costs and the lawyer advising a party should be acquainting his client on a regular basis with this reminder of what may be the worst outcome of a court hearing if the judge decides against your client. Beyond that, it is only fair and reasonable to factor in the costs of an appeal or appeals beyond the original trial judge's decision. As every lawyer knows, the worst result in a court hearing can be an unexpectedly good result, as an appeal from the other side may inevitably follow.

Finally, you need to make sure that your client has key decision-makers either present or readily contactable throughout the mediation. Failing either of these, the advising lawyer needs to ensure that he or she and the client have some considerable leeway on the terms of settlement which can be agreed on. A mediated settlement invariably reflects the dynamics and ebb and flow of the day's discussion. To take a decision elsewhere a few days later may simply lead to the matter being re-argued and the hard won solution jeopardised.

3. Be flexible

No one intent upon a successful mediation outcome, from my experience, can remain in an entrenched position throughout the proceedings. As a minimum, there should be a range of relief your client will be prepared to consider, especially any options which may 'expand the pie', which can result from parties working co-operatively in a transaction. If your client for any reason, be that emotional or cultural, is unwilling to move from a fixed claim you may have to advise against mediation.

The most common problem I have encountered in this area is the lawyer and his or her client who is relying on counsel's advice or a valuer or other expert's opinion, which appears to be open to debate, but no one is willing or able to discuss or critically review the opinion or advice because no one present has either the knowledge or experience to do so. Where external advice or an opinion is so pivotal to a matter, the expert should either be present or be capable of being questioned by the mediator and the other party and his or her lawyer even if that has to be done over the telephone.

4. Be client responsive

Mediations do not work well if the clients are not present or are not permitted by their lawyers to meaningfully participate in the conference. In many recent mediations, I have found the lawyers encouraging clients to make opening statements; to say how they feel about the dispute and the other party; and, generally, to intervene on factual matters throughout, in order to ensure there is a clear understanding of the issues involved. This is a very pleasing development and is supportive of the notion of mediation proponents that mediation is the client's process, or at least a process that does empower the parties, as opposed to the courts, where the clients invariably take a 'back seat'.

Not all clients are capable of expressing themselves clearly or articulately and some may be nervous or intimidated by the other party or the process itself. Thus, one cannot as a general rule demand their participation in opening statements and the like. However, there is no reason why a party should not be regularly consulted by his or her lawyer, who may need a 'time out' to discuss more fully with the client what new issues have arisen. The lawyer can then convey to the mediator the client's feelings or reaction to the events of the day and the developing issues.

Cross-cultural mediations impose additional demands in the mediation. It does add one further element to the dynamics of a mediation where one or more of the parties do not speak English (or are not confident in speaking English as a second language). Time needs to be taken to ensure that any interpretation is accurate where an interpreter is used. It is usually best for the mediator to engage any interpreter required to ensure that the foreign party's interpreter is not giving advice in the foreign language and thus interfering in the process, no matter how innocently.

5. Be frank (but diplomatic)

I can recall no specific harm being done by a lawyer or his or her client in a mediation speaking plainly or frankly about their views on a factual matter. In fact it often helps at the beginning of a mediation 'to clear the air' if the parties speak strongly of their hurt and anger. The mediator may have to re-phrase the expressed views of the parties to distil the essence of the complaint in unemotional language but that is a standard mediator skill.

However, if the abuse from one or more of the parties continues unabated for too long it will, in my experience, do little to assist the parties in reaching a successful outcome. The abusing party will merely make the other side respond in kind or else become very defensive and less inclined to consider all options dispassionately.

There is then a question of the timing of any 'plain speaking'. It is always far better at the beginning or if an impasse is reached later in proceedings and one party refuses to move from an entrenched position. It is most unhelpful when concessions are being made on both sides and a sense of trust is being established. A lawyer advising a party who senses his client is becoming too emotionally over-wrought at this stage should seek a 'time out' to allow this emotion to subside and to ascertain the cause of the upset.

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6. Be patient

➢ This leads me logically to my next point, the need for lawyers to be patient in a mediation and to encourage their clients to be no less patient. Many successful mediations take time as the parties come to terms with each other's point of view or different interpretation of the common facts. I sometimes encounter lawyers whose enthusiasm appears to flag at the slow progress being made and who have an irresistible urge to say 'That's it. We've been more than reasonable to date. We'll make one last offer and then we go!'

Ultimatums of this kind invariably do not help and the other side will as often as not reply in kind at a quite disparate figure and all hope of a negotiated settlement is lost. The mediator in this situation will try to get the lawyers and their clients to consider what has been achieved to date and what the alternative to a settlement might be and the lawyers advising the parties should seriously discuss these issues with their clients in private to ensure their abandonment of the process is what they really want.

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7. Be alert

My final point comes from my reflection upon the lawyers who are most successful in mediations. They are invariably very observant, looking for concessions from the other side and indeed their own clients or taking suggestions from the mediator on board to keep the negotiations going and adapting their settlement proposals to the dynamics of that particular mediation.

A lawyer in a mediation may need to be well prepared but it is essential that he or she does not read from a prepared text or have a specific solution in mind. Rather he or she should be continually evaluating and re-evaluating what is said on both sides and considering what a court might do if the matter has to go there and what is a fair result for both parties in the circumstances.

If you find you are getting stale or it is difficult to concentrate to be able to do this effectively, ask the mediator for a break to recharge the batteries.

Mediation is very demanding and at times it can be a draining process for all concerned, especially the lawyers, as everyone needs to concentrate the whole time. If a party engages both a barrister and solicitor to be its representatives, there is the opportunity to divide responsibility between the two of them but both need to be closely monitoring what is being said and done and to compare notes from time to time so both are on the same wavelength. Equally both need to ensure their client is keeping up with what is being discussed and where the mediation is heading.

Conclusion

Much of what I have said is common sense and I am not sure any of it will come as a significant revelation to experienced mediators or to lawyers who appear regularly in mediations.

It may assist, however, lawyers who are new to the process and who may be curious as to what qualities are required to adequately represent and assist their clients in a mediation. In this new age of court-ordered mediations, every practitioner may one day need to be able to represent their client in a mediation and, as the process is so different to a court hearing, I hope that these seven principles will be of assistance in making the adjustments needed to help optimise the chances of a successful outcome. ❖

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Conferences, Workshops

20-23 June 1999

12th Conference of the International Association for Conflict Management San Sebastian-Donostia, Spain.

Submissions are invited in the areas of negotiation, third party intervention, international and intergroup conflict, decision processes, organisational conflict, communication, culture and conflict, social justice, environmental and public resource conflict, conflict in the public sector. Submission deadline: 15 February 1999.

For further information go to http://mba.vanderbilt.edu/bruce.barry/lacm.call4submissions.htm