Effective representation at mediation: the five key elements

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Advocacy in court and advocacy at mediation contrasted

Learning how to represent clients at mediation is very different from learning advocacy in court. To learn how to cross-examine, you can watch it being done or read the transcripts. This should be done with an understanding of what a cross-examiner seeks to achieve. More fundamentally, you would do this with an understanding of how the tribunal functioned.

None of this is true about learning how to represent clients at mediation, which is held in private. Participants usually agree to keep a mediation confidential, as do the mediators, who can have statutory obligations to keep them so.[1] There are no transcripts.

On a deeper level, what is a lawyer representing a client at mediation seeking to achieve? To answer that question, one must answer a more fundamental question: How and why does the mediation process work?

This paper is based on the premise that you cannot effectively represent a client at mediation without understanding what mediation is (and is not) and, most importantly, why it is a very effective process for resolving disputes. If you do not understand these things, you will not know what you should seek to achieve in representing a client, let alone how to accomplish your objectives.

For this reason, much of this paper deals with what mediation is (and is not) and with how and why mediation works.

The five key elements in effective representation at mediation

- Have an effective preliminary conference.
- Prepare your client for mediation, including a best-case/worst-case analysis.
- Be an effective advocate at mediation.
- Use the dynamic of mediation to your client's advantage.
- Document the agreement reached at mediation.

Have an effective preliminary conference

The pre-mediation conference or preliminary conference is an essential step in preparation for a mediation. This section is about how to maximise the benefit of the preliminary conference.

Make sure there is a preliminary conference

The preliminary conference is an essential step in a mediation. If the mediator does not suggest having one, organise it yourself. Otherwise, there is a risk that the mediation will go off the rails because of lack of preparation or lack of authority to settle.

Check out the mediator

The preliminary conference is your chance to make sure that the mediator's style is suitable for the dispute in question. You may want a facilitative mediator, rather than a directive mediator who offers opinions on legal issues and on whether particular settlements are reasonable. You should not feel inhibited from inquiring about the mediator's style. The preliminary conference is effectively your last chance to do this because, once it is over, the doors are closed and the plane is heading down the runway.

Check out your opponent

Use the preliminary conference to assess the negotiating style of the other party's lawyer and the role they will play at the mediation. Will they be positional bargainers, starting with an ambit claim and then making incremental concessions? Or will they engage in interest-based negotiation? Will they play a hands-off role, letting their client take the lead, or will they maintain tight control of the negotiation?

Use the preliminary conference to help your client become comfortable with mediation and the mediator

If your client is unfamiliar with mediation (and most are) and uncertain about the benefits of the process (and most are), make sure that the clients attend the preliminary conference. This should help your client to see that mediation is a structured and familiar process that has a good chance of leading to a settlement. Your client may also develop a level of trust in the mediator personally, as well as in the process itself.

Educate the mediator

Use the preliminary conference to make sure that the mediator has a grasp of the essential facts and issues of the dispute. There may be an incidental benefit from this process: The other party's summary of how it sees the dispute may give you clues about how it is likely to approach the mediation.

Make sure the parties will be prepared for the mediation

The preliminary conference is your opportunity to make sure that the parties are prepared for the mediation. For example, you may want the other party to provide copies of critical discovered documents, or to serve an expert's report that is late. While the mediator cannot direct the other party to do this, the preliminary conference is your opportunity to persuade the other party that you need these things for the mediation to be effective.

Get agreement on what the mediator should do to prepare for the mediation

It is up to the parties what the mediator reads to prepare for the mediation. Because mediators may charge for reading time, the mediator's time literally may be the parties' money.

How much preparation should the mediator do?

Some lawyers think that the more the mediator knows about the facts and the law of the dispute, the better. Others believe that, because the mediator is not an adjudicator, only a general knowledge of the dispute is necessary. Yet others take the pragmatic view that busy mediators may not read everything sent them anyway. Form a view on how much preparation the mediator should do and seek agreement on it at the preliminary conference.

Get agreement on the mediator's fees and how they are to be shared

You should clarify what the mediator's fees are; how they are to be shared among the parties; and whether the mediator requires payment in advance or into a solicitor's trust account.

Mediation agreement

Make sure everyone agrees on the form of the agreement to mediate. The mediator usually will recommend a mediation agreement. If not, you can use the agreement to mediate recommended by the Law Society. Go to its web site **(www.lawsociety.com.au)** and then to the site map; in the left column (headed '*Information for Solicitors – Areas of Law*'), click on the link '*Mediation and Evaluation Information Kit*'. When that document loads, go to page 23.

Date, time and venue for the mediation

Get agreement on these essential matters. There is no point having the mediation before the parties and their advisors are ready. On the other hand, if legal proceedings that will determine the dispute have been set down for hearing by a court in two weeks, or the court has ordered mediation by a particular date, everyone will have to be ready to mediate before then.

Make sure the mediation rooms are suitable

It is essential to have comfortable and soundproof rooms for the mediation, and as many rooms as there are parties. One of the rooms must be capable of seating everyone. The rooms should be available the whole day of the mediation and into the evening. Conference rooms in solicitors' offices can often be used and doing so will avoid having to hire rooms at a commercial venue.

Check authority to settle

The single most important function of the preliminary conference is to ensure that those attending the mediation have authority to settle the dispute between the parties. You should not be shy about inquiring whether this will be the case. There is little point in negotiating with people who do not have authority to resolve the dispute.

Authority to settle – difficult cases

In some cases (e.g., where a government department, a local government or a large corporation is a party), it may not be practical or possible to have the ultimate decision-maker at the mediation. In cases like this, the practical alternative may be to have the highest level of authority possible present at the mediation and the ultimate decision-maker available for consultation by phone.

Who will be attending the mediation?

At the preliminary conference, you should inquire who will attend the mediation on behalf of the other party, and state who will attend on behalf of your client. While there is no magic in numbers, it assists in preparation for the mediation to know whom your client will face across the table.

Costs

Many mediations are driven by concern about costs. To make informed decisions at the mediation about settlement, the parties will need to know what it has cost to come this far and what it likely will cost to pursue the proceedings. At the preliminary conference, agree that, before the mediation, the solicitors each will tell their respective client four items about costs:

- solicitor-client costs to date, including those of the mediation (What has it cost to come this far?)
- If the dispute is not resolved at mediation, the additional solicitor-client costs of a contested hearing and any likely appeals (If the matter does not settle at mediation, what will it cost to run the court case to finality?)
- Costs payable to the other party if the clients loses the contested hearing (If we run the court case and lose, how much will we have to pay the other party for its costs?)
- Costs recoverable from the other party if the client wins the contested hearing (If we run the court case and win, how much of our costs can be recovered from the other party?)

Document the agreements reached at the preliminary conference

A good mediator will confirm by letter the agreements reached at the preliminary conference. If the mediator does not do this, ask your solicitor to do it. There then can be no doubt about what the preliminary conference has achieved and this eliminates the possibility of disputes arising later.

Prepare your client for mediation, including a best-case/worst-case analysis

Many lawyers think that representing a client at mediation is simply a matter of going along and seeing what turns up. If you do not prepare your client for mediation, they will be significantly disadvantaged because they will be unprepared for the extreme pressure to settle that mediation will place on them. This section is about how to prepare your client.

There are three steps in preparing your client for mediation:

- Ensure that you and your client understand what mediation is and what it is not.
- Prepare a best-case/worst-case scenario.
- Explain the dynamic of mediation to your client.

What mediation is and what it is not

Mediation is a structured negotiation assisted by a third-party neutral called a 'mediator', who has no power to impose an outcome on the parties and thus is not an adjudicator like a judge or an arbitrator.

The mediator does have power to control the mediation process (who talks next and how long; what issues are discussed; whether the parties are together or separated; when to have lunch, etc.).

The mediator thus has power to control the *process* but does not control the *outcome* of the process.

Because the mediator has no power to impose a result on the parties, the rules of natural justice do not apply. It is standard practice for the mediator to talk to the parties in private and be told things that must be kept confidential to the party imparting them.

The mediator can and should help the parties work out what issues (factual, legal and emotional) have to be resolved in order to make settlement possible.

The mediator can and should help the parties work out what each party needs (as distinct from what it says it wants) to satisfy itself with respect to each issue.

The mediator can and should help the parties to create and explore options for resolving the dispute. The parties are not limited to results that a court or arbitrator could order. They are limited only by their imagination, by the practicality of the option being considered, and by their ability to agree on it.

A mediator should not give legal advice or advice about the likely outcome of factual disputes. It is almost impossible for mediators to be regarded as neutral and impartial if they do these things.

The mediator can and should, however, 'reality test' the position taken by a party. This is usually done in a private session, without the other party or parties being present. There is a fine but important line between vigorous reality testing and giving legal advice.

The mediator can and should help the parties (usually in private) consider how attractive is their best alternative to settling at mediation (usually a successful conclusion to litigation).

Because the mediator has no power over the substantive outcome of the process, the rules of natural justice do not apply. It is normal practice for the mediator to talk to the parties privately and to be told things by one party that must be kept confidential from the other party or parties.

Mediations almost always take longer than the parties and their lawyers anticipate, so a wise lawyer will warn clients that they need to be patient. But they almost always take much less time than the court hearing or arbitration that may be avoided.

Counsel are now often briefed to appear at mediation. Some counsel are experienced at representing clients at mediation and understand that a quite different form of advocacy is required at mediation in order to be effective.

The lawyers for the parties can play a wide range of roles at the mediation, ranging from non-participation to extremely active involvement. What role they play is a matter for their clients.

Try to understand what lies behind the dispute, no matter how often your client or solicitor tells you that; 'It's just about money' or; 'It's not about money; it's a matter of principle'.

Explore what your client needs in order to resolve the dispute (as distinct from what your client says they want).

Explore options for resolution of the dispute. Don't limit the options to remedies that a court or arbitrator could order.

Have a preliminary conference with the mediator and the other party or parties, or at least with their lawyers. This is an essential administrative step.

Prepare a position paper and copies of key documents.

Preparation of the position paper is an important part of preparation of your client's case for mediation, because it forces you and your client to crystallise the factual and legal issues in dispute; to assess your client's and the opposing client's chances of prevailing; and to consider options for settlement.

The position paper should succinctly deal with these three matters in no more than about five pages. Your aim is to be readable and persuasive, not to quote slabs of High Court authority.

Explain to your client that, as with litigation, you cannot be too prepared, but your time is your client's money. Full preparation requires an understanding by you of:

- The legal issues raised by the dispute.
- The factual issues raised by the dispute and the factual matrix in which they arise.
- Actual and potential evidence if the dispute goes to court or arbitration hearing.
- Knowledge of relevant expert opinion.
- The prospects of obtaining/defending against relief.
- Enforcement hurdles.

Get instructions on how much preparation you should do, and do it.

Make sure that your solicitor gives your client information about the costs position:

- Solicitor-client costs to date, including those of the mediation.
- Additional solicitor-client costs of getting to the end of a contested hearing.
- Costs payable to the other party (as agreed or assessed) if your client loses at a contested hearing.
- Costs recoverable from the other party (as agreed or assessed) if your client wins at a contested hearing.

Prepare a best-case/worst-case scenario

Your client will not be able to evaluate offers made to them at the mediation, or determine what offers to make, without knowing what the likely alternatives are. An offer to a plaintiff of $1 million will be very attractive if the best alternative is likely to be judgment for $750,000, but much less attractive if there are good prospects of obtaining judgment for $2 million.

Once irrecoverable costs are taken into account, the 'best case' may not be particularly attractive, especially if the process of trying to achieve it (usually, continuing the proceedings to judgment) incurs a substantial risk of the 'worst case' (losing the court case). This process will help your client understand that a mediated result that is not as good as the 'best case' may be acceptable because it removes any risk of suffering the 'worst case'. Mediation is an attempt to manage this risk.

Explain the dynamic of mediation to your client

Mediation is not fun. It is not a refuge for the woolly-minded barrister who would prefer to avoid preparing cross-examination, nor for the client who would prefer not to be cross-examined. It is physically, intellectually and often emotionally exhausting.

Mediation forces the parties to confront their options and to make hard choices between them. Mediation works because this imposes almost unbearable pressure to settle.

You should warn your client about this. Pressure is easier to resist if it does not come as a surprise. Forewarned is forearmed. Other things being equal, a party better able to resist the pressure to settle will do better than one who is less able.

The dynamic of mediation is set out in section 6 of this paper. You should prepare your client by explaining the dynamic in detail to them.

Be an effective advocate at mediation

Advocacy in mediation is a skill distinct from advocacy in court. As an advocate in court, you are subject to detailed regulation.[2] There is almost no regulation of advocacy in mediation.[3]

At a mediation, you have a unique opportunity to advocate your client's cause directly to the client on the other side of the dispute. Normally, you are prohibited by the Advocacy Rules from doing this.[4] Some mediators try to prevent lawyers from acting as advocates.[5]

There is very little material available about advocacy at mediation. Most commentators seem to think that a lawyer who advocates the client's cause at mediation is being *'adversarial '* and therefore is not behaving constructively and is jeopardising settlement prospects.[6] At least one acknowledges that there are many possible roles for lawyers at mediation, including 'polite advocate'.[7]

Your client, if properly prepared, will make settlement offers and evaluate settlement offers made to them based partly on the risk of the worst-case scenario. Usually, this is losing in court. If the opposing client is doing the same, then it may be productive to emphasise the strength of your client's case and to create doubt about the strength of the opposing case.

Given this, advocates should not forgo the opportunity to persuade the other client of the merit of their client's case and the weakness of the opposing case.

It is obvious that the type of advocacy used in court is unsuitable for mediation. A different style is called for.

Advocacy in mediation must be adapted to the audience and to the type of dispute. It should be simple, polite and firm.

There is no need to mince words. If credit is in issue in the proceedings and your view is that the credibility of the client on the other side of the dispute would not survive cross-examination, you should say so. You can do this as part of explaining why your client is likely to prevail if the matter goes to hearing.

Use the dynamic of mediation to your client's advantage

Explain to your client that mediations typically follow a pattern. After introductory remarks by the mediator, there will be an initial and often lengthy joint session in which the parties state their positions to the other parties. There may be lots of (often emotional) venting.

During this period, the parties may seem to be moving away from each other rather than towards each other. They may resile from tentative compromises struck earlier. Warn your client not to be alarmed by this process.

Explain to your client that the initial period usually is followed by a period in which the mediator helps the parties isolate the issues that must be resolved, in which these issues are discussed, and in which options for resolving these issues are canvassed.

Explain to your client that there probably next will be private sessions in which the mediator, perhaps robustly, will 'reality test' the strength of your client's factual and legal position. Warn your client not to be alarmed by this process.

Explain to your client that it will probably not be until after the private sessions have run for some time that settlement offers will be made and exchanged. At this point, the parties will probably start moving towards each other.

As already noted, mediation forces the parties to confront their options and to make hard choices between them. Mediation works because this can impose almost unbearable pressure on parties to settle.

This point typically comes in the late afternoon when, after an exhausting day of negotiation, the defendant puts an offer, says that this is the final offer, and it probably is or is close to the final offer. (The roles are reversed if your client is a defendant.)

At this point, your client has a choice between:

A. **Money that almost literally is on the table.** It is there for the taking. It is a certainty. But it is far less than your client hoped to get and perhaps not even enough to pay their legal costs, or to repay the mortgage, or to repay the loan from Aunt Maude to fund the litigation.

B. **The eventual outcome of the proceedings.** This is some time, perhaps far, in the future. It is uncertain. It is hedged about with the inevitable lawyers' qualifications ('I've told you many times that, although your prospects are good, no case is unloseable'). It may be much better than the money on the table. But achieving it will incur the distinct, but difficult to quantify, risk of losing the case, getting nothing and bearing both sets of costs. This may lead to bankruptcy/insolvency.

Mediation works because this point usually is reached after an exhaustive consideration of the merits of the parties' positions and of the options for resolving the dispute, and after exhausting negotiation has narrowed the differences between the parties to the maximum extent apparently possible. In blunt terms: as far as settlement is concerned, this is as good as it is going to get.

At this point, your client must make a terrible choice between a certainty that is much less than was hoped for, and a mass of uncertainties that eventually may produce a much better result but also carry with them the risk of a much worse result. You, no doubt, will give the best legal advice you can, but only your client can make the choice.

If you have prepared your client for making this terrible choice, you can say at the appropriate time,

> Remember I told you that a time would come during the late afternoon when you would find the pressure to settle almost unbearable? Well, here it is. Don't lose your nerve. The other party is feeling the same pressure, or worse.

Many clients will find the pressure to settle unbearable and will want to accept the offer. You should be prepared for your client to buckle under the pressure of the mediation. If you have warned your client about the choice they have to make, you can say:

> Hang on a moment. The offer you're proposing to accept [put] gives you less [is much more expensive to you] than your best alternative. Remember I explained that you probably would be better off not settling than accepting less than [paying more than] your best alternative. That reality hasn't changed.

> It's up to you, but I suggest we discuss the offer for a while before you tell the mediator to accept [make] it. How about a coffee/a walk in the park/a smoke/a square meal/a good night's sleep/adjourning the mediation? '

You should be prepared for pressure on your client from the mediator to accept [put] the offer that you have doubts about. You should be prepared to help your client resist that pressure. Your job is to represent your client and to make sure they obtain the best possible settlement, not to enhance the mediator's 'success' rate.

Ultimately, of course, it is up to your client whether to put [accept] the offer. Only the client can make the choice. Don't be surprised if your client ultimately goes well below [above] the 'bottom line' ['top dollar'] that you were told about in conference.

Document the agreement reached at the mediation

If agreement is reached on some or all issues, you should not let the mediation finish without the parties recording in writing what has been agreed, and signing the document.

A good mediator will insist on this. If the mediator does not, you should, in order to protect your client's interests (and also to protect you).

What is essential is to record the agreement(s) reached, to prevent backsliding, second thoughts and legitimate disagreement about what was agreed.

The document can expressly be legally binding, or expressly not legally binding – i.e., just a memorandum of understanding. The important thing is to formalise what the parties have agreed by recording it in writing.

It is very tempting at the end of an exhausting mediation (especially when there are spouses/children/dogs waiting impatiently for you and/or urgent things to do back at chambers and/or tomorrow's case to prepare) to say to your opponent, 'Just send me a fax tomorrow recording what the parties have agreed, and I'll get my client [or solicitor] to sign it.'

Resist the temptation. This is a recipe for disaster. Instead, draw up a document at the mediation, while everyone still is there and resolved to settle. Drafting the document will flush out exactly what the parties have agreed and also often makes them realise that some extra items also need to be agreed (e.g., time for payment).

The document can be and often is handwritten. If the mediation is taking place in a solicitor's office, someone may offer to get it typed up so that it looks 'more like a legal agreement' or may offer to use their firm's precedent for settlement deeds. Do not accept the offer.

Once people (especially lawyers) are given a typed document, they will think of endless changes and there is no reason not to make them, with the result that you will be there all night. The beauty of a handwritten document is that there is not much space for changes, so the alternative to keeping changes short and simple is to write the whole document out again. Usually, people are too tired to do this.

Lawyers often want to include elaborate releases in the settlement document, or insist on a separate deed of release, or want to use the firm's precedent for a release developed by the senior partner. Resist this. Drafting or analysing these documents will consume a lot of time and can actually generate ill-will, because the lawyers will speculate about every possible cause of action that the parties may have against each other, in order to make sure that the release covers them.

A release can be very simple. Often, the phrase 'mutual releases' is sufficient in a shorthand agreement.

1 For example, see *Civil Procedure Act 2005*, section 31.

2 *The New South Wales Barristers' Rules*, Rules 16 - 72 (Advocacy Rules)

3 Rule 51 prohibits a barrister from knowingly making a false statement to the opponent in relation to the case (including its compromise). The prohibition on misleading and deceptive conduct in the *Trade Practices Act 1974* and/or the *Fair Trading Act 1987* applies during a mediation despite its confidentiality: *Quad Consulting Pty Limited v David R Bleakley & Associates Pty Limited* (1990-1991) 98 ALR 659.

4 Rule 54

5 Sir Laurence Street incorporates in his standard mediation agreement an acknowledgment by the parties that they will behave in accordance with an attached protocol. The protocol provides that "*[l]egal advisers are not present as advocates ... A legal adviser who does not understand and observe this is a direct impediment to the mediation process". See "Representation at Commercial Mediations*", (1992) 3 ADJR 255.

6 See, for example, B. Sordo, "*The Lawyer's Role in Mediation*", (1996) 7 ADJR 20 at 25.

7 J. H. Wade, "*Representing Clients at Mediation and Negotiation*", Dispute Resolution Centre, School of Law, Bond University, at 153. The roles include Kindly Enemy, Point Scorer-sniper, Control Freak, Passive Observer, Uncommitted Procrastinator, Bad Cop and Strategic Intervenor: Id. at 138 - 155.

How many mediators does it take to change a lightbulb?

Well, let's unpack that shall we?

First of all, let's be clear that it isn't the mediator's function to change the lightbulb.

The mediator will explore with the lightbulb how it feels about the on and off nature of its job, its unhappiness at always having to work nights, and its relationships with the other parties, including the new lightbulbs that it feels are a threat to its position.

The mediator will talk to the new lightbulbs, reframing and normalizing their observation that the principal lightbulb is completely out of its box, and identifying that their real issue is that being picked on one at a time constantly undermines their team spirit.

The darkness seems quite hostile to all the lightbulbs and keeps telling them to go and unscrew themselves. The mediator will allow it to vent its anger and express its distress at how it always feels unwanted.

The mediator will help guide the darkness and the lightbulbs, both new and mature, to a solution reflecting their new understanding of each other. Bright sparks will realise that you'll have to be left in the dark now because the final outcome is confidential.

From http://www.consensusmediation.co.uk/mediationjokes.html

Why did the mediator cross the road?

I'm sorry, I can't share that information with you unless the chicken authorises me to tell you.

From http://www.consensusmediation.co.uk/mediationjokes.html