

Getting a Successful Outcome through Mediation

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1. INTRODUCTION

Mediation is an increasingly popular process for resolving disputes. Many standard forms of agreement contain mediation clauses and the courts can now require parties to mediate before going to trial. But not all mediations are successful. A common reason for failure is that the participants in the process do not understand how mediation works. Mediation is not a one-day process; rather it consists of multiple phases beginning with the selection of the mediator and continuing with information exchange and assisted negotiation and ending with a final signed agreement setting out settlement terms. A lack of knowledge often results in poorly planned mediations with participants unprepared. It is the responsibility of lawyers entrusted by their clients with managing the dispute resolution process to make sure the mediation process is properly designed. Proper preparation is often the most important factor to a successful outcome.

The purpose of this paper is to explain the dynamics of mediation, identify the procedural issues to be addressed in the process design and to offer practical suggestions for a successful outcome.

2. MEDIATION COMPARED TO LAWYER BASED NEGOTIATIONS

Mediation is a much more sophisticated process than it may appear. It should not be confused with the negotiations conducted by lawyers focusing solely on legal interests. Mediation puts prime emphasis on the client as decision-maker and the mediation process should be designed to address the expectations, concerns and emotional needs of the clients. Legally based negotiations put the techniques of lawyer-advocate first. In mediation, the client is exposed to the important facts of the case and makes an assessment of risks and benefits without those facts being filtered through lawyers. Lawyers may well have an emotional attachment to a client's case, which may interfere with their ability to objectively assess the probabilities of success. In legal negotiations, the owners of the problem may not even be present. In mediation, lawyers and their clients are able to participate in a confidential dialogue with the mediator about their needs without the fear of disclosure of information or fear that the disclosed information will adversely affect the outcome if the case is not settled. Neither party can subsequently call the mediator to give evidence in court or arbitration. Contrast this with negotiations where the parties are often unwilling to be frank.

Legal negotiations usually occur after costly disclosure has taken place. In mediation, the facts are co-operatively shared between the parties without the need for costly formal disclosure. This is often a side benefit of mediation.

The mediator is trained to explore a creative resolution to the dispute with outcomes not limited to the exchange of money or the declaration of parties' rights. In addition, mediation can achieve settlement at early stages of the dispute.

3. HOW TO CHOOSE THE MEDIATOR

The choice of mediator can be a very important factor affecting the outcome of the mediation. The parties' lawyers usually make the selection. Unfortunately, that selection is often based only on superficial information gathered through enquiries of colleagues and acquaintances. Typically the enquiry is simple: "Is anyone familiar with Mediator A?" The answer is often the equally general "Yes, Mediator A is good". The parties, however, should engage in a more exhaustive and sophisticated investigation. A more appropriate enquiry would probe the following factors:

Is the mediator a respected authority for the business and technical situation in dispute?

It is a common view that subject matter expertise is not an important characteristic of the mediator, but expertise in the subject matter of the dispute can give credibility to the mediator when assisting the parties in evaluating the strengths and weaknesses of their position.

What kind of training in mediation techniques has the mediator received?

This is a particularly important criterion for former judges and lawyers whose style is often too evaluative. Effective training gives mediators insight into their natural biases and habits.

Does the mediator understand why designing the mediation process is the first and most important step?

What kind of procedures does the mediator use to encourage the exchange of information prior to a formal mediation? Good mediators ask the parties for confidential memos that probe the important factors of the dispute. These are followed up by telephone conversations with the lawyers to ensure that the necessary parties attend the mediation and that all the decision-makers understand the important facts in dispute.

What are the interpersonal skills of the mediator?

Is the mediator good at "reading" people? Can the mediator understand any cultural differences? Good mediators quickly pick up what people really mean and do not merely rely on what they say. For example, where there are major personality clashes, an experienced mediator may decide that an opening session may be unwise and offer an alternative approach. If the dispute is between French and English parties, would a co-mediation team familiar with French and English be the best combination to act as neutrals?

What is the mediator's track record?

Most mediators will supply references but paper credentials do not fully reveal a mediator's skills and style.

Is the mediator optimistic by nature?

Optimistic mediators set the tone of mediation toward a successful resolution. Is the mediator hardworking and willing to put in long hours if necessary? It is not unusual for settlement breakthroughs to occur late in the day. If so, it is often better to continue the mediation into the evening rather than send the parties' home to return another day. Mediators must commit themselves to the process and convince the lawyers and parties to do likewise.

Is the mediator creative?

Cases often settle because mediators put the facts in a new light. They may help the parties to explore as a medium of exchange non-cash considerations such as future

work, discounts or referrals. Innovative mediators are constantly thinking about ideas to break impasses.

What is the mediator's style?

A common belief is that a mediator should have either a “facilitative” or an “evaluative” style. Facilitative mediators do not express an opinion on the merits. Evaluative mediators view their role much like that of a judge; they hear a summary of the arguments and then express an opinion as to who wins and who loses. Evaluative mediators should be avoided because they can pre-empt the parties reaching their own solution. Good mediators do form an opinion but they view their role as one of guiding the parties to an understanding of how a judge or arbitrator may view their facts and the law of their case and take account of wider considerations than those merely legal. These mediators rarely offer evaluations and only with the consent of the parties and after other tactics have failed.

It is not unusual for lawyers selecting a mediator to fail to appreciate the best style of mediator for their clients. The parties choose mediation because they think they can convince an evaluative mediator of the correctness of their position. They believe such an opinion will cause the case to settle. The reality is, though, that if such an opinion is adverse to one party, it will find ways to rationalise not accepting the opinion. That party will often lose trust in the mediator and faith in the mediation process.

The danger from the mediators' point of view in being evaluative is that they may not have all the facts on which to make a judgment.

4. THE IMPORTANCE OF A PRE-DISPUTE AGREEMENT TO MEDIATE

All contracts should contain clauses making mediation the first step in a dispute resolution process. When serious disputes arise, there is a tendency to be pre-emptive if only to demonstrate a show of strength. Suggesting mediation is often viewed as being contrary to the “tough” attitude that the lawyer presumes the clients expect. When the parties are compelled to attempt mediation by their agreement, it is much easier to get them to co-operate in the mediation. When the parties are in litigation, it is common to hear the remark that the case is not ready to be mediated until after full disclosure has occurred. This is often not true, since information can be exchanged under a fast and less expensive mediation procedure.

5. THE ADVANTAGES OF MEDIATION SERVICE PROVIDERS

Lawyers often want to avoid the cost of using an agency to administer mediation and try to find mediators on their own. Lawyers soon learn that agency fees are generally a good investment in achieving the client's goals. This is certainly a way of shifting responsibility for setting up a mediation on to the agency. Mediation service providers help the parties to quickly select an experienced, appropriate and available mediator who is free of conflict. The service provider then pushes the parties to move the mediation process on expeditiously. Without the help of a mediation service provider, the parties may find the process delayed while they try to find an acceptable and available mediator. This is particularly true in cases involving multiple parties.

Another advantage of using a mediation service provider is that adoption of its mediation rules may avoid the drafting of a more formal mediation agreement. The delay in drafting a mediation agreement may be an impediment to quick implementation of a mediation process and the opportunity to reach an expeditious settlement. An agreement that simply adopts a set of existing mediation rules will cover the important subject of confidentiality and co-operation.

6. IMPORTANCE OF THE INFORMATION EXCHANGE

In order to have a successful mediation, the parties must be in a position to evaluate how the strengths and weaknesses of their position would turn out in a court or arbitration. Normally, until the mediation process begins, the parties have not had the benefit of any “reality testing”. The mediator’s role is to assist the parties in that exploration. Such guidance cannot take place unless all the facts are disclosed and the opinions of experts have been exposed and analysed by each side. It is not uncommon for mediations to fail because expert statements differ widely on critical facts and opinions. Prior to the negotiation phase on the day of the mediation, a good mediator will co-opt those experts into the mediation process. Lawyers who make the mistake of focusing their efforts solely on convincing the mediator of the merits of their position as they would do in court or before an arbitrator forget that it is the parties, not the mediator, who decide whether and on what terms they will settle.

Another reason that mediations fail is that those with the real interest in the outcome are not in fact participating. These stakeholders may be financial or personal. The mediator should confidentially probe to seek their identity and make sure they participate. These not so obvious stakeholders may be senior family members, insurers, lenders or senior executives.

The mediator’s confidential questionnaire to each party plays a crucial role in the design of the information exchanged. It should elicit the following types of information:

- A candid assessment of why the dispute has not been settled.
- The extent to which critical information has not been supplied.
- Disclosure of their reliance on expert opinion. If these opinions are important, it is essential to find out whether they have been reduced to writing and exchanged. Often they are not written because the parties want to avoid the expense pending the outcome of the mediation. The mediator must then find creative ways of exchanging those expert opinions.
- Identification of any important issues of law.

Once these questions have been answered, the mediator should explore individually and confidentially with the lawyers the implications of the facts on the design of the mediation process. For example, the mediator may suggest an additional exchange of documents and written reports. If expert reports have not been written, the mediator may propose a pre-mediation conference with all the experts present. The purpose of that meeting would be to determine whether and at what points the experts agree or disagree and what further information would cause them to modify their position.

As a result of receiving that confidential information, the mediator may suggest how the opening session should be structured and who should be the spokesperson for each party. Often the best presenters are the parties and their consultants rather than their lawyers.

7. THE FUNCTION OF THE OPENING SESSION

The opening session is often a lost opportunity to facilitate the settlement process. Inexperienced lawyers may view their role as that of an advocate directed primarily to the mediator. This is particularly true where there has been a history of contentious litigation preceding the mediation. Lawyers must understand that the ultimate object of persuasion is not the mediator but their opposite number. The lawyers’ most effective role may not be as presenters of their client’s story but rather as stage director, especially in the opening session, which should not be used as part of an adversarial

process. When lawyers do make a presentation, they should avoid berating their adversaries in true court style. Laymen often view lawyer advocacy at best as partisan and at worse as insulting. It can be counter-productive and it may not encourage adversaries to have an open mind on the problem. If there are important legal issues, they should be briefed and discussed among the lawyers and the mediator before any open mediation session begins. Legal points are better analysed in the private sessions with the mediator than in the opening session.

There are other reasons why clients should tell their side of the story to their adversaries. Parties don't like to settle cases when they feel the other side is not being truthful or is not sympathetic. These objections to settlement can often be overcome by the power of "looking your adversary in the eye". A good mediator reminds the parties to talk to each other and achieve eye contact to allow the adversary to gain an insight into the opposition's position.

Most of all, the parties usually want to tell their story. Being able to have the equivalent of their "day in court" fulfils a powerful emotional need. A good mediator sees and encourages the fulfilment of this need. Sometimes one of the parties needs to apologise to break an impasse. This often happens when the parties have had a long relationship that has suddenly soured as a result of the dispute. The mediator and the lawyers need to be aware of situations in which an apology would be useful.

8. THE FUNCTION OF THE PRIVATE SESSION

Lawyers usually are aware that the private session following the open session is an important part of the mediation process. However, they wrongly believe that the primary function of the mediator is to shuttle back and forth with offers and counter-offers. The process is in fact much more subtle and complex. The good mediator must gain the trust of the parties in the private session. The mediator accomplishes this by empathy and demonstration of understanding of the parties' position. Mediators use the open sessions to explore the parties' issues. For that reason, it is important for the mediator not to show any partiality then. If this trust is not developed, the parties will engage in negotiation with the mediator rather than giving the mediator a sense of what would satisfy them and lead to settlement. The mediator has to be "on side" for both parties and well aware of their differing negotiating positions.

The role of the mediator in the private session is to help the parties understand and acknowledge the strengths and weaknesses of their own positions and that of their adversaries and the consequences of not settling. A good mediator will help the parties gain insight into these factors through informal, and sometimes formal, probability analysis of various outcomes in court on all or some of the issues. There is an important distinction between evaluation by the mediator and assistance in probability analysis. Experienced mediators seldom tell a party that they are going to win or lose particular points. Rather, the mediator leads the parties to draw and speak out about their own conclusions on their issues.

The composition of the private session is important. Local authorities often send multiple representatives to mediation without a clear leader. Family-owned companies might send two or more generations of executives. Companies may send line managers, in-house lawyers and insurance claim representatives. The parties may be relying on consultants who have been paid substantial amounts of money for their opinion. Members of these diverse groups may not have the same notion of what is an acceptable settlement. A common dynamic is that a senior company officer does not want to undermine a project manager or line manager who is attached to this longstanding negotiation. A good mediator senses these problems and suggests methods of achieving consensus within these groups. In some situations, an institutional stakeholder, such as a board, may not be present. The mediator must find a way to get those distant players to accept a settlement that has been found to be

reasonable by those who were present. This can take the form of a confidential report by the mediator on the fairness of the settlement.

9. DOCUMENTATION OF THE SETTLEMENT

If the settlement is reached in a private session, the parties must understand its terms. A written memorandum of the settlement should be discussed in an open session to ensure that its terms are fully understood. Most mediators will assume the role of the scribe in order to control the agenda for that document. While these memoranda may later be superseded by a more formal legal document, it is important that the parties commit themselves to the settlement in writing before the mediation adjourns. If the mediation is concluded with an understanding that lawyers will go back to their offices and draft the first and final settlement agreement, it is important that the mediator stays in contact with the parties. Otherwise there is a danger that the process of negotiating the details of the agreement may cause the settlement to collapse.

10. WHAT IF THERE IS NO SETTLEMENT BEFORE THE MEDIATION SESSION ENDS?

The most common reason for failure of a well designed and executed mediation is that some facts are not clear and therefore the issues are not subject to a probability analysis at the time of the session. Another common reason is that necessary persons fail to attend. Experienced mediators who sense a continued desire to settle the matter will adjourn rather than terminate the mediation. The mediator may continue to talk confidentially with the parties to try and find the processes that will change the quantity or quality of information upon which a party is basing its position. The mediator may invite the parties to come back after they have been through formal disclosure. The mediator may also suggest that a customised arbitration be used to finally resolve the items in dispute, which may limit the issues or the maximum or minimum recovery, using “high/low” arbitration.

11. CONCLUSION

The settlement of business disputes through mediation is a complex process. A successfully designed mediation will empower the disputants to change their previously held beliefs in order to reach a sensible business decision.