Mediation Strategies

1. Mediation has been used to resolve disputes long before lawyers adopted it as their own. It dates back to Ancient Greece and has been used in various forms by a number of civilisations, ethnic and religious groups, states and industries ever since.

2. Despite that long history, in the context of modern litigation, it began to gather momentum in the late 1980s and early 1990s. Its popularity coincided with the introduction of case management which compressed the litigation process into a much shorter duration. The effect of that was to also compress the cost of litigation. Although case management has probably reduced the cost of litigation generally, the effect of having to pay for litigation over a much shorter period of time has no doubt highlighted that cost in the minds of litigants.

3. Since then most if not all practitioners have become very familiar with mediation, which is now almost invariably conducted at some point in the life of proceedings, either voluntarily or pursuant to a court order. But familiarity breeds contempt. The frequency with which practitioners become involved in mediation has tended to remove its shine as an effective form of dispute resolution. Continual reassessment of what we do and how we do it is critical to our ability to deliver good effective legal services to our clients.

4. Mediation remains an effective method of dispute resolution if undertaken properly. Today we are looking at strategies to get the most out of mediations.

WHEN TO MEDIATE

5. Like most things in life, timing is everything. It is important to consider when is the best time, during the life of a dispute, to mediate.

6. By the time lawyers become involved, a dispute will usually have evolved to a point when proceedings have been, or are about to be, commenced. The dispute will then develop in different ways depending on the jurisdiction in which it is being fought out.

7. When is the right time to mediate in the life of a dispute will depend on a number of things such as:

   (a) the nature of the proceedings;

   (b) the personalities involved;

(c) the sophistication of the litigants;

(d) the speed at which the proceedings have been conducted so far; and

(e) the likely costs going forward as well as those already incurred.

8. The important thing is to give the question some thought.

9. There will be some cases where the timing may appear to be beyond the control of the parties. Some court lists have a practice of imposing mediation on the parties and from time to time courts will direct parties to mediate when the time is not right. We should as practitioners be prepared to push back when we have formed a view that the time is not right.

10. There is generally a tension between two competing but important criteria when picking the moment to mediate.

(a) Litigants generally want to make an informed decision as they can. The more information about the dispute, and more importantly, the other side's case, a party has the more they can assess the case, its risks, its costs.

(b) Litigants want to mediate to reduce the costs of the dispute. The longer cases run the more costs are incurred.

11. So you will have to undertake a cost-benefit analysis to determine the best time to mediate. At what point will the law of diminishing returns mean the additional information you are likely to acquire will be outweighed by the costs of acquiring it.

PRELIMINARY CONFERENCES

12. Once the parties have elected to participate in mediation, to maximise the benefits of the process, it is essential that both the client and practitioner are prepared.

13. Preliminary conferences provide an opportunity to the parties and their representatives to discuss with the mediator the process for the mediation and explore issues that have the potential to derail the mediation. Preliminary conferences are usually held between a few days to a few weeks prior to the mediation.

14. By no means an exhaustive list, the following are some issues that should be settled prior to the mediation commencing:

(a) who is coming?

(b) who has authority?

(c) who are the representatives?

(d) will there be any ratification required?

(e) who will sign any agreement that may be reached?

(f) what are the issues (legal and non-legal)?

(g) how will any agreement that is reached be documented?

(h) should someone bring a draft or template to use if it there is an agreement reached?

POSITION PAPERS

15. Position papers should not be underrated by parties. Regardless of whether the dispute has just begun or has been on foot for some years, position papers provide a unique opportunity for a party to articulate their understanding of the dispute directly to the other.

16. Consequently, position papers can be a powerful tool.

17. An effective position paper is **not** one that sets out legal principles and why a party will win, but one which creates a narrative of the dispute, identifying the risks if the dispute continues and assist the other party to see the dispute in a different way.

18. The position paper should set the tone for how the mediation is to be conducted.

OPENING STATEMENTS IN THE GROUP SESSION AT THE MEDIATION

19. So many practitioners fail to take the opportunity to make an effective opening statement in a group session at a mediation. In some cases they determine not to make one having dismissed it as unnecessary because, for example "*we all know what the case is about"*. In other cases they roll their arm over and just walk the mediator and their opponent through their perspective of the case and why they will win.

20. An opening statement is a unique opportunity to speak directly to the person across the table. In virtually every other aspect of the dispute you will be dealing through intermediaries. Counsel will speak to the other side's counsel who will then speak to the instructing solicitor who will then speak to the client. In a mediation you will have possibly the only opportunity to look the other party in the eye.

21. The opening statement is not an opportunity to make submissions. No one has ever been persuaded to settle a dispute because of a lawyer's submission in an opening session. That is best left for the judge.

22. In most cases it is not an opportunity to walk everyone through a detailed analysis of the pleadings and explain what the case is all about. Ordinarily the lawyers, and probably the parties themselves, will have read the pleadings. They will have an understanding of what the cases is all about.

23. You should look closely at all aspects of the dispute, including the events that led to it, to try and identify things that would make settling at mediation more attractive than proceeding to trial. The obvious one that everyone raises is the saving of costs going forward. But there will often be other things that you can highlight.

24. Consider who is your audience for your opening statement. So often lawyers sit across the table staring down their opponent during the opening statement like they are performing some form of verbal Haka.

25. In virtually all cases you should direct your opening statement to the party who will make the decision whether to settle and on what terms. Usually that will be the client.

MULTIPARTY LITIGATION

26. Mediations involving a number of parties with disparate interests raise particular issues that need to be considered.

    (a) the relationship between the parties.

    (b) whether one party's position is contingent on another party's actions.

    (c) can some parties be dealt with as a group or must they be dealt with separately?

    (d) how would obligations be expressed to flow in any settlement that may be reached?

27. You need to identify, and be conscious of, the dynamics of dispute.

    (a) Is there a driving party the others will follow?

    (b) Keep an eye on the sleeper party.

28. The sleeper party is the one who sits passively through most of the sessions and allows others to negotiate. then, at a fairly advanced point in the process, the sleeper party will

awaken and propose terms that throw the negotiations or an existing agreement in principle into turmoil.

29. If there is a party who appears to be content to sit and watch all that goes on around them you should ensure you involve them at all relevant steps.

ACHIEVABLE SETTLEMENTS AND HOW TO DOCUMENT THEM

30. Mediation can be the perfect forum for parties to interact directly to creatively find solutions to meet all parties‘ needs. Such a process can reflect the “edge effect” where two ecosytems meet.

31. However, unless the parties workshop during the mediation the achievability of their solutions, the creativity can be quickly lost.

32. Consequently, prior to reducing the parties’ agreement to writing, it is essential that the parties and their representatives consider how the solutions will be implemented, whether there are any risks and any contingencies.

33. Once an agreement is settled in principle, the parties should reduce the agreement to writing before ending the mediation. Although it may be tempting for the parties to celebrate reaching an agreement, the parties are unlikely to reap the benefits of their hard work if the agreement is left to be documented at another time as delay can cause further disputes about the exact terms of the agreement.

ETHICAL ISSUES

34. Everyone would appreciate that what goes on in a mediation is confidential. That is invariably reflected in a mediation agreement that the parties usually sign. It is often also reflected in a confidentiality undertaken signed by those attending who are not parties.

35. There are also confidentiality and ethical issues that arise within the mediation. That is particularly the case in multiparty disputes.

36. There is often disclosure between two or more parties of matters that cannot be disclosed to another participant. You need to be conscious of what can and cannot be disclosed and to whom.

37. The dynamics of a mediation often also give rise to parties and lawyers dealing in close proximity. Although it is common (and desirable) for each party to have a break out room to

discuss things in private, the acoustics of the rooms at some locations (not at Greenway thankfully) is questionable.

38. However, the breakout rooms are not the only places that confidential discussions take place in a mediation. You will generally be able to recognise when a private conversation is taking place and know to keep your distance. But from time to time those private confidential discussions are overheard. There is an ethical responsibility not act on, or repeat, something you have overheard that you know was private and confidential.

39. Similarly, during a mediation parties and their lawyers will move from room to room conveying offers or information or asking questions. There is also the potential in that process to inadvertently see something such as a document that will know is confidential. The same ethical responsibility applies to something inadvertently seen as overheard.

ELECTRONIC MEDIATIONS

40. As the years go by, technology is becoming an integral part of our professional and personal lives. Consequently, it is inevitable that electronic mediations will become, maybe in the very near future, cemented as a common platform to resolve disputes.

41. The ease with which a party can access a dispute resolution process from the comfort of their home or office and interact with another party who may be in a completely different time zone capulates the very essence of alternative dispute resolution being informal and fast.

42. However, as is all too familiar with technology, such a process can have its pitfalls.

43. Where mediation emphasises the effectiveness of interacting directly with the other party by being in the same room and looking at the other decision-maker in the eye, the use of technology can distort human interaction and create nuances that may not be there. This may be particularly heightened when a mediator turns off the screen to one party so that the mediator can have a private session with the other. In circumstances where the blocked party cannot see what is going on, this may cause a level of unnecessary anxiety.

44. The mediation process must update as society evolves and changes, however, it is essential that the established benefits of mediation are realised. Ultimately mediation is a useful dispute resolution process to preserve the parties‘ relationship. Therefore, prior to utilising any online platform, the parties should ensure that the process will not, in itself, be another cause of conflict.

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