

**MEDIATION:
WHY SOME MEDIATIONS GO WRONG
AND PITFALLS TO AVOID**

by

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These notes are written on the basis that those who read them know what mediation is, have participated in a mediation, both successfully and unsuccessfully, and might recognise situations and attitudes they have encountered which caused a mediation to go wrong. I start from the premise that **ANY** dispute is capable of resolution through mediation provided all parties come with a genuine desire to explore settlement. However, willingness to try and resolve matters is only the start and these notes are designed to help the 'Barkises' get there. Doubtless most of the observations will come as no surprise to many of you, and if I have omitted anything please feel free to add to it at the end.

In a pale imitation of Julius Caesar, I have divided these notes into three parts, and will deal briefly with several points under each heading.

BEFORE THE MEDIATION STARTS

1. Preparation.
 - 1.1 The representatives;
 - 1.2 The client;
 - 1.3 The bundle;
 - 1.4 The Mediation Position Paper.
 - 1.5 Experts. Mini mediations.
2. Foresight.
 - 2.1 Anticipating the reaction from the other parties;
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AT THE MEDIATION: THE PLENARY SESSION

1. Never pass up the opportunity of an opening plenary session.
2. Alienating your opponents.
3. Language best avoided.
4. Don't Duck a difficulty.

THEREAFTER.....TO THE END GAME AND SETTLEMENT?

1. The first offer.
2. Absence of decision making authority.
3. Mediation is a *process*, not an amount of time.
4. Last minute changes or conditions.
5. The Settlement Agreement.
6. Keep the door open.

BEFORE THE MEDIATION STARTS

Preparation:

- 1. The representatives:** I cannot stress too much how vitally important it is for those representing clients in a mediation to be fully prepared. One of the commonest reasons why some mediations go wrong is a failure by one or other party to prepare properly before going to a mediation. In my view one should prepare for the mediation at least to the same level as when preparing for trial. Although Mediation is not a trial, if one party is ill prepared it becomes all too painfully apparent in a Mediation, particularly when appearing against a party who **is** well prepared and knows precisely where they are going. In many ways, preparing for Mediation is sometimes more difficult than preparing for trial. At least at trial there is a judge to decide an issue, in a Mediation you are faced with an opponent who is equally certain that his view of the law/the facts/the outcome of the case is as strongly felt as your own. You have to dispute the issue with your opponent in the presence of both sets of clients. It is not easy and being ill prepared is the worst possible position to be in.
- 2. The Client:** An equally common cause of a mediation going wrong is the ill prepared client. We are all familiar with BATNA, WATNA and all the other acronyms which mediation trainers delight in, but in reality a mediation is more than likely to fail to achieve a resolution if the client has not considered with his team beforehand ‘what we really want’; ‘what we must have’; ‘what we can live with’; lastly, thinking outside the box, what *might* be a solution. All of these are easier to state but less easy to achieve. If you allow your client to enter into a Mediation without having properly prepared for it along the lines set out above then not only will he fail to get a result with which he will be satisfied at the Mediation but the person he will blame, of course, is you!
- 3. The Bundle:** Sometimes I am sent boxes of ring files, trial bundles, full witness statements, all the exhibits. I am happy to read them if I am required to but given that a Mediation is not a trial then one should give careful consideration as to what is absolutely necessary in a mediation in order to provide sufficient documentation for the Mediator to understand the nature of the dispute, the parties respective positions, and also to allow the other parties to have in the bundle what they need for the purposes of the Mediation. What can create a

problem is if the bundle is prepared unilaterally and the other party complains that half the most important documents for their case have been omitted. I have never had a mediation fail because of complaints about the bundle itself, but what has often occurred is a breakdown in the mediation when one side produces a document the other has never seen before. Last minute expert reports are a prime example which can cause a mediation to founder. If you are planning to use an expert report which is not ready say so and avoid the accusation of ‘ambush’.

4. **The Mediation Position Paper.** Curiously, an aggressive Position Paper can cause more upset than the most polemic pleading. Somehow clients can live with rude combative letters passing between their respective legal advisers, and even read with equanimity diatribes criticising their behaviour and alleging heinous breaches of contract or duty, but, put in what they regard as a rude and uncompromising Position Paper and they immediately cry ‘foul’; ‘they are not serious about mediation’ and ask ‘what is the point?’ An ill judged Position Paper can cause a mediation to be pulled by the other side, and I have experienced mediations going wrong from the start because of the perceived lack of good faith by those on the receiving end.
5. **Experts. Mini mediations.** If a dispute revolves to a greater or lesser extent around expert evidence, a mediation is almost certain to go wrong if each party serves expert reports which express widely differing opinions and there is no attempt at a rapprochement before the mediation itself. Joint meetings seldom resolve much, and there is nothing more soul destroying for the ‘commercial’ team than to sit around a long mediation day while their legal team and the mediator try to get a common position between intransigent experts. Failure to address this problem before hand can often be fatal for a successful outcome in the mediation. I have often held ‘mini-mediations’ with experts with considerable success in getting them to a position they can sign up to for the purpose of assisting the parties in the mediation.

Foresight

6. **Anticipating the reaction from the other parties.** Too often a mediation has failed almost in limine because one party has misjudged the reaction from the other parties either in the plenary session or in response to their Position Paper. Most reactions are predictable and therefore should be anticipated and factored in so that the mediation is not derailed by the disappointment or anger of one's own client at the reaction from the other party.
7. **Getting the representation right.** This decision can make or break a successful mediation. Apart, of course, from the real decision maker, and make sure which is the real decision maker, who should attend the mediation is of vital importance. If there is an imbalance of representation between the parties this is bound to lead to friction and very often prevent a settlement occurring. Do not underestimate the sensitivities of the lay client in terms of the effort and time (and money) he is putting into the Mediation and if he fails to see a similar commitment from the other side, the Mediation will get off to a bad start. Very often I have had complaints at the Mediation that we have sent along our Chief Executive, the other side have only sent along the Manager and similar in relation to experts, witnesses etc. If in doubt, liaise with the other side, there is no harm in talking to other parties before the Mediation takes place so as to be able to get the best out of the day and provide your clients with the best opportunity to achieve the solution they want.
8. **Flexibility.** One of the commonest failings in a mediation which often leads to no settlement is an absolute inability by one party or another to be flexible. The preparation of the client and those representing them requires the need at some stage to be flexible. If this has not been addressed before the mediation there is a danger that the inability to be flexible in terms of a potential solution will cause the other side to regard that as a sign of complete intransigence and, worse, bad faith. One cannot always anticipate what 'outside the box' thinking might produce by way of a possible solution, but readiness to consider such suggestions is an essential requirement of a successful mediation and preparing the client to be flexible is the mark of a good mediation advocate.
9. **Speaking to the Mediator.** This can be critical. I don't mean of course the preliminary courtesy call, but failure to tip off the mediator beforehand about a

particular issue which is a 'must' or a 'no-no' for your client can lead to disaster. Not telling the mediator about personality clashes which are not apparent from the papers can be a classic cause of a failed mediation. The preliminary contact with the mediator provides parties' representatives with a unique opportunity to help the Mediator to understand not only what the dispute is about, but his own client's position. How often have we, as advocates, wished we could see the judge and tell him what the case is about or tell him something about the case which we think is vital that he understands in order to be able to determine the case. With a judge of course it's impossible, with a Mediator not only is it possible but it is highly desirable and failing to use the opportunity may deprive your clients of an opportunity to secure a settlement.

AT THE MEDIATION: THE PLENARY SESSION

- 10. Never pass up the opportunity of an opening plenary session.** Too often I have seen a mediation not result in a settlement because the parties have refused to take part in a plenary session. This is a unique opportunity that should not be overlooked and simply dismissed as being "unnecessary". I am often telephoned to say "we don't think we need an opening session, we both know what the other side's position is". I encourage parties not to take this attitude, there are several reasons why. The opening session provides a vital opportunity for the Mediator to not only understand who the decision makers are, what their aims are, but also the effect that they have on the other side. This is an essential element in Mediation which is unavailable at trial and therefore should not be passed up lightly. Sometimes there are real concerns that the degree of animosity or distrust or even fear between the parties will dictate that a full plenary session may set back the mediation process. If that genuinely is your concern share it with not only the mediator but also the other side so that you are not accused of 'funking' a face to face meeting with the other side's principals.
- 11. Alienating your opponents.** The importance of language and style of speaking in an opening statement cannot be over emphasised. The words used and the manner of delivery will influence the way the mediation progresses throughout the day. Immense damage can be caused by an inflammatory address and can 'put back' the settlement considerably while the mediator tries to repair the damage. Sometimes, even after a long day in which the unfortunate events of

the opening session have been smoothed over, the resentment caused by injudicious opening remarks will return and destroy what looked like a promising resolution.

- 12. Language best avoided.** Overstating one's case will provoke a reaction. Insisting on success: "You must agree with us"; "Your case is hopeless"; "You have no answer"; "This is a try on"; "This is a crude attempt to extract money"; and the myriad other ways of asserting the overwhelming strength of one's case will cause the other side to be equally assertive in support of their own client's case and the mediation becomes an acrimonious trial with the legal teams forgetting why they are there in the first place! There are ways of making a point without running the risk of scuppering the mediation at the outset. Equally, there are ways of having a sensible discussion about an issue without the mediation becoming a trial.
- 13. Don't duck a difficulty.** Just as overstating one's case may result in no settlement, refusing to engage with the other parties on the issues can also cause a mediation to end without a settlement. "We are not here to debate the legal points"; "It's all in our pleadings"; "Read our protocol letter"; "You are just wrong"; and the numerous variations on the same theme, are quite often interpreted by the other side as a tacit acceptance that you recognise that you are vulnerable. The consequence then is a hardening of their position and an increasing unlikelihood of a resolution. Be prepared to deal with the real issue if necessary and, if you have a weak point, concede it. That will add more credibility to your good points and will engender more realism on both sides.

THEREAFTER.....TO THE END GAME AND SETTLEMENT?

- 14. The first offer.** Mediations can be scuppered by an unrealistic first offer. Remember that there are three types of offer. Acceptable; Unacceptable; and Interesting! A patently untenable negotiation stance or a lack of pragmatism is just as bad as an over-valuation of one's settlement position. The trick is to make an opening offer which sets the agenda from your client's viewpoint without provoking the tired old phrases like: "We are not bidding against ourselves"; the John McEnroe response; "Think again"; or worst of all: "We see no point in staying!" Conversely, the response is equally important to get right and a failure to do so may itself result in no settlement.
- 15. Absence of decision making authority.** A frequent, but unforgivable cause of a failure to reach agreement is the absence of the real decision maker. 'At the end of a telephone' is no substitute for experiencing the ebb and flow in a mediation, and, insurers apart, who normally trust their legal team, it is vital that the real decision maker attends the mediation.
- 16. Mediation is a *process*, not an amount of time.** How often is this simple truth forgotten! Drawing inferences from the amount of time the mediator spends with one side, or the time taken to get a response to the last offer can lead one down a false trail. It is vexing sometimes to be waiting an age for a response, but don't read anything into it. Use the mediator especially when formulating offers as the mediation progresses. Seek his opinion: might the other party react if we offered X? Fresh perspective – on the *dispute* and on the *negotiation*. Neglect to use the mediator to the full can hinder a successful resolution, and the later in the day it is, the more important it is to get the exchanges right.
- 17. Last minute changes or conditions.** One of the most disappointing reasons why a mediation fails to achieve a settlement is the introduction of a new point or a condition of settlement which has never been raised before. Disappointing because it could normally have been raised earlier if not at the beginning. Downright aggravating if the late introduction is a tactic. Inevitably the other party will suspect a malicious motive, and all the good which has been done during the day can be destroyed in a moment.

- 18. The Settlement Agreement** Don't leave this to the last minute. It is curious phenomenon that having spent the day helping their respective clients to a resolution of the dispute, the legal teams inexplicably too often adopt a confrontational stance over the drafting of the Settlement Agreement! Is it an inability or unwillingness to let go? A disappointment that weeks of future work have disappeared? Whatever it is don't fall out with your fellow professionals over the terms of the Settlement Agreement. If you must use boiler plate clauses the last thing anyone needs at the end of a long mediation is a row about whose clause is best! It is important to have essential elements of any settlement agreement before you come to the mediation. If a particular form of words is required bring it with you, if an apology is required, bring a draft with you, a reference etc. Consider tax consequences, VAT and any other potential trap well before the end of the mediation day. It is essential to do as much preparation towards a settlement agreement as you would towards the mediation itself.
- 19.** Make a list of the essentials that you need in any settlement agreement. If you have that at the beginning of the day with you then nothing will be overlooked. There is nothing worse in a mediation than drawing up an agreement and somebody comes up with a vital clause or issue which hasn't been the subject of the mediation but which is essential to the settlement agreement. Many a mediation has almost foundered at the last because a party has insisted upon a particular clause which has never been subject to negotiation. It always promotes a row and sometimes prevents what would otherwise have been complete resolution taking effect. Most important of all, if there are any special conditions make them clear at the outset so that all subsequent offers and counter offers are made on the same basis. Failure to do this has resulted in many a mediation collapsing at the last minute.
- 20. Keep the Door Open.** If settlement cannot be reached on the day, make sure that the door is left open. Leave offers open (but avoid the *Brown v Patel* situation!); consider adjourning for a limited period; keep the mediator in the loop. Lastly, never leave a mediation which has not produced a settlement without knowing the three essentials: Precisely why there was no settlement; what the full consequences are; and as far as possible what each side's respective *real* final positions are.