Constructive mediation

By A W Street SC

Everyone has a different view about the role of mediation in litigation strategy. However, we are all bound by New South Wales Barristers Rule 17A to inform the client of the reasonably available alternatives to fully contested adjudication. In nearly all civil cases, one such alternative is the structured assistance to resolve the dispute through the process of mediation.

To measure the discharge of that duty owed by the barrister to the client there are, in my opinion, three essential criteria:

- the information must be imparted at the earliest reasonable opportunity;
- the information must provide a clear understanding of the nature of the mediation process so as to permit the client to make a decision about the client's best interests; and
- the client must receive adequate advice from the barrister about the prospects of success in litigation and the extent of the particular and inherent risks as to adverse outcome. This enables the client to evaluate their best interests in the context of the available litigious and mediation processes.

Whether these steps are being adequately taken might well in the future require a contemporaneous record by the barrister of the steps taken to fulfil the obligations under rule 17A.

Duty to provide a clear understanding of the mediation process

The most important feature of mediation is that the client is in control. This is in stark contrast to the rights-based outcome, in which the ultimate decision imposed is controlled by the court. Clients who understand this are less likely to be shackled by over-zealous lawyers.

Further, ensuring that the client is conscious of his or her ownership of the process, including determination of what, if any, consensual outcome is agreed, carries with it a breadth of scope for negotiation and resolution unconstrained by a court-imposed, rights-based decision. The client should be informed that the presence of the mediator permits a structured and controlled environment in which to explore the resolution of the dispute. This helps to avoid the particular and inherent risks, as well as uncertainty and delay, in a rights-based court adjudication.

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Judicial experience of the mediator

There is a considerable advantage if the mediator has judicial experience, given the role to be played in private session, testing the client's grasp of the spectrum of best, worst or tolerable adjudication outcomes. Moreover an experienced judicial officer may provide the added clout needed to drive home to the client a sound grasp of the particular and inherent risks, as well as to sever any over-zealous control of the client by the lawyers.

Although a mediator with judicial experience does not participate in the mediation process as an adviser, the hypothetical reality checking drawing upon that judicial experience has a didactic and beneficial impact in relation to the client's grasp of the adjudication process. Personal views expressed by the mediator as to the perceived strength or weakness on a merits basis of the issues for adjudication when expressed in private session, can be extremely constructive. Where, however, the mediator expresses any such personal views in joint session, this is, in my opinion, most unfortunate and generally destructive of the mediation as it polarises the parties. The impartiality of the mediator in joint session and abstaining from entering into the well of the dispute from a partisan viewpoint is of the utmost importance to a constructive mediation process.

That said, it remains the position that experienced practitioners skilled in the role of a mediator may well achieve the same outcome as a mediator with judicial experience. I remain of the view that the gravitas of the mediator is of considerable importance. Indeed, in the context of litigation, the process of mediation should, in my opinion, always involve a mediator with legal qualifications. I suspect that legislative changes to ensure that legal mediators have maintained their professional right to practice given the pervasive importance of the process of mediation is not too far away.

The most important part of the barrister's brief opening statement is, to communicate the client's understanding of the alternative processes, their attendance in good faith and their genuine willingness to listen and explore areas of resolution. It is unhelpful to use the opening statement as an adversarial address or an opportunity to intimidate or interrogate. Equally, obstinancy as to understanding the other side's case and sparring on issues rarely creates a constructive atmosphere. The barrister's role should be to advance the client's control of the process, distinguish between commercial and legal issues, provide legal advice, assist in formulating offers capable of acceptance in effectively resolving the whole or desired part of the dispute, and settling / advising on any settlement documentation.

As to the issue of when to mediate, the Hon Mr Trevor Morling QC has said on a number of occasions 'It is never too early to mediate'. I agree.