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Mediation and How to Negotiate the Best Result for Your Client

Mediation is a powerful tool to achieve a resolution of your client's dispute on best possible terms, both in an economic and holistic sense. However, it doesn't just eventually happen, on the day. For the most effective results:

- **understand and manage your client's expectations from the start of the matter,**
- **prepare yourself and your client for attending the mediation, and**
- **be mindful of the process on the day.**

Note re Legal Professional Uniform Continuing Professional Development (Solicitors) Rules 2015: This Seminar Paper complies with the compulsory topic of Professional Skills and also touches briefly on Practice Management & Business Skills.
If this particular educational activity is relevant to your immediate or long term needs in relation to your professional development and practice of the law, then you should claim one "unit" for each hour of attendance, refreshment breaks not included.

Overview

1. Why cases should settle at mediation and why they may not

2. Effective Preparation

- Client Preparation – managing expectations
- Solicitor Preparation – getting your house in order

3. On the Day – important strategies

- Mindfulness of the client's needs & importance of emotional calm
- Principled v Positional Bargaining
- Tips for Negotiating with Credibility
- Capitalising on your knowledge of your client (an advantage over your opponent)

Closing commentary: **Why Mediations are often successful where Informal Settlement Conferences are not**

Introduction - What is Mediation?

"Mediation" as you might know it, can take various forms, including facilitative, therapeutic, transformative, or evaluative models.

For example[1]:

- **Mediation** is a process in which the participants to a dispute, with the assistance of the mediator, identify the disputed issues, develop options, consider alternatives and endeavor to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.

- **Early neutral evaluation** is a process in which the participants to a dispute present, at an early stage in attempting to resolve the dispute, arguments and evidence to a dispute resolution practitioner. That practitioner makes a determination on the key issues in dispute, and most effective means of resolving the dispute, without determining the facts. (Note that the NSW Law Society offers an Early Neutral Evaluation service).

[1] From NADRAC Glossary of Terms, (National Alternative Dispute Resolution Advisory Council)

[2] "Nearly Neutral: A Mediator's Best Bet", By Amanda Selvarajah, The Australian Dispute

- **Evaluative mediation** is where the mediator, as well as facilitating the negotiations between the participants, also evaluates the merits of the dispute and provides suggestions as to its resolution. Note: evaluative mediation may be seen as a contradiction in terms since it is inconsistent with the NADRAC definition of mediation.

- **Family Dispute Resolution** is conducted by an independent practitioner to assist people affected, or likely to be affected by separation or divorce, to manage and resolve some or all issues arising between them without going to court. A legal definition can be found in the Family Law Act 1975. The term "family dispute resolution" is an umbrella term that covers many different sorts of ADR processes, including mediation and conciliation.

- **Restorative, victim-offender, community accountability conferencing** – are processes which aim to steer an offender away from the formal criminal justice (or disciplinary) system and refer him/her to a conference with the victim, others affected by the offence, family members and/or other support people. The mediator may be part of the criminal justice system or an independent person.

Mediation of civil litigated claims (eg personal injury and commercial matters), is essentially a "facilitated negotiation", which involves an initial joint session with the parties and then "shuttle" style negotiations between the parties' legal representatives through the mediator, addressing essentially the same issues that will be before the Court.

Depending on the parties and their choice of mediator, this type of mediation can involve varying degrees of intervention by the mediator (ie in terms of evaluation of the merits of the dispute and suggestions as to resolution) by the mediator who, in the strict sense of the definition, ought in fact be "neutral".

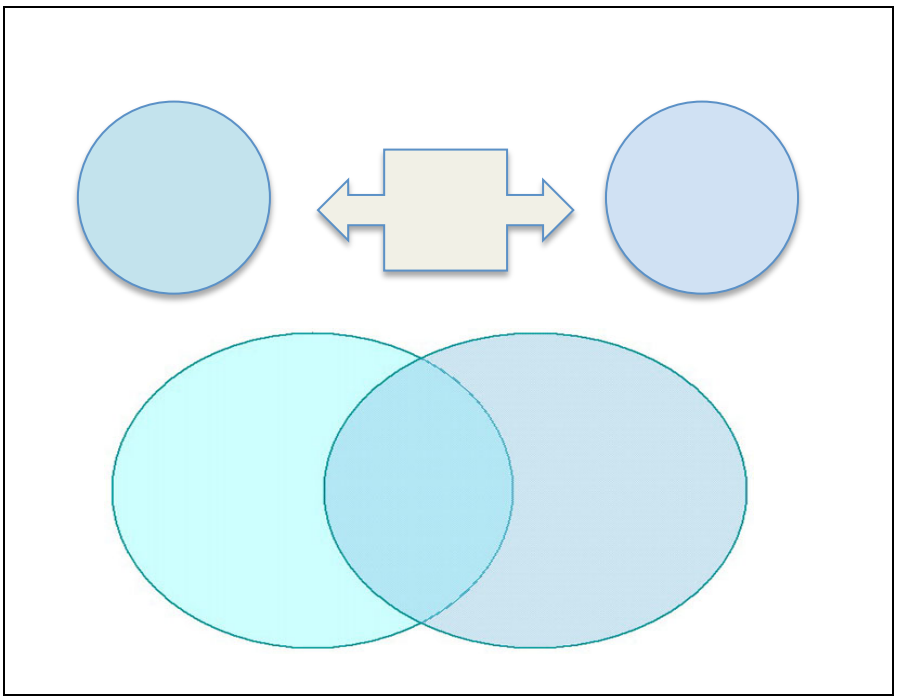
There is a significant amount of dialogue emerging on the concept of "neutrality" of the mediator role and what that does or should mean, exactly. One commentator makes the suggestion that:

> …perhaps instead of aligning neutrality with a mediator who never intervenes, it may best be to hold mediators' interventions to standards of "non partisan fairness or impartiality" instead. For example, weighing, as an objective third party, whether an intervention would make sense to "facilitate a productive dialogue by encouraging or even coaching reticent or inarticulate parties", to promote a generally more just proceeding.[2]

Although there is a national accreditation system, Mediation is not subject to regulation and this has likely enabled an evolution of different styles in the litigation space – in line with market demand, perhaps.

[2] "Nearly Neutral: A Mediator's Best Bet", By Amanda Selvarajah, The Australian Dispute Resolution Research Network, posted 8 Feb 2017, https://adrresearch.net

1.
Consider why a case should settle at mediation and why it may not



Cases should settle because both sides understand the respective strengths and weaknesses and potential value (range) and wish to reach a compromise reflective of this; ie **for something in the range**.

If the case doesn't settle it is likely because one or both parties have unreasonable expectations; and/or someone is not willing to compromise.

It is an important role and function of the Mediator to try to get the parties to "shift" towards a willingness to compromise, if they do not already come to the mediation in this frame of mind.

The mediator only gets 1 day, at best, to attempt to do this. The parties' legal representatives have an important ongoing relationship with their clients from the commencement of the matter.

Accordingly, solicitor preparation and also preparation of the client for mediation and management of expectations regarding the outcome of their case, is critical.

The key is in managing client expectations at every step of the way (ie from investigation stage) and in thorough, mindful preparation for mediation.

The checklist below is something I came across on the internet whilst researching something else. It is actually a very useful tool which I have come to use as an aide memoire for myself during mediations, as the day unfolds. It assists me in deciding how much pressure / intervention to use with the parties in the course of their negotiations, before I'm willing to concede that a deadlock has been reached and that the mediation should be called to a close.

These checklist items may also double as useful considerations when screening new clients (in relation to contingency fee-based matters).

Resource: Checklist Tool of why a matter may not settle

Consideration? Yes / No

1. Need an administrative declaration.
2. Cut and dried bulk cases.
3. Need to shift responsibility elsewhere.
4. Demonstration of effort: "I won't give in without a fight".
5. Indeterminate results; uncertain rules.
6. Settlement offers wildly divergent.
7. Preservation of a tough commercial reputation.
8. Need to control precedent and "the law".
9. Need to award responsibility for difficult ethical or policy decisions.
10. False expectations of one or both parties.
11. Entrenched judicial power over certain social issues.
12. The Tribunal as theatre.
13. Bluffing and playing chicken.
14. Disputes where one or both parties are not paying for the process.
15. High conflict about low resources.
16. Adjustive dissonance (each party is adjusting emotionally to loss at different rates).
17. Negative intimacy - one (or both) parties' meaning to life consists of continuing the conflict.
18. Risk preference – one party enjoys a gamble.
19. Benefits of delay.
20. Expert helpers actually make the conflict worse.
21. Hanging on to life-meaning values.
22. One or both of the parties are lawless renegades.

TOTAL: YES / NO /

Note:

- Any checklist is only an educational and diagnostic guide.
- Less than 10% of conflicts which enter a lawyer's office actually reach a final judicial decision.
- Occasionally conflicts with only 1 "YES" from the above will reach a Judge.
- Many conflicts with 10 or more "YES" answers nevertheless reach a negotiated settlement after years of stalemate.

2. Preparation

I reiterate the point of cases settling at Mediation because both parties are prepared and know the respective merits of the case and range of damages potentially applicable. An important function of the Mediator is to achieve a shift in attitude in any of the parties is they are not wiling to compromise.

To give that the greatest chances of success on the day, it really does put the emphasis on the parties' legal teams in preparing the matter and their clients' expectations – from the get go.

Client Preparation – managing expectations well ahead of mediation:

- Screen your client properly first (if acting contingently)

- Provision of a comprehensive advice re prospects of success and range of damages at various key stages, including:
  - at the start of the matter / investigation stage
  - at the completion of an investigation / commencement of proceedings
  - before undertaking any settlement negotiations

- Advice to address costs etc – as per "Smythe Order", 42.32 UCPR

- Explain the mediation process – (Resource: Mediation Booklet)

From the first consultation:

- ALWAYS begin by asking the client what they wish to achieve from the claim generally.

  (*Monetary compensation, professional discipline, apology, changed practice so that the same misadventure does not happen again, etc*)

- Provide your client with advice regarding whether / to what extent their expectations are reasonable.

  This essentially involves assessing the strengths, weaknesses, opportunities, and threats (SWOT analysis) of the client's case – in generic terms at the first consultation stage and in real terms prior to obtaining instructions on negotiations for settlement.

- Re monetary damages: The best alternative solution should be discussed, as well as the worst-case scenario – (*in writing and in person*).

Provision of a comprehensive WRITTEN advice addressing the following items:

Checklist:

- onus of proof
- legal elements to be proven
- facts in issue
- expert evidence obtained ("warts and all")
- expert evidence served by the defence
- prospects of success
- range of potential damages – (low, high, most realistic)
- re damages for non-economic loss: reference to any legal precedents are helpful
- legal costs – (party/party and solicitor/client)
- statutory reimbursement obligations (HIC, Centrelink, private health, NDIS*, etc)
- explanation of ALL deductions applicable before calculation of net figure from any settlement / damages award
- risks of taking the matter to trial
- considerations in relation to the law regarding offers of compromise (explain the risks of getting on the wrong side of an offer of compromise)
- reference to solicitor/client contingency costs agreement and client requirement to follow legal advice

*Note: "The NDIS: Advice on Compensation Recovery", by Bill Madden, LSJ December 2016

Advice re costs etc – as per "Smythe Orders", Regulation 42.32 UCPR:

At any stage of proceedings, the court may order a party's legal representative to serve on the party:

(a) a notice that specifies:
(i) an estimate of the largest amount (inclusive of costs) for which judgment is likely to be given if the party is successful, and
(ii) an estimate of the largest amount (by way of costs) that the party may be ordered to pay if the party is unsuccessful, or

(b) a notice that specifies:
(i) an estimate of the best outcome that the party is likely to achieve if the party is successful, and
(ii) an estimate of the worst outcome that the party is likely to undergo if the party is unsuccessful.

Solicitor Preparation for Mediation - The Position Paper and Mediation Brief

The Mediation Brief does not require the same content as though you were briefing counsel in the matter generally. For the most part, reproduction of source factual records such as medical records, financial documents and the like – will mostly not be necessary.

That said, the Mediation Brief should include all material that you / the parties want the Mediator to be aware of, for the purpose of the discussions and negotiations.

As a minimum, this should include:

- Statement of Claim and Defence
- Statement of Particulars / Damages Statements
- Expert reports exchanged between the parties
- Any other material of particular relevance to the issues in dispute

The common sense approach is for the parties to prepare a joint Mediation Brief and to have some dialogue beforehand regarding which party will volunteer to do this and what documentation should be included.

The Position Paper should state:

- the client's legal position,
- the grounds relied upon to support this position, and
- the contested and uncontested facts for each of these grounds.

- Additionally and importantly, the document should conclude by noting the client's willingness to negotiate and discuss possible solutions in good faith.

There are varying approaches to the ideal length of a position paper. One approach is that 1-2 pages is appropriate as the position paper should be 'punchy'.

Another approach is that a more lengthy position paper may be useful to provide a comprehensive overview of the issues referred to above, particularly if there is a complex argument on the facts, a detailed factual history relevant to the issues in dispute or to set the context, a complex debate between the experts on a matter of duty or causation, a lengthy interlocutory history, etc.

A lengthy position paper may obviate the need to otherwise include copious source documentation in the mediation brief.

It may also serve the additional purposes of:

- setting out the full legal position of the case for the benefit and satisfaction of the party you are representing – to see how their case is understood by you and represented to the other side in this context; and

- setting out the full legal position and the client's case at its strongest, to the other side – enabling a more congenial approach to be taken when delivering a verbal address to the other side during the initial joint opening at Mediation; to demonstrate the spirit of compromise.

Client Preparation – managing expectations well ahead of mediation

Explain the mediation process – to empower your client in knowing what to expect and to be able to make the most of the process.

(Resource: Mediation Booklet – available in hard copy or on my website: ADRmediation.com.au)

The importance of an "apology"

One of the greatest advantages of mediation compared to a public trial is privacy. The rules of confidentiality that attach to mediation allow the parties to negotiate in an open, safe, and honest environment as there is no public scrutiny. This is conducive to parties being prepared and able to provide confidential apologies and concessions.

Lawyers should not underscore the importance of a genuine and constructively - conveyed acknowledgment of suffering, apology, and/or any other concession, on the attitude of the parties to the dispute and in turn, their attitude to the negotiations.

It is helpful if the plaintiff's lawyer obtains from their client beforehand, regarding whether such an acknowledgement is desired or indeed expected during the course of the mediation, as well as the specifics of how that acknowledgement should be conveyed.

Likewise, it is helpful if the defendant's lawyer explores with their client in advance of the mediation:

- the willingness to offer an apology or acknowledgment of suffering, including the nature and substance of any such proposal and the outcome that the client anticipates to achieve in making it;

- offers support and advice on the specific content of how an apology may be conveyed without the risk of being regarded as an admission of liability (unless appropriate to do so);

- discusses with the client who is the most appropriate person to convey that apology or acknowledgement; and

- assists the client to convey the same at mediation in a constructive way, including consideration of "who, what, when and where" – to ensure as far as possible that the expectations of the client (and the anticipated expectations of the plaintiff) correspond and coincide.

This will avoid the perilous situation whereby one party offers an apology that is deemed wholly inadequate, or which fails properly to address the relevant issues, or is in relation to an issue which was not that anticipated by the other.

It is also very constructive for the plaintiff to be informed, in the course of any expression of regret, the steps that have been or are being taken to prevent a recurrence of the subject incident. For defendants: keep in mind that this is important information within the knowledge of the defendant party but not necessarily known to the plaintiff.

It should also be mentioned here that **an "apology" does not equate to an admission of liability**. In the vast majority of cases, liability cannot be established (or conceded) without expert evidence addressing each of the legal elements of the case required to be proven.

The significance of an apology is not limited to personal injury matters:

As suggested by William Ury, co-author of the staple negotiation book: "Getting to Yes", in his sequel: "Getting Past No – Negotiating with Difficult People"[3]:

"Perhaps the most powerful form of acknowledgement is an apology. This is a lesson we all learn as children. If you say the magic words, "*I'm sorry*", you can continue playing the game. Unfortunately, it is a lesson we often forget as adults.

Take the Columbia law professor who put the following question to his contracts class:

> *"Seller promises Buyer to deliver widgets at the rate of 1,000 per month. The first two deliveries are perfect. However, in the third month, Seller delivers only 990 widgets. Buyer becomes so incensed that he rejects deliveries and refuses to pay for the widgets already delivered. If you were Seller, what would you say?"*

The professor was looking for a discussion of the various common law theories that would, as he put it, "*allow Seller to crush Buyer.*"

He looked around the room for a volunteer, but found none.

> "As is so often the case with first year students", he reported, "*I found that they were all either writing in their notebooks, or inspecting their shoes. There was,*

[3] William Ury, "Getting Past No – Negotiating with Difficult People", pp42-43, Random House Business Books, 2012

however, one eager face, that of an 8 year old son of one of my students. He was in class because his mother couldn't find a sitter. Suddenly he raised his hand.... 'OK' I said, 'What would you say if you were the seller?'
'I'd say, I'm sorry' "

As the child seemed to know instinctively, "crushing" an opponent is not the right answer. We often overlook the simple power of an apology.

The buyer was outraged because he felt wronged. What such a person most often wants is the recognition that he ***has*** been wronged. Only when that acknowledgement has been made will he feel safe in negotiating. An apology thus creates the conditions for a constructive resolution of the dispute.

Your apology need not be meek, nor an act of self-blame.

To a disgruntled customer, you could say, "*I'm sorry you've had this problem. You're one of my favourite customers and the last person I'd want to see unhappy. What can we do to make it up to you?*"

Even if your opponent is primarily responsible for the mess you are in, consider apologizing for your share. Your bold gesture can set in motion a process of reconciliation in which ***he*** apologizes for ***his*** share."

3. On the Day – important strategies

- Mindfulness of the client's needs & importance of emotional calm
- Importance of the Opening Statements
- Mindfulness of the solicitor's role
- Principled v Positional Bargaining
- Negotiating with credibility
- Capitalising on your knowledge of your client (an advantage over your opponent)

Mindfulness of the client's needs and Understanding the importance of emotional calm

A calm state of mind is important for rational thought.

The neuroscience behind why is plentiful; however the bottom line is that in order to get meaningful instructions from your client on the day of the Mediation, which will often involve complex legal, economic and emotional issues to be considered and weighed:

- your best bet of getting those instructions is when your client is calm; and
- instructions whilst your client is anxious, aggressive, upset etc may not be given at all or may be contra-indicated with reference to your advice.

Important Strategies at Mediation:

- Meet as a team beforehand and arrive at the mediation venue together.

- Make sure that you have provided a comprehensive advice to your client (which addresses the merits of the various opportunities as well as risks and worst case scenario) well ahead of the Mediation.

  DON'T leave such issues to the day of the Mediation or soon beforehand, and risk your client showing up in a state of stress and panic and not being able to provide meaningful instructions.

- "Reassure the Patient" as and when necessary.

- Demonstrate confidence, empathy and professionalism.

- Be mindful of the following key drivers of social behavior, to maximize the chances of "success" at the mediation:
  - Status
  - Certainty
  - Autonomy
  - Familiarity / a sense of belonging
  - Fairness

Seven basic principles of neuroscience to help understand conflict:

A very basic understanding of how the brain works during conflict will help you look after your client on Mediation day and navigate them through what is likely to be a stressful process for them, as follows.

1. The limbic system in our brain helps us to make sense of the world and is wired to ensure safety first and foremost. Depending on the input, the limbic system will **either**:

   - activate the protective response (primitive brain) – eg fight or flight, disassociation; **OR**

   - it will enable the use of higher cognitive functions (smart brain) – logic, reasoning, etc.

2. In many threatening situations posed by the individual's environment (ie in the case of attendance at mediation) – **we need full use of the "smart brain"** to best manage such situations however this is compromised when the limbic system has activated the primitive responses to the threat (fight or flight).

"Our protective response is fast, unconscious, incredibly powerful and also, when triggered by today's first world stressors that are primarily psychological and interpersonal in nature: counter-productive.

As a result, constructive communication shuts down, factual information flow ceases and is replaced by often erroneous assumptions, protective and escape behaviours interfere with collaborative skills and stress hormones inhibit the capacity for creating problem-solving.

Resolving a conflict situation at this stage is much more difficult with the brain regions needed to do so effectively offline".[4]

3. The brain's limbic system is wired to **"shoot first and ask questions later"**. If in doubt about the input, (eg friend or foe?) it will first be regarded as a threat (ie of danger, pain, etc).

    - Meeting someone unknown (eg even the Mediator) may generate an automatic fear response based on primal reflexes or the individual's own previous experiences.

    - The fear of uncertain pain is more dominant than acting on certain reward.

    - Information is key: Risk (informed decision) is less threatening than ambiguity (missing information).

      Hence the importance of provision of a comprehensive written legal advice well in advance of mediation; and explain the mediation process.

4. In circumstances of perceived emotional threat, where problem-solving skills are needed more than the "flight or flight" response, it is important to **down regulate** – to **calm the brain** so that cognitive function - reason and rationalization are restored. The individual needs to feel safe and secure.

5. The brain is a prediction machine and rapid screening / relevance detector – and is always trying to predict: both consciously and subconsciously[5].

[4] "Conflict: The Role of Self-Esteem, Reputation and Social Status Protection", by Rachel King, February 2017, Linked-In.

[5] Source: D Radecki, Neuroleadership Institute, referred to in: "Neurobiology Applied to Mediation", by Bogacz, Lack & Glasner, 6th Mediation Competition, International Chamber of Commerce, 9 February 2011.

I cnduo't bvleiee that I culod aulaclty uesdtannard what I was rdnaieg. Unisg the icndeblire pweor of the human mind, aocdcrnig to rseecrah, it dseno't mttare in what oderr the lterets in a wrod are, the olny irpoamtnt tihng is that the frsit and lsat ltteer be in the rhgit pclae.

6. **Social stimuli is as powerful as physical stimuli** - the brain reacts the same way to emotional pain is it does to physical pain. Accordingly, if Fairness is a reward, Unfairness is like acute pain.

(Utilising medical imaging techniques to record brain activity in 2009, researchers were surprised to find that experiencing social pain such as exclusion, unfair treatment and negative social comparison activated the same neural networks as did experiencing physical pain).[6]

Likewise, they found that **the brain uses the same neural networks to process social pleasure as it does physical pleasures**.

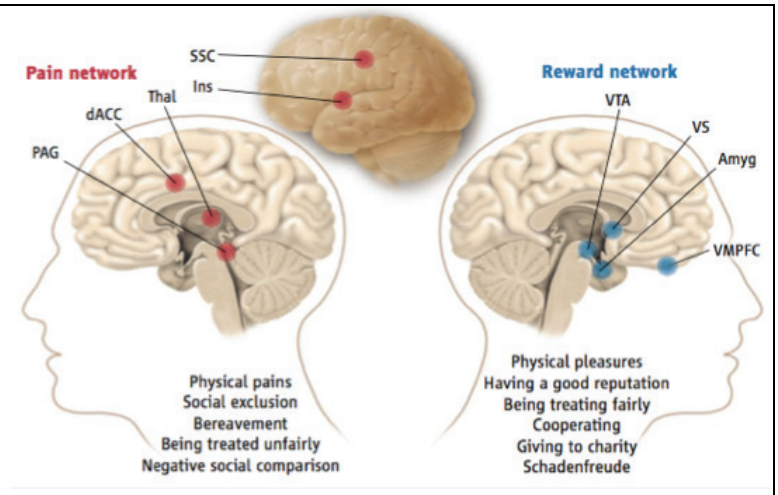


Figure 1. Physical and social pain activate and share the same neural pathways (Lieberman & Eisenberger, 2009, SCIENCE)

Accordingly, an increase in status is similar in strength and impact to a financial windfall.[7]

[6] Izuma, K. (2012). The social neuroscience of reputation. Neuroscience Research, 72, 283-286.

[7] Izuma et al, 2008, referred to in: "Neurobiology Applied to Mediation", by Bogacz, Lack & Glasner, op cit.

Such considerations may provide a valuable insight into your client's / the parties' drivers for conflict, and the importance of an apology / authentic engagement with the other side to address issues of status, autonomy, fairness and familiarity.

7. A sense of autonomy is key, because autonomy = certainty.

    - The brain likes to be able to predict and have a say in the future.
    - When a stressor is controllable, the protective response (of the primitive brain) is inhibited from activation.

Ways in which Mediators can encourage the parties to "down regulate" from fight or flight mode so that they can focus their attention on rational thought and re-framing the dispute in a constructive way: [8]

- Minimize perceptions of danger – (a warm and friendly approach);
- Recognise Mediation as part of a social process – allow time for the building of relations between the parties;
- Through **active listening** and repeating back to the parties what the mediator has heard them say – this encourages the parties to be more objective in how they perceive the issues / dispute;
- By **exploring with the parties, their feelings** in relation to the issues / dispute, and reframing what is heard in a constructive, positive way – fosters empathy, helps the parties to feel heard and understood and also helps the parties to focus on similar rather than opposite characteristics; feeling like they have more in common and are therefore not so diametrically opposed;
- By **challenging the parties' cognitive biases**; encouraging the parties to put themselves in the position of the other; guiding the parties to focus on the future rather than being stuck on the past – helps the parties come to a more accurate view of the situation and be willing to move towards a resolution;
- To allow optimal decision-making and cognitive assessments of possible rewards;
- To **encourage a co-operative approach** by the parties to the mediation; as though the parties are joint problem solvers or judges writing a joint

[8] "What can Mediators do to Help Parties Overcome Their Biases?" by Catherine Brys, Strathclyde University UK, 3 February 2017; http://kluwermediationblog.com/author/catherine-brys
and "Neurobiology Applied to Mediation", by Bogacz, Lack & Glasner, op cit.

judgement – this approach is more likely to be successful once the mediator interventions referred to above have been utilized with a constructive result.

Also note my views and observations in relation to Why Mediations are often successful where Informal Settlement Conferences are not **as referred to at the end of this paper.**

On the Day

The Importance of the Opening Statements

Opening Statements are critical as they provide the parties with insight into where the other party is coming from and sets the tone of the mediation for the day ahead.

Like the written Position Paper, an Opening Statement should most importantly:

- address the matters that are most important to the client, (ie not necessarily limited to legal issues); and

- acknowledge the client's willingness to negotiate and participate in the process in good faith.

Who should speak?

In my experience and opinion, opening statements are usually always much more effective when the parties themselves (or a suitable representative of the defendant party/ies) speak during this process.

It may help a plaintiff to feel supported in expressing their emotions; and likewise it may help a defendant party to listen respectfully and without taking personally (in the case of agents of the defendant) the brunt of the plaintiff's emotions, by considering that:

> ***The magical power of mediation lies in the ability of the process, (most usually at the time of the opening statements), to allow parties to feel truly heard. The opening is an important opportunity for all parties to experience the true nature and value of really being listened to.***
>
> ***A party who feels heard can rarely sustain that anger for any length of time: the concentrated listening process at Opening can go a long way to defusing the anger because each come away from that process feeling thoroughly and empathically heard.***
>
> *Paul Randolph, "The Psychology of Conflict – Mediating in a Diverse World", (Bloomsbury 2016)*

The handling of emotions should be discussed beforehand, particularly in cases of death or serious injury.

The opening is equally an important opportunity for the defendant party/ies to express their position. There may be little more validating or gratifying to a speaker than to have such close attention paid (by everyone in attendance at the mediation, being the key stakeholders in the matter) to what has been said.

Also, speaking during this process should not necessarily be limited to the parties' barristers. Solicitors who have had the day-to-day carriage of the matter for a significant period of time are often able to make a worthwhile contribution.

The importance of active and demonstrated listening

When the respective opening statements are being delivered, it is important for the other party to listen respectfully and attentively.

- If the parties and their legal representatives demonstrate that they are listening, (rather then rehearsing in their minds what they are going to say when it is their turn to speak), you / your side is more likely to be listened to in return.

- Active listening which is demonstrated to the other side is critical to breaking the downward cycle of the parties repeating their positions to each other (and becoming more polarised in doing so) simply because they don't think that their point has been heard or understood by the other party.

- Listening to, understanding and acknowledging the other side's point of view is not a concession; it is not the same as agreeing with it.

Even the Harvard Program on Negotiation advocates[9]:

> "At the negotiation table, what's the best way to uncover your negotiation counterpart's hidden interests? Build a relationship in negotiation by asking questions, then listening carefully. Even if you've decided to make the first offer and are ready with a number of alternatives, always open by asking and listening to assess interests. Note that if your style of listening isn't sufficiently empathetic, it won't elicit honest responses.
>
> A relationship in negotiation is a perceived connection that can be psychological, economic, political, or personal; whatever its basis, wise leaders, like skilled negotiators, work to foster a strong connection because effective leadership depends on it."

[9] "The Importance of Relationships in Negotiation", by Jeswald Salacuse, Harvard Law School Program on Negotiation, Daily Blog 14 March 2017

Mindfulness of the solicitor role

Maximising Your Effectiveness at Mediation:

Be mindful of your role at the Mediation in advance of attending and participating in the process.

The best role for the lawyer to adopt during the private sessions at mediation is that of 'Expert Contributor'. A good lawyer will:

- adopt a problem-solving approach rather than an adversarial approach at mediation;
- work with their client, not for them, to achieve a solution;
- be well-prepared, quick to react to changing perceptions and expectations from their client, and bring reason and calmness to clients who are totally overwhelmed by the whole mediation experience;
- again, encourage instructions from their client to start the mediation with genuine and realistic offers in order to maintain good faith.

Both in Preparation and On the Day of Mediation

Principled v Positional Bargaining

The relevance of this school of thought re Negotiation is that a plaintiff's compensation claim is rarely driven by the goal of maximum monetary compensation alone.

Ascertain the plaintiff's expectations well ahead of Mediation / settlement negotiations – and communicate these to the defence so that proper preparations can be made on the other side to meet the plaintiff's expectations as far as possible.

Principled v Positional Bargaining

> Arguing over positions produces unwise outcomes, is inefficient and also endangers an ongoing relationship.
> In principled bargaining, however: the participants are joint problem solvers; and the goal is a wise outcome reached efficiently and with good will; an outcome that fulfills the parties' interests.

Resource: "Getting to Yes – Negotiating an Agreement Without Giving In"
by Fisher and Ury, (Updated, Random House Business Books 2012)

This book and school of thought is all about the wisdom and utility of bargaining over interests and not positions.

A simple yet effective example: 2 chefs arguing over a lemon:

They agree to split the lemon in half. If they had communicated effectively, they would have realised that one wanted the lemon for the juice and the other for the rind – and they each could have negotiated the use of the entire lemon.

Successful outcomes through principled bargaining are best achieved when the parties focus on separate and common interests, rather than positions; and generate and ultimately agree on options for resolution, by:

- exploring interests and options for achieving them through effective communication
- considering how the other party sees it – and taking that into account when considering the options for resolving the problem
- avoid having a bottom line – are open to alternatives that achieve their interests

The value of communication:

The purpose of negotiating is to serve your interests.

The chances of that happening increase when you communicate those interests, because:

- The other side may not know what your interests are; and you may not know theirs.
- Your assumptions may be wrong.
- One or both of you may be focusing on past grievances instead of on future concerns. Or you may not even be listening to each other.
- If you want the other side to take your interests into account, explain to them what those interests are.
- You will satisfy your interests better if you talk about where you would like to go, rather than where you have come from. Instead of arguing with the other side about alleged past rights or breaches, talk about what you want to have happen in the future – and WHY – that is, based on your interests.
- Negotiating hard for your interests does not mean being closed to the other side's point of view. Quite the contrary. You can hardly expect the other side to listen to your interests and discuss the options you suggest if you don't take their interests into account and show yourself to be open to their suggestions.
- Successful negotiation requires being both firm AND open.

And so, principled (as opposed to positional) bargaining is the clever way.

Negotiating with Credibility

The Opening Pitch:

There is no magic formula for calculating the plaintiff's opening demand. The initial demand should achieve two goals:

1. it must be high enough to leave the plaintiff with sufficient room to make concessions and still arrive at an acceptable settlement figure;

   BUT

2. it should not be so high that it turns off the defence and causes the defence to terminate the mediation.

The most effective negotiation strategy involves encouraging instructions from the client to start the mediation with genuine and realistic offers in order to maintain good faith.

Commencement with unrealistically high or low offers will inevitably result in an unrealistic counter-offer from the other party or worse still: a walk-out.

Mediations with multiple parties' legal teams in attendance are too time-consuming to arrange, expensive and stressful for the clients in attendance, to result in an early cessation because of an unco-operative approach right at the start. Cessation without settlement should only occur when there is a genuine deadlock after having attempted to negotiate in good faith.

Tips for establishing credibility:

- Provide a break down of the components of the offer, and
  - be ready to do the same with respect to legal costs;
  - for complex damages claims, a template of components of the offer (consistent with the solicitor advice to client, eg in accordance with the "high" range as an opening position), may be useful;
  - use of a template in this regard for conveying all offers should quickly demonstrate damages that are "concrete" and those which are negotiable.
- The more expert and factual evidence served in support of the claim / defence prior to the Mediation, the better.
- References to relevant legal precedents may also be very effective

- Alternatively: do your research and be aware of any adverse legal precedents / judgements on similar matters and be prepared to demonstrate how such judgements are distinguishable from your client's matter, if raised by the other side.

The Opening Response:

Conversely, the plaintiff should not put too much weight in the defendant's initial offer / counter-offer.

The defendant's succeeding offers will give the plaintiff a better idea of what the defendant is willing to do to resolve the case.

Don't reveal your client's bottom line to the Mediator until necessary:

Some counsel in my experience don't wish to know what their client's bottom line is. They feel they can do a better job maximising a result from the other side without this knowledge.

I agree with this approach with respect to my role as Mediator as well.

As the parties get closer to an agreement, be wary of exposing plaintiff's bottom line to the mediator, too soon. Once you tell the mediator your bottom line, the mediator may subconsciously or otherwise, begin to explore how much lower the plaintiff will really go. By exposing the bottom line too soon, a party may possibly risk losing its negotiating leverage.

On the Day

Capitalising on your knowledge of your client (an advantage over your opponent/s)

Provision of comprehensive evidence re liability & quantum:

Defendants often point to unrealistic demands from a plaintiff or counsel as the principal reason for failure of settlement negotiations.

While many factors can cause settlement negotiations to fail, from the perspective of having represented defendants, a significant reason why settlement negotiations fail is the lack of information that the defendant and its representatives have with respect to liability and damages.

Accordingly, the more detailed the information and evidence that has been served on behalf of the plaintiff, the better for the benefit of a defendant insurance claims officer. This is even more so if a defendant's legal strategy has been to conserve defence costs by only obtaining minimal evidence itself.

Other relevant factors:

- **Service or lack thereof, of reports from treatment providers**
- **The plaintiff's credibility and likeability as a witness at trial**
- **The plaintiff's bottom line versus what is negotiable – and wrongful assumptions by the defence about the plaintiff's actual expectations; Remember: principled v positional bargaining**

On the Day

Saving face when there is a potential deadlock:

If the parties negotiate to impasse, the mediator may consider whether it is appropriate to make a proposal to the parties regarding settlement.

The mediator's proposal is a number selected by the mediator which is intended to push both parties to a number to which they have been unwilling to go. If both parties agree to the mediator's proposal, a settlement is achieved. However, if one side accepts the proposal and the other rejects it, the party rejecting the proposal is not told that the other side accepted.

This may assist on achieving a settlement whilst at the same time saving face to each of the parties if they have already issued instructions regarding their respective final offer.

In closing:
3 Reasons why Mediations are often successful where Informal Settlement Conferences are not

Legal representatives may often be divided over whether to agree to the added expense and logistics of a Mediation, in the belief that the same outcome may be achieved by holding an Informal Settlement Conference ("ISC") instead.

The upside of an ISC is that they are easier to organise, fewer diaries to co-ordinate, will usually only run for a few hours and may not need the same space in terms of venue and logistics.

BUT:

ISC's still cost our clients real money in terms of intensive preparation beforehand, counsels' attendance and often the clients' attendance, as well as the inconvenience and/or stress caused those clients in attendance.

Many ISC's don't achieve a settlement. In my view, this may be attributed to the following factors:

- there's less emphasis to attend an ISC with a genuine willingness to compromise;

- ISC's may be seen as an opportunity to settle on certain terms only, as a "try on".

This may be particularly so if there is no looming trial deadline and plenty of time to continue to prepare the case and/or hold out for "a better result" when the parties try again next time.

For that reason, a common approach is not to allow clients to attend an ISC for fear it will afford the opposition some tactical advantage. For example, a concern that the opposition may mainly be trying to size the other up re how the parties themselves and/or key factual witnesses are likely to perform in the witness box.

Why can Mediation make the difference in achieving a settlement?
Here are 3 compelling reasons:

1. A Vessel on a Mission Needs a Skipper

An ISC has no one taking charge. Indeed if someone does, it may play further into the adversarial process and in this regard, is unlikely to be constructive for the purposes of settlement.

A Mediator plays an instrumental role in navigating the process in a skilled, fair and constructive way. A Mediator chairs and guides the parties through the process with the objective of serving all of the parties jointly and each of them separately.

A Mediator's role as skipper can support and protect the parties on their destination towards an amicable settlement by:

- Providing the very structure for the process
- Ensuring procedural fairness
- Managing any power imbalances which may or may not be associated with an ISC depending on the attendees
- Managing any potential deadlocks
- Supporting the legal teams by inspiring the trust of their clients in their lawyers to give difficult instructions required to settle

  For example:

  - By acknowledging the skill & experience of the legal teams;
  - By encouraging the clients to listen to their legal advice; and
  - By reality testing the clients on their positions and alternatives (which may serve to reinforce advice and concepts already explained by their lawyers, or indeed encourage them to ask their lawyers more questions that are needed to be asked before they are prepared to provide instructions on settlement).

These are no small issues.

Yet there is no-one in this role at an Informal Settlement Conference.

2. Everyone Acknowledges the Benefits of a Good Detox!

A Mediator is a trained professional in conflict management who is dedicated in this role to chairing and guiding the communications and negotiations in a constructive way.

The Mediator serves as a buffer against the parties' basic human instinctive stress reactions to being situated in the presence of their opponents. The Mediator's role is to help manage and "down regulate" the heightened emotional states of the parties by creating and maintaining a social environment of safety and respect, where direct contact is constructive. Such an environment is important to enable the parties to make decisions and give instructions based on the rationality of the situation and not be a slave to their emotions.

The Mediator's very presence and demonstration of respect for the parties serves to mirror and validate each party on a fundamental level. At the same time, it addresses the psychological issues that are stimulated by interpersonal conflict – the human need for validation, stability, predictability, fairness, and the value of the sense of self.

A Mediator's role in re-framing and de-toxifying the adversarial nature of the dispute during the course of negotiations is what makes the crucial difference in the parties being able to reach a settlement.

The ability of the Mediator to provide a zone of objectivity and safety within the midst of the conflict enables wildly polarizing allegations and offers to be exchanged in a way that allows the parties to posture, to express and advocate for their positions without leading to a walk-out or loss of face when those parties end up compromising on seemingly concrete demands.

A Mediator is there to support the parties themselves, by engaging with them, by taking the time to understand what is important to them, and being mindful and considerate of the parties who are often under a great deal of stress and are apprehensive about the dispute and the Mediation process itself.

An incredibly effective aspect of the Mediator's role is to facilitate the parties to be and to feel heard and understood, so that there can be a functional shifting from the past towards a focus on the present and the future – and an agreed outcome

This is often where Informal Settlement Conference's are crucially lacking.

3. Authentic Engagement

In my view, the greatest reason why Mediations make all the difference to settlement is because at an ISC there is no sense of occasion; no real engagement between the parties themselves. It's only about the number$ and a mere exchange of offers often may not be enough to resolve a dispute.

Even though civil proceedings are about monetary compensation, all legal representatives know that it's always about something, often so much more, than money. A mediation is often the crucial difference in facilitating authentic engagement that ticks all of the boxes and enables a compromise to be negotiated.

A Mediator provides much needed structure to the negotiations, by facilitating the joint opening in a constructive way, setting the tone and opening up the channels of communication for the day ahead. The Mediator provides the parties with an opportunity to engage and communicate with one another, to be heard about their drivers for conflict and their desired outcomes. The joint opening provides a much needed sense of occasion to those parties who are seeking "closure" on something greater than a monetary settlement.

The most fundamental aspect of the mediator's objective is to secure an <u>attitude shift</u> on the part of one or more of the parties. Without this, the parties are likely to remain in the same entrenched positions as when they entered the conflict, creating little prospect of settling their dispute.

An attitude shift and a genuine preparedness to compromise without seeing compromise as a sign of weakness – is not possible to achieve without the authentic engagement of the parties. This often isn't addressed at an ISC yet it is fundamental to settlement.

The difference between reaching an impasse at ISC v Mediation

Of course, the parties may reach an impasse because their positions are simply too far apart. This is a disappointing outcome for the parties. Yet in many ways, it is a valid goal of Mediation: everyone finally knows the real – not the theoretical – alternatives that must now be pursued. It may not be until the parties have reached this point, that they are prepared to be truly receptive to the Mediator's efforts and suggestions – which may result in an amicable settlement after all, with saving of face for all.

If not settled on the day, reaching an impasse after best attempts at Mediation may often lead to settlement thereafter owing to the fresh insight and adjusted expectations that emerge when the dust has settled.

The parties have a much more genuine and accurate idea of the compromises that may need to be made in order to negotiate a settlement on the most favourable terms following Mediation.

It is unlikely that the same degree of insight could be gleaned in the course of a failed ISC; and so there is a risk that any settlement thereafter, whilst positive in itself, may not be based on the most optimal information.

So, do the benefits of the greater ease and costs savings of an Informal Settlement Conference really outweigh the benefits of a Mediation?

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