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Commercial Mediation - Top Tips for Best Outcomes

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Commercial Mediation - Top Tips for Best Outcomes

INDEX

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MEDIATION – HOW TO GET THERE

by **John Walton**

CONTENTS

Every conflict we experience, no matter how trivial, points us toward a crossroads in our lives. One path leads us into anger, fear, confrontation, and bitterness and draws us into quarrels over the past. This path reveals a deep level of caring about outcomes, sterile communications, contemptuous ideas, negative emotions, and unpleasant physical sensations, blinding us and dissipating our energy and spirit. This is the path of impasse, aggression, and antagonism.

A second path leads us into empathy, acceptance, honesty, and mutual respect and draws us into negotiations over the future …

In addition to these is a third path … This path leads us into increased awareness, compassion, integrity, and heartfelt communications and draws us into awareness of the present. It integrates the honesty and caring about outcomes encountered on the first path with empathy and caring about people encountered on the second …

In this way, every conflict leads us to two different crossroads. In the beginning, we face a choice between fighting and problem solving. Later, we face a subtler, more arduous and far-reaching choice between merely settling our conflicts and seeking to learn from them, correcting our behaviours, and moving toward forgiveness and reconciliation.

Ken Cloke, *The Crossroads of Conflict – A journey into the heart of dispute resolution*
Janis Publications, 2006

1. INTRODUCTION

Looking at Jenni McManus's headline article in last week's *Independent*, this seminar is timely; though it does seem to be a pet topic for that paper. I'm not sure that ADR warrants the shocked tones employed by Ms McManus.

As practising lawyers, we have been trained in the subtleties of the law; to appreciate the niceties of fine distinctions; to be able to compartmentalise issues; and to value the commercial certainties provided by the doctrine of precedent. A trip to the courts, with our arguments under our arms, and our clients (hopefully) in hand, ready to do battle with the other side is the stuff of our training, and of some of our dreams.

For those of us who don't go to court, the wise and considered reasoning of our very best judges gives us the guidance on ordering our clients affairs and business activities in such a way that it protects our clients' interests and hopefully secures the best outcomes for them. Without reported cases and the doctrine of precedent, where would we be?

And yet. For some reason, your client often does not quite share your enthusiasm for fine legal distinctions, and there is a very good reason for that. With very few exceptions, most commercial clients have businesses they wish to run, which typically do not involve spending time in lawyers' offices reading through briefs and understanding the procedural hurdles to *having their day in court*.

So, you explore alternatives. Historically, this was through arbitration, with specialists who understand the issues acting as decision makers after a truncated, and less *legalistic* process of argument. I would suggest, however, that the prize for quick and efficient determination of legal disputes now lies elsewhere. Most arbitrations involve extensive discovery and appeals, with AMINZ's new Arbitration Appeal Panel; much of the difference between going to court and arbitration has vanished. One system has reported judgments and a doctrine of precedence, and the other has confidentiality and the potential for an expert, specialist bench. Neither is likely to be speedy or cheap.

In the myriad of ADR options, only one is truly voluntary, and only one offers clients total control over the outcome, and that is a negotiated settlement through mediation.

2. GROWTH IN MEDIATION

> *… in discussing the future of civil litigation it is difficult for those of us who make a living from it to avoid the subconscious influence of our own role within it. Former judges usually want more arbitration and private mediation. Sitting judges usually prefer major trials of social, commercial or legal significance; few relish case management, interlocutory applications, and high volume trivia. Barristers are usually protective of their role as highly paid gladiators who control the procedural destiny of their own cases. Civil servants usually place the emphasis on throughput rather than quality. Most politicians want to reduce complex problems to populist sound-bites. Academics consider it their painful duty to rein in the dangerously wide freedoms arrogated to themselves by judges. And when was the last time the presenter of a conference paper made his or her mark by applauding the status quo? On a topic like this we are all hopelessly mired in self-interest. All we can do is try to evaluate the idea rather than its source.*[1]

In her article in the *Independent*[2], Jenni McManus identifies high costs, certain delay, rigid procedures and uncertain outcomes as driving commercial litigants away from the courts and into the arms of arbitrators and mediators. McManus goes on to quote Chapman Tripp's Jack Hodder as observing that there would need to be *strong countervailing reasons* for a chief executive not to consider alternative dispute resolution.

Traditionally, commercial litigants view mediation with some suspicion. For most of us, mediation was the stuff of family courts, cups of tea and biscuits, active listening, asking open questions like "*How do you feel about that?*", if not group hugs and singing *Khumbaya*.

Not an attractive proposition for many commercial litigants. Asking how they might feel by a toothy, earnest and enthusiastic facilitative mediator, could well result in a more forthright response than anticipated.

This unease is not helped by a perception of uncertainty of the process and the potential lack of structure around the result. Mediations traditionally have compromise writ large all over them. In our opening statements, most of us explain that you might not get your ideal result, but we hope that you will come out of the process with a result that is workable; that you can live with.

It is no surprise that many decision makers are tempted to send a relatively junior executive to mediation, hamstrung either by the inability to commit to a settlement or the expectation of the boss's wrath when the settlement deal is explained back at the office. It is also interesting, however, how willingly decision makers will settle when they are engaged in the mediation.

That might offend some of you who feel there is a right and just answer provided by the law, and clients are entitled to exercise their rights. Let me give you an example of how clients might view that.

A few years ago, an acquaintance entered into an unconditional contract to purchase a commercial property. The price was in the region of a million dollars. Prior to settlement, the vendor (an Asian lady) announced that the sale was off as she had found another buyer who had offered more.

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1 *Whether the adversarial process is past its use-by date – a New Zealand perspective*
A paper by the Hon Robert Fisher QC for the NZ Bar Association and the Legal Research Foundation Civil Litigation Conference, 22 February 2008, at para 2.

2 *Litigants turn their back on courts*, Jenni McManus, *The Independent* 26 June 2008, at p 6

The purchaser put a caveat on the property, and after lengthy litigation, in which the vendor ended up representing herself (after going through a number of lawyers) and abusing the judge, the purchaser won. At every stage, including being awarded costs which covered the entire purchase price.

After such a resounding victory, I asked this person if he was happy now being able to get on with his property development business, particularly now that the property had over doubled in value. He said no. Had he known how long it would go on for, and how it would take up so much of his time, he would not have bothered. His business was property development, not litigation.

Now, I am not suggesting that this would have been a case for mediation, but it is a clear example where a client may clearly have rights which can and perhaps should be enforced, but their interests lie elsewhere.

Mediation has moved on from those early days where it was perceived as being the realm of dealing with personal problems, and possibly international conflicts. With a backdrop of the considerable expense and uncertainty in traditional litigation, mediation has moved to fill the gap.

At the heart of our *dilemma* according to Hon Robert Fisher QC is the *ideal justice fallacy*. This is the assumption that ideal justice is both attainable and every person's right. Frustrated and disillusioned litigants greet the suggestion that certain disputes do not warrant legal representation with indignation. It seems to me that lawyers perhaps engage to eagerly in defining their clients' rights without considering the cost of establishing those rights, and the likelihood of successfully and meaningfully enforcing them. In that context, an enforceable, negotiated settlement agreement may be of considerable value to both parties.

By whichever route you or your clients come to ADR processes, it is a short but logical step to include mediation. As Bob Fisher observes:

> *The adversarial process is fundamentally sound but do we need a Rolls Royce to visit the local dairy. Most of the time a Lada or bicycle would do. So long as we recognise that we should also be using many other ways of resolving civil disputes.*

3. WHAT MEDIATION IS AND ISN'T

> *And the King said, Bring me a sword. And they brought a sword before the king.*
>
> *And the King said, Divide the living child in two, and give half to one, and half to the other.*
>
> 1 Kings 3:24

When ADR is discussed, we often hear the expression *the justice of Solomon* as a reference to halving the difference. The story of King Solomon threatening to cut a baby in half is actually more an example of the result that wider dispute resolution techniques, like mediation, can achieve. By reality testing the settlement options (sharing the child, albeit with the unfortunate side effect of killing it), King Solomon was able to return the child to its mother.

Perhaps a less brutal and more illustrative analogy is the classic dispute between two parties over an orange. A simple answer to the dispute might be to divide the orange in two, and give the parties half each. It is only after the parties put aside their rights claims and disclosed their interests in the orange that the mediator was able to ascertain that one party wanted the juice and pulp, where the other wanted only the zest. Under this analogy, both parties got 100% of what they wanted.

So, if mediation is not a group hug and is more subtle than a negotiation which results in splitting the difference, how are these lofty objectives achieved?

At its simplest, mediation is a process under which the parties:

(a) Express their respective positions, during which they may also express their disappointment with the other party (*venting*) and what their actions have cost them. This may well be their first opportunity to do this in a controlled environment.

(b) Get the chance to see the strength of the other's position.

(c) Consider the alternatives to a negotiated settlement, and test the likelihood of their preferred outcomes.

(d) Possibly reach a settlement agreement, though this is not an absolute pre-requisite for a successful mediation.

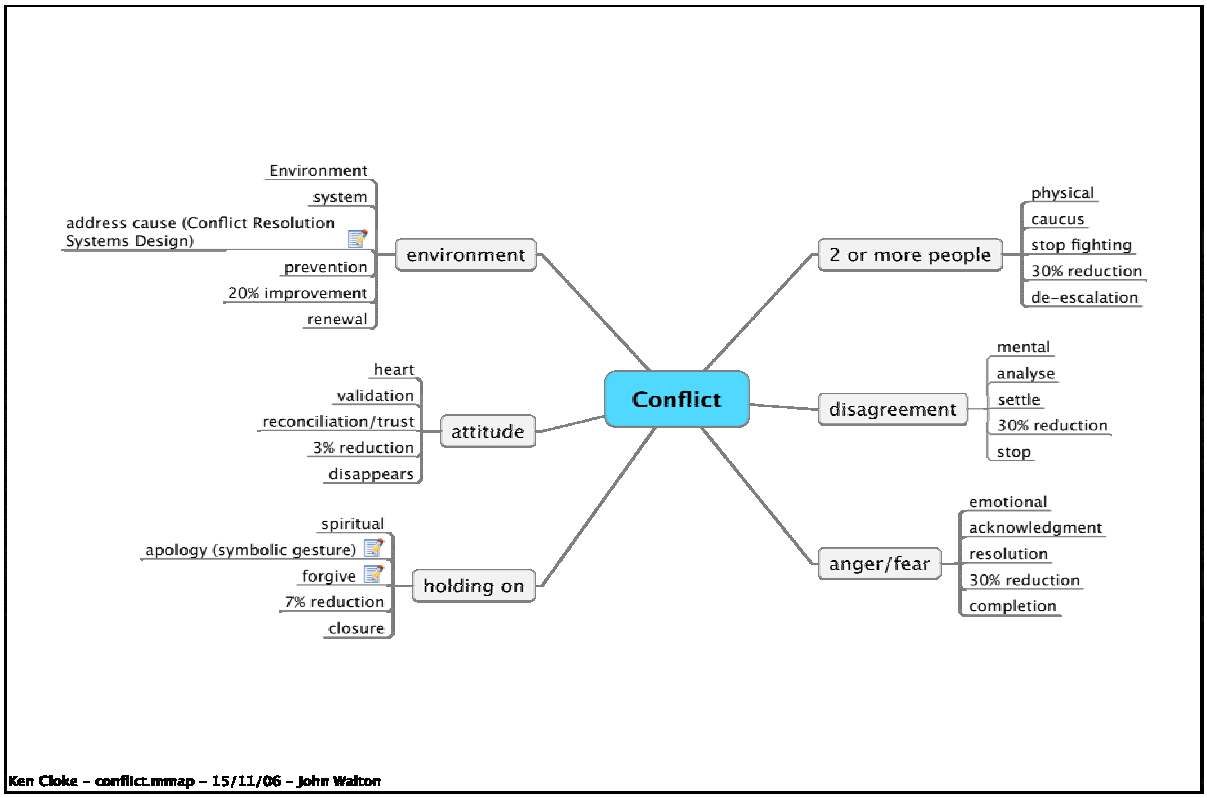
The true magic of mediation is the change in perspective which most parties undergo during the mediation process.

Typically, by the time mediation has become an option, the parties' positions have either become, or are well on the road to being reasonably entrenched. They will usually have had a disagreement with the other party and obtained legal advice as to their *rights*. As the dispute progresses, the parties tend to head further down the road to a fully entrenched rights based position.

One of the first goals of mediation is to get the parties to move their focus from their *rights* to their *interests* in resolving the dispute and moving on.

In the quote at the head of this paper, Ken Cloke refers to two crossroads.

At the first, we have the choice between the path of conflict and the path of empathy, acceptance, honesty and mutual respect which bring us into productive negotiation. Needless to say, Dr Cloke identifies mediation as the tool to draw us down the second path. At the second crossroads, we have a third path which leads to a better world, if you'll excuse the utopian language.



The figure above is an alternative presentation of Dr Cloke's dispute matrix.

Starting top right, and moving clockwise, the first stage of dispute resolution through mediation is to de-escalate the dispute, ie to stop fighting. This results in a 30% reduction in the dispute. If the disagreement can be dealt with, typically settled, there is a further 30% reduction. At 60%, this is clearly only part of the picture, and where most mediations will end. This is the horse-trade scenario, where the parties have no need of a further relationship; the price is simply settled.

This will often not be enough, where the parties do have an ongoing relationship; particularly if that relationship is high value, like an infrastructure project, or is commercially complex or enduring.

The next stage is to resolve the fear and anger engendered by the dispute, and that comes from dealing with the emotions surrounding the dispute, whether it is anger at being exploited, or fear of having the relationship terminated and the losses that would entail. For this, Dr Cloke awards a further 30%.

In the next two stages, you get 7% and 3 % (bringing us to 100%) for making an apology or some other symbolic gesture and validating the other party's position. At this stage, there is a true reconciliation with a re-establishment of trust and the dispute and all that came with it has gone.

Dr Cloke then identifies a further 20% improvement in relations between the parties, which comes with *systems design* which addresses the cause of the conflict. I'm sure you can all picture the scene – the parties have been through an extensive mediation, with the result that they are back on good terms and working together. One inevitably asks the other "*How did we get into this position in the first place*", and it is only when you address the root cause

and put systems in place to do this, that you gain the further improvement which Dr Cloke sets at 20%.

I appreciate that a 120% improvement in any relationship is perhaps idealistic, and for some unachievable. From my own experience, there is often a magic moment at which the parties' positions shift – whether it is the result of reality testing or making just the right comment at the right moment. At that point, you can usually say that the parties reassessed their *rights* based perspective, and accepted the realities of an *interests* based assessment of their positions, and took the unnerving step of exploring alternative outcomes.

If the parties take the opportunity to go any further, that will depend on the nature of the dispute, the parties and the skills of the mediator.

4. POTENTIAL ROUTES TO MEDIATION

Many commercial agreements (particularly in the construction industry) now include a mandatory referral to mediation as part of a tiered dispute resolution process. Mediation is also included in many statutory processes[3], and is explored in many court instituted proceedings.

Critically, whether the initial referral to mediation is voluntary or mandatory, continued participation can only be voluntary.

The decision of whether or not to refer a dispute to mediation will always rest with your clients, but as practising lawyers, you can influence that decision significantly. Before embarking on a mediation, whether as mediator or representing one of the parties, I always say to myself

It's not about me

For lawyers representing parties in mediation, the issue should always be – is this in the best interests of my client?

Having answered that question, it is up to all of us who practise in this area to bring our skills to the table.

Perhaps pre-empting what my colleagues may say, and casting a slightly different perspective, mediators should bring all their skills and experience to the table. While they have no direct personal interest in the outcome, it can be helpful for them to share their expert perceptions with the parties, whether through reality testing or by expressing a view directly to the parties.

Conversely, it can be very unhelpful to have a mediator who takes *neutrality* to the point of being passive. It is always worth considering that the disputants are usually experts in their particular fields. They will already have been in negotiation, and they will have taken expert legal advice. When engaging in commercial mediation, it is my experience that the parties benefit from mediators who understand the dispute and can bring their experience and negotiating expertise to the table[4].

While neutrality at some level is commendable, it should not be at the expense of giving the parties the benefit of your perceptions and your experience.

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[3] A search of the NZ Statutes database reveals 233 references to mediation in NZ statutes.

[4] For a fuller discussion of this, see *Beyond Neutrality* by Bernard Mayer.

If I might also be permitted to pre-empt my colleagues, there is also a tendency to consider mediation only as a tool in avoiding litigation or arbitration. Mediation has the potential for far wider application than this.

In complex projects, the relationship between the parties, and the potential for conflict, is established during the selection and award process. An aggressive tender process followed by enthusiastic and opportunistic exploitation of a competitive negotiation will often leave the successful party wondering if it has left money on the table and possibly aggrieved before the project has even started. Dispute of some sort is an inevitability in these projects; I have often heard one party observe "*You held my feet to the fire before – don't expect me to be cooperative when things aren't going your way*".

In the construction industry, where binding interim determination has been standard practise for more than half a century (whether by the architect/engineer or a disputes adjudication board), there are moves to appoint project mediators at the outset[5].

The first step is to meet with the parties to establish lines of communications and to review the risk register for the project, to identify the pressure points for the parties.

The second stage is to monitor contract communications to try to identify and deal with potential dispute before they escalate, and the final stage is formal mediation.

While many lawyers will counsel holding off mediation until the dispute has crystallised, it is my experience that mediation can be as, if not more effective if the parties acknowledge that conflict and the potential for dispute is inherent in complex and high value projects with lengthy relationships. Dispute is a continuum, and frequently the sooner the skills that mediation can bring are applied, the better.

5. DEALING WITH MULTIPLE PARTIES

From time to time, we get involved in multiple party mediations. The most common would be in respect of leaky homes, where every one from the owner to the designer, subcontractors and local councils get dragged in. I have also struck this in the marine industry, where a number of parties have an interest in the outcome.

In one of my first mediations as mediator, there were 5 parties directly interested in a marine construction dispute – the vessel owner, the contractor, the material supplier, the yard owner and an industry representative. To compound matters, the vessel owner did not speak English well (or perhaps periodically chose not to).

Before the matter was referred to mediation, the owners had taken every step they could think of to escalate the dispute, short of actually paying their lawyers and instituting proceedings. They complained directly to the Prime Minister, the papers, the material suppliers and maligned the contractor and the NZ marine industry, generally. By the time they came to mediation, the relationships between the parties were toxic to say the least.

After almost more time than the parties could bear, they had all expressed their respective positions, as only those with a marine industry background can. What became quickly apparent was that all the parties actually wanted to resolve the dispute, but couldn't work out how. They were also clearly very wary of being pushed into costs and liabilities which were open ended and out of all proportion to what they were originally responsible for; and it is fair to say none of them trusted the owner.

[5] This was first established by the Centre for Effective Dispute Resolution (see www.cedr.com and search for CEDR Solve). A New Zealand version of this approach is available for download from www.johnwalton.co.nz

While I could have explored all options and have left it to the parties to come up with a solution, what the parties were actually looking for was for some one else to propose a way forward. While caucusing with each of the parties, I explored the available options, and then put a solution to the main protagonists, the vessel owners and the main contractor. Left to their own devices, no one expected them to get to a resolution, and yet the solution was relatively simple. Included in the mediation agreement was a media statement, which the parties agreed to circulate.

This may appear perhaps to be a too muscular way of achieving settlement for some. However, where there are multiple parties, each with their own agenda, having expertise in the matter in dispute and using that expertise to help the parties to define their positions and to propose a way forward can be invaluable.

6. LIKELY PERCEPTIONS - SIGN OF WEAKNESS?

There has always been this perception that it is the party who blinks first, or has the weakest position who proposes mediation, as it involves negotiation rather than a testing of the legal position, and the quality of your counsel and the strength of your evidence, and enforcing your rights. I believe most competent commercial decision makers have moved on from such testosterone induced chest beating.

Issues such as face or doubts about the strength of your position have, from my observations, largely gone. Some decisions makers have reservations, mostly out of the uncertainty of what the process involves and an unease about where the parties might get to at the end of the process. Properly prepared, these reservations soon fade.

Of course, it helps if their legal advisers share this view.

Commercial Mediation - Top Tips for Best Outcomes

GOOD PRACTICE AS A REPRESENTATIVE

by **Maria Dew**

CONTENTS

1. THE DUTY TO ADVISE THE CLIENT ON MEDIATION

Is there such a duty?

A client has the reasonable expectation that their lawyer will provide them with advice on the best method of achieving what the client wants. In most cases the client seeks a resolution of the dispute by the quickest and most effective means available and on terms acceptable to them.

It is always a risk for lawyers to tend to view litigation in terms of the process itself involving procedural steps and timetables to be adhered to. We all know that litigation can take on a life of its own. Contrast this with the client who still retains their original priorities to resolve the matter quickly, with costs controlled and on terms they can live with.

It is of course, the lawyer's duty to safeguard and pursue the client's own priorities and aims. Therefore at all stages, before the issue of proceedings and throughout the progress of the proceeding when new information emerges or each time a choice of tactic has to be made, mediation or Alternative Dispute Resolution ("ADR") is one of the options to be considered. There is nothing particularly new or "alternative" about this duty. It is simply a feature of the relationship between lawyer and client, that at all times we act in their best interests.

The Lawyers and Conveyancers (Lawyers: Conduct and Client Care) Rules 2008, come into force on 1 August 2008. These rules now set out an express duty on lawyers to consider ADR.

> ***"Alternatives to litigation***
>
> *13.4 A lawyer assisting a client with the resolution of a dispute must keep the client advised of the alternatives to litigation that are reasonably available (unless the lawyer believes on reasonable grounds that the client already has an understanding of those alternatives) to enable the client to make informed decisions regarding the resolution of the dispute."*

The High Court Rules also require the court and the parties to proceedings to consider ADR. [1] Under Rule 442, a judicial settlement conference can be invoked by the court of its own motion.

When does the duty arise?

It is reasonably clear that the duty to advise clients on the alternatives to litigation arise once proceedings have been issued. However, the new Conduct and Client Care Rules do not limit the duty in this way and the duty to advise on mediation will now certainly arise before the commencement of proceedings.

Traditionally, litigators have been reluctant to embark upon ADR without having engaged in discovery of all the relevant documents, facts and expert evidence and even interrogatories.

The risks of entering into mediation too early must be assessed carefully. The parties must be satisfied that they do have the critical information available and that they are informed by experts' reports where appropriate. It is likely that lawyers' preference to delay mediation until after proceedings are issued will continue.

[1] Rule 442 "Court may assist in negotiation for a settlement", r442(5) provides that the Court may, with the consent of the parties, make an order at any time directing the parties to attempt to settle their dispute by the form of mediation or other alternative dispute resolution process agreed by the parties.

However, it is worth remembering executives settle matters frequently without the benefit of a detailed legal examination and often with only the available information. Mediation may on occasions be considered earlier than the standard "after discovery and interrogatories". One of the themes behind the ADR process is that the earlier it is introduced the better and the greater the saving in time and costs[2]

The emergence of costs implications

The United Kingdom court practice directions have for some time contained an express duty on lawyers to advise fully on ADR[3]. As a result, there is a gradual emergence of case law dealing with the question of costs where ADR has been refused by one or other party.[4] In *Dunnetts* case the refusal of the defendants to contemplate ADR, which had been recommended by the Court, meant that offers made by the defendant to settle prior to the hearing of the appeal could not assist the defendant on costs.[5]

To date, the Court of Appeal in New Zealand has not been attracted towards such arguments, at least on the facts that have come before it to date.[6]

While ADR is not mandatory in New Zealand the increasing appearance of the obligation to consider and advise upon it suggest that a failure to do so may leave counsel or the client open to criticism from the court or other party in any post trial application for costs.

In the United Kingdom there has this year been a public call for greater uptake of mediation by the Lord Chief Justice of England[7] and Master of the Rolls.[8] Their recent discussions on the costs implications of refusing mediation will likely lead to greater concentration on these issues when arguing costs there and ultimately perhaps in New Zealand.

One of the leading UK decisions in this area is *Halsey v Milton Keynes NHS Trust* [2004] EWCA Civ 576.[9] The Court dealt with the question "When should the court impose a costs sanction against a successful litigant on the grounds that he has refused to take part in alternative dispute resolution?"

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2 Mackie, *Commercial Dispute Resolution An ADR Practice Guide,* Butterworths, UK, 1995, para 4.2.3

3 UK Commercial Court Practice Directions 1999 require advisors to bring ADR to their clients attention in all cases to "(i) consider with their clients and the other parties concerned the possibility of attempting to resolve the particular dispute or particular issues by mediation, conciliation or otherwise; and (ii) ensure that the parties are fully informed as to the most cost effective means of resolving the particular dispute.

4 *Hurst v Leeming* [2001] EWHC 1051, *Dunnett v Railtrack* [2002] EWCA Civ 302, *Virani v Manuel Revert* [2003] EWCA Civ 1651 and *Halsey v Milton Keynes NHS Trust* [2004] EWCA Civ 576.

5 Brooke LJ at para14 noted that the defendant had refused to contemplate ADR on the basis that it would necessarily involve the payment of money, which his clients were not willing to contemplate over and above what they had offered. "This appears to be a misunderstanding of the purposes of alternative dispute resolution. Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of the lawyers and the court to achieve"

6 *Beadle v M & LA Moore Ltd* [1998] 3 NZLR 271 and *Glaister v Amalgamated Dairies Ltd & Anor* (2003) 16 PRNZ 840. In the former case, the Court reversed the High Court decision not to grant costs to the defendant on the basis that it had declined an offer to mediate. The Court of Appeal held where the defendant had made a payment into court which exceeded the plaintiffs award at trial, it was entitled to costs. In the latter case, the court rejected the argument put to reduce the plaintiff's costs award, as the plaintiff had been more successful at trial than any offer made to settle prior.

7 29 March 2008, Alternative Dispute Resolution: An English Viewpoint, a speech delivered by Lord Philips, Lord Chief Justice of England and Wales

8 Sir Anthony Clarke, Master of the Rolls, on 8 May 2008, gave a speech at the Civil Mediation Council's National Conference in Birmingham on The Future of Civil Mediation.

9 The Law Society and the ADR Group were both represented and made submissions as interested parties as the appeal was considered to raise a question of general importance. The Civil Mediation Council and CEADR also made submissions as interveners.

On the facts the successful litigant had not been unreasonable in refusing mediation. The personal injury claim was for a relatively modest amount and the costs of mediation would have been similar to the costs of mediation. Further, the Court assessed there had been little prospect of success as the claim lacked merit from the outset. However, Lord Justice Dyson went on to confirm that in some cases costs may not follow the event because of "unreasonable litigation conduct" if mediation was unreasonably refused. The Court provided guidance as to the factors that may indicate it is reasonable to refuse mediation eg: the nature of the dispute, the merits of the case, whether other settlement methods have been attempted, whether mediation had a reasonable prospect of success and how strongly the court had encouraged the parties to mediation. Significantly, Lord Justice Dyson noted that the courts active case management required the courts to encourage the parties to ADR where appropriate and the stronger the courts encouragement of ADR the easier it will be for the unsuccessful party to show that the other party's refusal was unreasonable.

In New Zealand, there are of course now similar duties both in the High Court Rules and Client Care rules to consider ADR. Further, active case management by the courts may now see ADR being recommended to the parties more often.

There is a costs catch all provision at High Court Rule 48D (f)[10] which provides for considering whether there is "some other reason" for refusing costs. This could arguably include any unreasonable litigation conduct in refusing mediation. In the writer's view, this may be an emerging area for arguments on costs in New Zealand. It may be helpful in further to have any "without prejudice save as to costs" correspondence refer expressly to the offer to mediate if it is appropriate for your clients case.

2. WHEN NOT TO USE MEDIATION

Mediation, or any other ADR, will not always be the answer. It will never replace litigation or arbitration and is not intended to. The key to effective use of ADR is to know when to use it and when not to.

There are some general principles that can be applied to determining when mediation will not be suitable.[11] In particular:

(a) Need for court assistance or protection – if there is a need for an injunction or some other form of urgent relief by way of a declaration or an order to protect or seize assets.

(b) Precedent -the parties require a precedent decision. An insurance company must litigate over the interpretation of a policy condition or a commercial party wishes to send a message to competitors or employees over a restraint of trade issue. However, it is important to consider that the precedent could be a benefit or a burden. Where such concerns exist the privacy of ADR can be attractive.

(c) Publicity- one of the parties seeks the publicity of litigation to further an interest in public or commercial awareness.

(d) Summary Judgment – if summary judgment is available, ADR will generally not be used for straightforward debt recovery.

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[10] *R48D(f) "Despite rules 47 to 48B, the Court may refuse an order for costs or may reduce the costs otherwise payable under those rules, if……(f) Some other reason exists which justifies the Court refusing or reducing costs…."* This has been relied upon infrequently in cases where the conduct towards the plaintiffs has been unsatisfactory e.g. *Aotearoa Kiwifruit Export Ltd v Southlink Ltd (2006) 18 PRNZ 60*

[11] Refer Mackie, Miles, Marsh, *Commercial Dispute Resolution: An ADR Practice Guide, Butterworths,* 1995, para 4.4 and *Hasley*, supra.

(e) No genuine interest in settlement - ADR is consensual. If one party is not willing to attend mediation then the option cannot be pursued. However, such attitudes will often change during the course of the dispute and so the option of mediation should always be re-evaluated. Few parties litigate for the sake of the process. Most parties are interested in the substantive outcome. So it should not be too readily assumed that an initial "no" will be forever.

(f) Delay – if mediation would delay the hearing date this would be a reasonable ground to refuse, though this will rarely be the case if it is offered in good time prior to hearing.

(g) Costs of mediation - such costs may not be justified if the offer to mediate only comes shortly before the hearing and the hearing is not more than a day or two of hearing.

3. SELECTING YOUR MEDIATOR

Choosing the mediator who is best suited to your particular dispute can be crucial in ensuring the success of the mediation. It is assumed that in every case the mediator will have the appropriate qualifications, training and experience in mediation.

Mediators are mostly selected by word of mouth and reputation. Alternatively, parties may seek a short list of suitably qualified mediators from the panel of mediators trained and certified through LEADR or AMINZ.

To a great extent the skills of a good mediator are partly innate and partly acquired by knowledge and experience. So in selecting a mediator, some useful questions should be asked with each new mediation. What kind of mediation, primarily facilitative or evaluative, do you want? How vital will the subject matter expertise of the mediator be?

It has been noted in the United Kingdom mediation environment, that most advisers currently underestimate the importance of the process skills and overestimate the importance of subject matter expertise. This is said to be partly due to immersion in the arbitral/litigation process and a focus on finding a factual/legal answer to a specific question and partially because the nature of the mediation process is still not understood as well as it could be.[12]

A good mediator should be able to offer both evaluation and facilitation. It is unlikely that a purely facilitative mediator will be sought after in commercial disputes. Equally, the evaluative skills required are not always straightforward. The true evaluative skill is not just the application of logic and law. If this was true reasonable lawyers should be able to settle matters themselves. The true evaluative skill that lawyers seek in mediators is the ability to assist parties in joint and private sessions to explore, with the advice of the lawyers, the significance of the strengths and weakness in the respective cases. This requires rapport, communication and credibility.

The following points will also be important to consider:

(a) Does the mediator's style fit with the nature of the dispute and the needs of the parties. This can often require an assessment of the client and the other party's client - who might they relate best to?

(b) Will a lawyer be the best mediator of this dispute? Should it be a mediator from another discipline? An accountant, engineer or other professional.

[12] Mackie, Miles, Marsh, *Commercial Dispute Resolution: An ADR Practice Guide, Butterworths,* Third Edition,Para 6.2.3

(c) Co-mediators - If there are multiple parties should co-mediators be appointed? Should you consider a co-mediator expert. A good process mediator can be selected to lead the mediation, assisted by a subject matter expert e.g.: in a building dispute may be best to appoint a co-mediator from the building industry.

(d) Who do the other party want to use? This may be a critical factor in the other party's willingness to use mediation. If there is a mediator that the other party will listen to - this is likely to be the mediator you want. However, do you know how much the mediator has been used by the other party or the other party's lawyer in the past? Is there a potential overuse of that mediator by one party that you need to consider with your client? This may require a fine balancing of interests and risks.

4. PRELIMINARY CONFERENCES

A preliminary conference will generally be called for by the mediator in the weeks prior to the mediation date. This is a valuable opportunity to ensure that the mediation will play out in a way that is most beneficial to your client and to the prospects of a successful mediation.

The mediator will provide the parties with an agenda for the preliminary conferences. The conference will often be attended by the parties legal representatives but there is always the opportunity for the parties to attend by arrangement.

While all mediators have their own style and format for conducting preliminary conferences, generally they will cover the following matters:

(a) Venue – this should preferably be a neutral venue but increasingly commercial parties and representatives no longer feel threatened that the venue is in an available boardroom provided by one of the parties' representatives.

(b) Defining "the dispute" – the definition of the dispute should be kept short, simple and in neutral language that both parties can agree upon.

(c) Parties – it is important to ensure that all parties confirm who will attend and that they have the necessary authority to settle. There is nothing more frustrating to the process than to have a party attending with only partial authority to settle. Equally, a decision maker who has not been involved in the process of the mediation can derail the process in a phone call during the mediation. There is no substitute for spending the hours in mediation considering the case in joint and private sessions, developing positions and working on proposals. If insurers are involved it is preferable that they attend or otherwise the authority to settle is on behalf of all interested parties.

(d) "Will say" statements – the parties should consider whether summary form witness statements are necessary for the mediation.

(e) Experts – the parties should consider whether expert reports will be exchanged and the parties' respective experts are available to attend the mediation. The parties will not want to see the mediation get derailed by one or both parties' unwillingness or inability to settle without having their expert advice available.

(f) Agreed issues and agreed chronology of events.

(g) Exchange of Opening Statements – the parties will generally agree a timetable for exchange of opening statements. These statements should not replicate an opening statement that would be used in court. The appropriate tone for such statements is dealt with in the mediator section of this seminar. As to the format, there is a helpful outline provided by CEDR.[13]

(h) Documents – the parties should also explore whether there are any documents that they consider are necessary to be sufficiently informed to make decisions at mediation. The parties may wish to agree a common bundle of documents or attach relevant documents to their respective statements. Documents presented should be restricted to key documents that will be referred to in mediation. A flood of documents may only distract the parties from the process of mediation.

(i) Settlement Agreement – the parties should prepare and settle the standard terms of a draft settlement agreement as far as possible prior to the mediation. This will save time at the end of the mediation when parties and representatives are tired. The draft settlement agreement will usually already have settled clauses including parties, background, confidentiality, full and final settlement, jurisdiction and governing law if appropriate.

(j) Mediation Agreement – generally this will have been presented to the parties by the mediator prior to the preliminary conference. The parties will be expected to have agreed to its terms, the mediator's fees and executed the mediation agreement by the time of the preliminary conference.

5. PREPARING YOUR CLIENT

Earlier this year Jim Farmer QC expressed his reservations about mediation[14]. "Forcing people to settle their disputes by scare tactics that involve misleading them as to the strengths of their case does nothing for the respect for the law and for the courts. It is little wonder that insurance company lawyers favour mediation. It provides exactly the right environment for obtaining settlements at levels below that which would be otherwise achievable".

In my view, these concerns are entirely justifiable if clients have not been adequately prepared for mediation.[15] The lawyer and client should never underestimate the time and effort that must be dedicated to preparing for mediation. The opportunity for scare tactics and misleading assessments of the case, to impact either the lawyer or the client, will be much reduced if they have discussed thoroughly what will be covered at the mediation. The well prepared client will go into the mediation having already made real progress in their assessment of the dispute, the risks, costs, the litigation pathway going forward and what they are willing to settle for now.

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13 www.cedr.com/cedr_solve/advice/opening.php and /documentation.php.

14 Jim Farmer QC, Civil litigation in Crisis?, a paper prepared for the New Zealand Bar Association and Legal Research Foundation, Civil litigation Conference at Auckland on 22 February 2008. His paper acknowledged "The growth in mediation is, without doubt, a direct outcome of the failings of the Court system. But mediation is not without its own problems and issues of principle." Page 4.

15 His comments may also arise out of concerns over mediator styles. Mediation should of course never involve coercion or misleading parties. As discussed above, mediator selection is also another key factor in minimising the risk of the matters Jim Farmer QC raises.

The aim in preparing any client for mediation should be, as much as possible, to ensure that nothing said in mediation will be a complete surprise. As the representative, you should always ensure that you have discussed with your client what you know will be covered during the mediation[16];

(a) what are the strengths and weaknesses of your client's and the other party's case?

(b) a detailed analysis of each item of claim assessed against the degree of possibility or probability of success. There is a need for high/low bracket (ie a range) for each head of claim as this will allow for the uncertainties of litigation such as quality of the witnesses and Judge's assessments.

(c) what is the estimate of time to trial? – this may be significant to the client given current delays in the courts.

(d) what is the estimate of full costs of litigation/arbitration going forward if the matter does not settle?

(e) what is the estimate of costs recoverable from the court if your client is successful, or payable by your client if not successful?

(f) what are the worst and best case scenarios (ie the net recovery after legal costs) if your client does not settle?

(g) what will be the management time and costs involved in litigation/arbitration if the matter proceeds?

(h) are there other non monetary benefits in either settling now or proceeding to a hearing?

You should also look to develop with your client any other settlement options that could involve something other than, or in addition to, a cash settlement. Encourage them to be creative about what the other party might be looking for. What might be at the heart of the dispute for the other party? Even commercial parties attending mediation have egos, reputations, shareholders interests and other interests beyond the mighty "cash settlement".

Client opening statement. In my view, it is generally preferable to have the client or clients non-legal representative make a short statement in addition to the lawyers opening statement. This should be rehearsed with you. It can cover any aspect of the dispute, it may involve an acknowledgement or personal comment that can be useful in setting the scene that the mediation is intended to be different and not entirely adversarial. Even in commercial mediations there is always the opportunity to use such statements to effect. We are all open to being persuaded, or even shifted slightly, away from our original cynicism by genuine non threatening statements.

Overcoming client reluctance. Prior to mediation, clients new to mediation will typically report one or more views; the dispute is highly unlikely to settle, they are not willing to compromise their position or the other party is not likely to be reasonable. There will be cases where this is true and not all disputes are amenable to mediation. It goes without saying that clients, once fully informed, should not be dissuaded from their view that they do not want to attend mediation.

[16] It is surprising that clients and lawyers will sometimes not have considered the uncomfortable reality of a detailed breakdown of legal costs, expert witness expenses, disbursements, court hearing fees and other costs associated with the litigation prior to the mediation.

However, at the core of mediation is simply an opportunity. This may be a less confronting approach for parties. It should not be underestimated the value of this opportunity. It is generally, a valuable and cost effective opportunity for your client to reassess their position and to sit in the same room with the other party and discover more. This is also likely to be the only opportunity prior to trial, to have the legal representatives in the same room focused on possible outcomes. Finally, the assistance of a skilled mediator objectively and impartially testing assumptions and reality checking with both parties provides a critical opportunity. The parties and their legal representatives will, of course, have done much of this separately. However, the power of the mediation day is that the parties get to do this together on the same day and with the assistance of the same person hearing both sides of the dispute and challenging each sides perceptions.

The settlement rates for mediation in New Zealand tell the story best. The generally accepted ratio for mediation settlements achieved is in the region of 70%. There is some anecdotal evidence of commercial mediators in Auckland achieving settlement rates approaching 80 percent [17].

6. CONFIDENTIALITY AND SETTLEMENT

Most lawyers, clients and mediators see confidentiality in mediation as a cornerstone of the process. It is a vital benefit of mediation and often for commercial parties is a key attraction to the process.

However, there are limits to this confidentiality and the representative should always be careful to ensure that the client is aware of these limits.

The LEADR and AMINZ standard mediation agreements certainly cover confidentiality issues in detail. The LEADR agreement provides a blanket confidentiality protection for the parties, mediator and the process subject to law. The AMINZ agreement provides confidentiality protection for the parties but subject to any agreed subsequent disclosure by them. Many commercial mediators have their own crafted versions which deal with confidentiality in slightly differing ways. This clause should be carefully considered prior to signing and always include provision that the entire process of the mediation is to be treated as privileged and “without prejudice”.

Currently, the common law gives no greater confidentiality protection to the ADR process than it does to “without prejudice” communications generally. The “without prejudice” privilege protects communications made during the course of genuine negotiations conducted with a view to settling an existing dispute. However, there are a number of limits on this protection.

The Law Institute of Victoria has summarized the types of communications which will not attract the “without prejudice privilege” in mediation[18]:

- The statement is made in circumstances that cannot be objectively considered as part of the negotiations for settlement or reasonably incidental thereto.

- The statements are part of settlement negotiations but are unqualified admissions concerning objective facts.

[17] Anecdotal evidence from private commercial mediators in Auckland is that settlement rates in commercial mediations are in the region of 70% to 80%. In the employment jurisdiction mediation settlement rates are at approx 67%; refer *Personal Grievance Mediations conducted at the Department of Labour: a snapshot August 2006.*

[18] (see Mediation – A guide for Victorian Solicitors, Law Institute of Victoria, 1995, p41)

- The statement is not concerned with the same subject matter as the negotiations.
- A party engages in conduct which is misleading or deceptive or likely to mislead or deceive contrary to legislation.
- They are communications that contain an offer and acceptance which thereby create a contract.
- They are communications which constitute criminal or tortuous conduct.
- They are communications the disclosure of which will prevent a party from misleading the Court.

The New Zealand Court of Appeal and High Court have nevertheless given serious weight to the public policy argument favouring mediation confidentiality[19]. The Court will not be easily tempted to peer behind the veil of mediation confidentiality. In late 2007, the Court of Appeal delivered the two most recent decisions on mediation confidentiality[20]. These latest decisions continue to develop the strong public policy argument.

In *Hildred,* the parties had decided to mediate relationship property issues arising from the end of their de facto relationship. Each party was represented by solicitors during the mediation process. They engaged an experienced barrister to act as mediator and entered into a LEADR agreement to mediate. This was noted by the court as containing detailed provisions relating to confidentiality.

At the conclusion of the mediation the parties entered into a settlement agreement. Within days, Ms Hildred felt demoralised and dejected at the gross unfairness of the bargain and sought to avoid it.

In arguing the case before the Court of Appeal the parties agreed that they had mutually waived compliance with the conflict provisions of the settlement agreement requirements. The Court noted this position but reserved consideration of the force and effect of confidentiality when parties choose problem solving by mediation.

Robertson J, delivering the Court of Appeal's decision, put the matter succinctly by stating "Every piece of litigation has risk attached to it. If parties choose to make their own bargain so as to eliminate such risk, only in exceptional circumstances can they have the Court permit them the opportunity to start again by engaging in conventional litigation" [21]

The Court soundly rejected the appellant's urging to consider what was done and said during the mediation and what drove the parties to a settlement at mediation. The only exception noted by the Court to the general confidentiality of mediation is where there is an inquiry into whether or not a settlement was reached, which was not in issue in the present case.

The appellant's various arguments including duress, misrepresentation, unconscionability and mistake were all rejected. The Court noted that documentation relating to the various relationship property and business activities were available to both of them. Robertson J went on to comment on what he may possibly have thought was the real reason behind the appeal, "If Ms Hildred now feels that she went to mediation inadequately prepared, that is

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[19] *Vaucluse Holdings Ltd v Lindsay*, (1997), 10 PRNZ 557 (CA); *Carter Holt Harvey Forests Ltd v Sunnex Logging Ltd*, [2001] 3 NZLR 343 (CA); *Acorn Farms Ltd v Schnuriger* [2003] 3 NZLR 121 (HC).

[20] *Hildred v Strong* [2007] NZCA 475 (private mediation) and *Just Hotel Limited v Jesudhass,* [2007] NZCA 582 (statutory mediation)

[21] *Hildred*, supra para 22

not a reason to elevate the position taken by her former partner to a representation nor a ground for the Court to grant relief.'[22]

In *Just Hotel's* case, the Court of Appeal reversed an Employment Court decision and declined to permit the employee to refer to a statement made by the employer during the mediation in later proceedings. This case was decided in the context of a statutory confidentiality protection for the mediation process.[23]

Mr. Jesudhass had been employed as the General Manager with Just Hotel. He had been suspended and raised a personal grievance. The parties entered into mediation under the Employment Relations Act 2000 (ERA) and both were represented by counsel. During the mediation it was alleged the employer had relayed to Mr. Jesudhass, through the mediator that *"he would not be permitted to return to work and that he would be dismissed immediately after the end of the mediation".* The Employment Court initially held that Mr. Jesudhass was entitled to adduce evidence of this statement made in the course of the mediation as it was *"other than an attempt to resolve his employment relationship problem"* and therefore was not a statement made for the *"purposes of the mediation"* as required by s148(1) of the Act.

The Court of Appeal overturned this decision finding that all communications "for the purposes of the mediation" attract the statutory confidentiality, except possibly where public policy dictates otherwise. The judgment went on to quote from *Sunnex Logging*[24] restating the principle that mediation by its very nature requires the parties to "lay bear their souls". The Court of Appeal noted that to consider whether the communications were for the "genuine" or "legitimate" purposes of the mediation as held by the Employment Court would require a difficult resolution of disputed accounts of the mediation. The only example the Court gave as an exception was in the case of criminal conduct. This decision provides additional comfort for those working in the statutory mediation environment. There are similarly worded confidentiality provisions contained in other statutes dealing with mediation.[25]

In summary, while the Court is very reluctant to look behind the veil of mediation confidentiality, the privilege is not absolute. Legal representatives should be wary of giving any absolute assurances about confidentiality in mediation and advise clients on the limits of confidentiality depending on the particular mediation forum.

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22 *Hildred*, supra para 65

23 Section 148 Employment Relations Act 2000, provides that the parties and the mediator "must keep confidential any statement, admission, or document created or made for the purposes of the mediation and any information that for the purposes of the mediation, is disclosed orally in the course of the mediation".

24 *Sunnex Logging,* supra at 349

25 Other statutes which contain mediation confidentiality provisions include the Weathertight Homes Resolution Services Act 2002; Human Rights Act 1993; Family Proceedings Act 1980; Children, Young Persons and their families Act 1989; Residential Tenancies Act 1986; Health and Disability Commissioner Act 1984;

Commercial Mediation - Top Tips for Best Outcomes

WHAT A MEDIATOR LOOKS FOR – GETTING IT RIGHT ON THE DAY

by **Deborah Clapshaw**

CONTENTS

1. INTRODUCTION

There are proven strategies for getting to 'yes'. Understanding that mediation is not a one-day event, but is a continuum of interaction from the time of mediator appointment until termination of the mediation is key. The preparatory phase is critical. A good mediator will make contact and will identify with you what needs to be done in preparation for the 'day' in mediation. Similarly, if the case doesn't settle at the mediation a good mediator will always follow up by phone call or other contact to see whether anything has changed and a settlement has become reasonably possible. A number of cases settle within days of the mediation meeting.

On the 'day' the keys to success are:

- Getting alongside your mediator
- Getting the language right
- Being alert to deception
- Courtesy and respect

The pitfalls to avoid are:

- The decision trap for advocates
- Rigid adherence to a negotiation strategy
- Negotiating in the nano or strato spheres

2. GETTING ALONGSIDE YOUR MEDIATOR

You will get the most from your mediator if you treat them as your ally, partner and resource. Used effectively they will be your gate keeper to resolution. This does mean that you have to trust your mediator, so careful mediator selection is important.

Mediator Selection

Background, experience, professionalism, oversight by a mediation organisation and settlement rates all count for something but they don't tell you much about what your mediator will actually be like on the day. There are many different mediator styles to be aware of. Traditionally lawyers will be familiar with four primary approaches to mediation: facilitative, settlement, evaluative and therapeutic.[1.] In practice, these categorisations are not particularly meaningful as no approach can be described with any precision.

Facilitative mediation does not mean that your mediator simply "directs the traffic" and evaluative mediation does not always mean that your mediator will give an opinion on the merits. There are in fact, many ways a mediator can analyse and evaluate a case and a number of them are essential elements of a facilitative approach. Both approaches or models require a much more sophisticated analysis. Moreover, most mediators will adopt several of these approaches and progress from one style to another during the course of the mediation.

1. Laurence Boulle Mediation Skills and Techniques 2001, p.14 para. 1.29. There are may other typologies which are all interesting but of limited practical value in mediator selection.

Since there is no one size fits all guideline to the models to be adopted, the best way of assessing a mediator's style (apart from at the table) is to interview him/her on the types of strategies they may use. The following questions should give you an indication of mediator style:

- what is the primary purpose of mediation? (this could be very revealing especially if they suggest that the deal is the purpose which gives rise to interesting questions about what means will justify that end)
- what does your mediation process look like? (note how flexible they are)
- what are the key aspects of your role?
- is there anything you will not do as a mediator (remember here you are concerned with mediator ethics not ingenuity or lack of orthodoxy)
- what do you do to break impasses?

Since trusting your mediator is a precondition to success you will want to select a qualified, accredited mediator whom you have interviewed and discussed your expectations with in advance.

Communicate Your Expectations

You need to tell your mediator what you need from them, ideally in advance. For example how much analysis do you want from your mediator:

- none,
- pointed questions that raise issues or imply answers,
- an analysis of the case including strengths and weaknesses,
- predictions about likely results in court,
- resolutions or specific settlement proposals?

How much pressure do you want your mediator to apply? Is the pressure to be applied on the other side or on both parties? Do you want the mediator to break the bad news about their case to your client? (Your client may feel confused if you express a very different view of their case in mediation. Let the mediator help you with that reality check).

Do you want the mediator to work through a detailed reality check on the costs and risks of not settling? You will have focussed already on a range of questions with your client but you will need to address them all over again in the mediation. (For example:

- what do you get if you go to court (what is the likely result in $ terms?)
- what are your chances of achieving that outcome?
- what does it cost you to get that outcome?
- what are your chances of collecting a judgment if you obtain one?

In the mediation, these answers need to reassessed and additional questions asked such as:

- is there something more I might achieve in mediation?
- do I have any interests which will be better served by a private settlement today?)

Strategise With the Mediator and Follow their Cues

You will always know more about your bargaining position and interests than the mediator does, but the mediator will always know more about your opponent's bargaining position and ability to settle than you do. This is the benefit of being in mediation, so strategise with them and follow their lead.

Your mediator will have some useful tips about what to say, when to say it and how to say it. What can appear to be minor errors of judgment by one party can have the unintended effect of a serious backward retreat by the other party and sometimes the kiss of death to the negotiation. For example, an important acknowledgement is expressed poorly, an apology is made too soon and appears to lack genuine sincerity, an offer is couched in language which is too strong or suggestive of a threat, an offer is made with insufficient regard for how it will be received by the other party and an important disclosure is made when the other party isn't listening.

The mediator will have ideas about the framing of an acknowledgement or apology as they are likely to have a clearer sense of the other party's psychological needs. They will have an opinion on when, how, to whom and by whom any acknowledgement or apology should be made.

Ask your mediator how other parties will respond to an offer or demand that you are planning to make. With their experience, objectivity and awareness of the other party's needs, they will be in a better position to evaluate whether it will generate the response you want. They can be your sounding board and they can also caucus with the other parties to ascertain the proposal's likely reception before you put your foot in your mouth. After all, you are in mediation, so you have an ally who can find his/her way into the other side's camp. The mediator will know the decision making culture and constraints of the other side.

Use of Caucus

Whenever you are in doubt (and that is likely to be often given the multi-dimensional nature and complex dynamics of a mediation) ask to caucus.

In private conference with the mediator you will get a sense of how the dynamics can be used to move toward the goal of the mediation. Use the caucus as an opportunity to give the mediator a sense of the challenges for your client and to get a sense of the other side's constraints.

3. GETTING THE LANGUAGE RIGHT

This is critical.

Your Opening – First Impressions Count

There is a golden opportunity at the beginning of every mediation to ensure that you get the best out of the process. Your opening, whether it is delivered entirely by you, your client or jointly, is a once only opportunity to speak informally with the other side and have an impact. At the beginning of the mediation they will be listening. Treat this opportunity as you would your 15 minutes of uninterrupted speaking time before the Court of Appeal.

Remembering that your focus is on the other side:

- begin with an overview of your case from your point of view.
- stick to your best points.
- touch but do not dwell on the legal issues.
- provide a description of the impact on your client.

It is important to avoid accusatory language and language which will inflame the situation. It is well known that people who are attacked are unable to listen.

If, in your opening comments you express a genuine collaborative perspective and willingness to listen and consider other perspectives, the other side is more likely to reciprocate.

Later In The Day

It is always easier to get what you want by talking about the reasons you desire or need them than by bullying the other side into accepting what you want. Persuasion is more effective than intimidation. Try to promote the mediation as a joint solving exercise.

Framing The Offer

It is well known that parties evaluate offers according to how they are described or framed, particularly relative to other proposals.

There are some basic principles to follow:

- risk taking is based on a calculation of gains and losses
- people are loss averse such that losses loom larger than gains
- people have a bias towards the status quo
- options are devalued when presented with other options
- the tendency to avoid losses can incline people to put too much weight on sunk costs (costs already incurred)

So offers or demands need to be framed as gains rather than losses. For example,

> "if you are willing to pay $10,000 now we will walk away. You will no longer have to pay your lawyer and your expert and can get on with your life and business without hearing from us again. $10,000 now is really peanuts compared to the legal costs and risks of liability you could face in court."

The best offer is one:

- which commences with a restatement of all the interests of all the parties which have been identified in the mediation.
- is followed by a proposal, the components of which are shown specifically to meet the identified interests.
- is mutually beneficial for all the parties.

4. BEING ALERT TO DECEPTION

Anecdote and research suggests that negotiators use deception as a tool of persuasion to create doubt routinely in mediation. Doubt creation is a legitimate strategy. In fact it is one of the key ways of achieving movement in a mediation eg, "if you had read the Court of Appeal decision in *X v X* which incidentally I have in my briefcase and you are welcome to borrow, you might take a different view on *Y v Y*", or "on that topic my expert states ….". However, there is a fine line between legitimate doubt creation and deception.

There are three dominant deceptive strategies to watch out for:

- falsification, ("this is my best offer"),
- concealment (no mention is made of the fact that this is a "leaky building"), and
- equivocation ("this is a very reasonable offer").

If you are vigilant, you will ask for evidence and verification of statements of facts or intention, you will listen intently for what is not said and ask about it and you will seek clarification of vague and ambiguous statements.

5. COURTESY AND RESPECT

Do you tend to agree with people who are argumentative, aggressive and show you and your views little respect? No! Enough said.

6. COMMON BUT AVOIDABLE PITFALLS

The decision trap for advocates

What we see depends on where we stand, who we are and what we have seen before or as Winston Churchill put it, "Where you stand depends upon where you sit".

Advocates unavoidably have partisan perceptions. They develop a theory of the case based on partisan information (their own and their client's) and they generally look for facts to support their own claims (biased assimilation), overlooking the evidence which might defeat them (confirming evidence trap). The decision trap often results in over confidence in the evaluation of the case.[2.]

2. For the " Wikipedia" on decision traps, see "Good Lawyers should be Good Psychologists" shortly to be published in 23 Ohio State Journal on Dispute Resolution (2008)

Rigid Adherence to a Negotiation Strategy

Leave the bottom line and the tactic "we will have to see you in court then buster" behind in your office. You need to approach the mediation open to learning new information which changes your mind and may give you a preview of the dark side of your case. You need to be able to redo your litigation risk analysis on the fly to assimilate new information. Your negotiation strategy has to be flexible enough to allow for this.

Repetitive strategies backfire. You cannot stage a walk out or announce that the negotiation has reached your client's bottom line 20 times and still hold your head up high – one trick ponies have no street credibility.

Negotiating In The Nano or Strato Spheres

When you spend a significant amount of time negotiating numbers which are far out of the range of potential agreement, valuable time is wasted. Moreover, parties' emotions can become charged during the process of offer and counter offer making it more difficult for settlement to occur. An important question to ask to ensure that your demand or counter offer is consistent with your game plan is "Is this only a reaction to the other side's movement? Is it communicating where the case can settle or is it communicating a settlement range much higher than intended?"

A Final Word On Impasse

Impasse is not necessarily a dirty word. It simply means that both sides have negotiated to a point beyond which they cannot go and have therefore irrevocably established that settlement is not possible at this time. What is important to ensure is that the impasse is real and not simply apparent. A good mediator will check that there is no possibility of a settlement today and will ask the parties for their absolute honesty in doing so.

An apparent impasse (which may be based on strategy or face saving) can be broken, provided that the parties still retain a willingness to settle. The reality is that most cases will settle if the parties eventually state what their best numbers are. In other words if the parties know that the true gap separating them is small, more often than not they will find a way to bridge it. Strategies for breaking impasse are as diverse as the personalities of the clients, counsel and the mediator.

7. FURTHER READING

(1) Deborah Clapshaw The Good, the Bad and the Ugly, NZ Lawyer Issue 85, 4 April 2008 25. http://www.nzlawyermagazine.co.nz/CurrentIssue/Issue 85/F6/tabid/797/Default.aspx

(2) Andrea K. Schneider What Family Lawyers Are Really Doing When They Negotiate (July 2006)http://ssrn.com/abstract=920505

(3) Will Your Proposals Hit the Mark? Negotiation Newsletter Program on Negotiation Harvard Law School Vol. 11 No.5 May 2008