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Practice issues in mediation

No mediator is an island: A mediator supports others, but who supports the mediator?

Bianca Keys

The Accord Group administers the Office of the Mediation Adviser (OMA) under an appointment from the Australian Government. In this role, we work with a national panel of over 130 mediators and are making about 140 mediator appointments each year for franchise disputes. This requires not only that we mediate process issues with the disputing parties, but also that we provide process and emotional support to the mediators that we appoint.

Our work on the OMA is certainly an interesting and rewarding experience. One of the most valuable aspects is working with our panel of over 130 mediators. The experience and the knowledge that these individual mediators bring to the table is an incredible asset to the franchise sector.

In administering this panel it is clear that there are many challenges faced by our mediators in this line of work. Mediating is exhausting! Imagine if you were to tell somebody that your job involved long hours, tension, arguments, tears, legal jargon and recalcitrant advisers, defamation, walkouts, often no lunch due to separate meetings, and then little thanks at the end of the day. There would be very few people pursuing work in this field!

However, something does draw people into working in this area: it is the process. The transformations in relationships and communication, mutually-conceived solutions that can not be achieved through the court system, building of trust, connecting with people, and seeing people's needs met that ultimately drives a special breed of positive, perceptive and persevering people into the mediator's chair.

In working with our panel, we see it as our duty to offer the support required to tackle these challenges and to be able to thrive on the perks to continue this

work. Preserving the sanity of those who are preserving the sanity of disputants is the challenge we face and continually strive to perfect in supporting our mediators.

So, what are the main challenges and pressures faced by mediators dealing with disputes?

We have recently put this question to our panel, and received a collection of all too-familiar responses: familiar to us as fellow mediators, and some specifically familiar to us in our dealings with franchise disputes.

Our mediators report the following challenges:

- situations where a party is not particularly willing to attend, or where they present themselves as willing yet act in a contradictory manner
- difficulties in obtaining payment
- mental exhaustion from being expected to be a patient listener, counsellor, psychologist, referee, offer communicator, moderator, lawyer, philanthropist and, one we are all familiar with, the 'squabble-stopper'!
- the structural content of administration of the mediation
- refusal of the parties to agree to your process suggestions (separate preliminary meetings)
- to do the best job possible each time for the parties involved
- disparities in understanding of the mediation process and the additional time it takes to explain it
- unrepresented parties with little or no idea of the reality of their situation
- physical and mental endurance to keep going, through the impasses and sometimes through the night!
- advisers/representatives who do not understand or support the mediation process
- managing the urge to give legal advice where there is none, or where this



- advice is destructive
- always having to be neutral and ‘powerless’
- high emotions
- being rested and ready to be your best self on mediation day
- ongoing exhaustion from the negative behaviour of disputants over time
- entrenched positions
- lack of preparedness of parties and representatives
- lack of authority, despite assurances otherwise
- initial shyness of parties and feelings of hopelessness
- parties who feel that the mediator is ‘in on the plot’
- the ‘auditor syndrome’: is the mediator welcome or liked?
- parties who carry ongoing emotional burdens and now have a fresh target – the mediator!

This list could go on and on. So, how do mediators resist the urge to have their own emotional and mental breakdowns? How do they carry on with this work? Thankfully, we work in a field of perhaps the most positive and sharing individuals imaginable. We work amongst people who have often had a lifetime of experience in dealing with people in dispute before even tapping into the field of mediation. There are lawyers, ex-judges, small-business owners and psychologists. Again the list goes on. We have a wealth of experience to utilise in order to find out how another may have dealt with a similar situation, or to find out exactly what type of support is required to keep the engines running.

On an administrative level, there is a lot of support that can be offered to

help provide a clean and clear passage to mediation day. This support needs to be prompt and of course encouraging in its approach. Responsive and well-trained staff are essential. There may be the need for assistance with particular points of law and in being kept up to date with the latest developments in an area. There is a role that can be played in educating the population, or at least those in dispute, by providing adequate information regarding the process of mediation. In cases where there is a reluctance or unwillingness to attend, the OMA can assist by sending letters outlining the consequences of non-attendance under the Franchising Code of Conduct. As administrators we support the mediator by giving encouragement, reassurance, advice or brainstorming during the preparation phase, or by suggesting to the parties that legal advice be obtained and providing a short-list of names for this purpose.

For many mediators, they find great support in either the co-mediation model, or in having an observer that they can speak, and collect their thoughts, with as the mediation progresses. Supervision or engaging a counsellor for debrief can also be invaluable. The human element is essential for us all as mediators. I am sure that none of us underestimate happy and positive collaboration with a colleague. The opportunity to share concerns is fundamental to continuing in this area of work.

Essentially, we need to be able to download our frustrations, our disappointments and any other emotion, and we definitely need to be able to laugh about it. Many of our mediators made this point clear in their desire to create

forums for discussion: the space to swap ‘war stories’. From our point of view, we are always happy to lend an ear and to offer the chance to debrief. Creating and maintaining dialogue is so important.

Mediators also need their own downtime, when a strong coffee and a quiet spot under a tree are just the thing. Or my personal favourite that came from one of our mediators: ‘The Mediation Breakfast’. An innovative mediator’s wife developed this one. It arms the mediator with a full belly that takes him through the entire day! Lateral thinking skills definitely run in this family!

Preparation is also tantamount to a long-life mediation career. Being well rested, keeping your personal life in check to the extent that one can, and maintaining a level of inner peace and congruency are all so important. Working on this and bringing your natural personality to the work that you do can assist your professional and personal well-being immensely. From the mediations we administer it is clear that those mediators with high settlement success rates are those who have learnt to achieve the above. They are organised, flexible, positive, encouraging, have a good theoretical preparation, and possess an enthusiastic energy. None of these is possible without preparing yourself and looking after yourself.

Ultimately, any mediation can be daunting, exhausting and exhilarating. But it is how you prepare yourself and the support you receive that makes the difference. One might find oneself tearing out one’s hair and crying, ‘Why don’t people do what is good for them?’ At times like this it is worth recalling what an international colleague of ours often says, ‘Mediators never fail: only the parties do’. While this may be an exaggerated statement, it is not without an important message. If we are to focus on preparing ourselves and getting the support required to continue this work, we cannot fail the parties in doing the best that we can. ●

Bianca Keys is Mediation Manager of The Accord Group Sydney and can be contacted through www.accordgroup.com.au. Applications to join the OMA Mediator Panel are welcome. See www.mediationadviser.com.au.

contributions

Contributions to the **ADR Bulletin** for 2006 are welcome

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