CHAPTER SIX

PREPARING TO MEDIATE

Preparation is essential before engaging in any process. From this perspective negotiation and even more so mediation is no different from preparing to go to trial. Preparation is essential for the parties to mediation and for their representatives. Preparation is also highly desirable, though not always possible, for the mediator, in that the mediator may have no advance information about the nature of and / or the background to the dispute. In the latter situation the mediator will nonetheless have a basic plan for the conduct of any mediation that he might be involved in. What then, and how, do the parties and the mediator prepare for mediation?

The **KEY RULE** for successful mediation is that **"THERE ARE NO RULES !"** Every mediation is different.[1] The final objective for the mediator is to broker an agreement between the parties. Unlike a court hearing or arbitration the process is not scripted and pre-determined by a set of Rules of Procedure or by a set of rules for the conduct of the arbitration as set out by the CIArb, LCIA or ICC etc.

The mediator will loosely set out the running order of events but will then adjust the number of hearings and caucuses (*if any*) to meet the needs of the mediation as it proceeds.. The mediator will operate under the contractual terms and within the ethical guidelines established by the organisation, if any, that appointed him or her. These Rules, where they apply, will also impose duties on and accord rights to the parties and their representatives.

Apart from the mediator's running orders and the contractual and ethical constraints, the appropriate approach for party representatives to adopt for a mediation conference will depend on the personalities involved and the nature of the dispute. What the appropriate approach is will vary but the goals of the party representatives and the goals of the mediator remain the constant for all mediations

THE MEDIATOR'S GOAL

1. **TO ESTABLISH A RAPPORT WITH THE PARTIES.**
   - ***HOW IS THIS ACHIEVED ?***
     - **BY BUILDING A BRIDGE BETWEEN THE PARTIES, BASED ON**
       - **TRUST IN THE IMPARTIALITY OF THE MEDIATOR**
2. **EXPLORE THE ISSUES & IDENTIFY WAYS FORWARD BY NARROWING THE GAP BETWEEN THE DIFFERENCES BETEEN THE PARTIES RESPECTIVE WANTS, NEEDS & EXPECTATIONS**
3. **FASHION A COMPROMISE SETTLEMENT BETWEEN THE COMPETING WANTS AND NEEDS OF THE PARTIES.**

1 **Court-based Mediation: A preliminary analysis of the small claims mediation scheme at Exeter County Court :** A Report Prepared for the Civil Justice Council : Dr Sue Prince : University of Exeter : March 2004 *"It is difficult to determine the reasons why some cases settle and some do not because of the complex and diverse range of factors involved in each case. There are many variables such as the nature of the dispute; the amount involved; whether the parties have an interest in a legal resolution because they regularly use the legal system; and the style of the particular mediator. "* at page 76.

CHAPTER SIX

THE REPRESENTATIVE'S GOAL

- **TO NEGOTIATE A BINDING SETTLEMENT, ACCEPTABLE TO THE CLIENT**
  - *HOW IS THIS ACHIEVED? BY WORKING THROUGH THE MEDIATOR TO DISCOVER*
    - **WHAT THE OTHER PARTY WANTS AND IS PREPARED TO OFFER AND**
    - **TO DISCOVER WHAT ONE'S OWN CLIENT WANTS & IS PREPARED TO SETTLE FOR**
  - *THIS IS FACILITATED WHERE THE PARTIES HAVE :-*
    - **TRUST IN THE IMPARTIALITY OF THE MEDIATOR**
  - *AND THROUGH THE SKILL OF THE MEDIATOR IN IDENTIFYING :*
    - **WHERE PARTIES HAVE LESS TO LOSE THAN THEY MIGHT HAVE THOUGHT (*for example Costs*),** And
    - **FACTORS WHICH ONE PARTY VALUES MORE THAN THE OTHER** (*for example An apology*)
  - *AND THROUGH THE PROCESS IN THAT*
    - **THE MEDIATION GIVES EACH PARTY THEIR DAY IN COURT.**

Often the settlement is then routine.

Having said that there are no rules, this does not mean that the client representative is left with no guidelines or precedents as to how to approach a mediation conference. The experienced mediator will develop a series of set responses to given types of situation. The skills of a mediator and the skills of a party representative can be learnt though case studies and the experiences of others and by practice. Whilst each mediation conference and each set of clients is different, there are guidelines for the general approach that a mediator should adopt for certain categories of mediation.

SOCIAL DISPUTES : A "touchy feely" approach is often needed where the respective clients are private individuals involved in personal conflict, be it a family issue or a neighbourhood conflict. Family disputes within the remit of the Family Court have their own specific rules and are regulated by Her Majesties Court Services.

COMMUNITY DISPUTES : (*planning, environmental control, social disruption***).** The approach required demands a firm hand complemented by a high degree of diplomacy. The spokespersons for communities tend to be highly motivated, single minded and inflexible, having promised the community to deliver a specific outcome from which they are unwilling or feel unable to deviate. A mediator has to ensure they have sufficient opportunity to put their views across without dominating the process and to ensure that the parties listen to and take on board the views and expectations of the other.

COMMERCIAL DISPUTES : Commercial mediations are likely to be less affected by the personality traits of the parties and sensitivities will be less fragile. Where professional clients such as insurance loss adjusters are involved with private clients in respect of claims by an assured against an underwriter, an approach that accommodates both the insensitivities of the adjuster with the sensitivities of the assured is needed both by the mediator and by the representative who has to take into account the predictable conduct of the other side.

INTERNTIONAL DISPUTES : International Disputes can present the parties and the mediator with a need to bridge gaps in perception based on culture and different concepts of good faith. This is especially so where one party is from the Pacific Rim where "Face" is vital and so there is the need to allow a party to save face, perhaps by accepting concessions, without expecting an outright apology or acceptance of wrong doing. Indeed a token exchange may well be needed in order to achieve a settlement.

MULTI-PARTY DISPUTES : A highly organised but flexible running order is required to ensure that everyone is involved in the process, whilst at the same time dealing with matters in a logical sequence.

Information gathering before the mediation session begins.

Participants : Information is power and can provide vital bargaining chips. Providing the representative has prepared his case well in consultation with his client, all the information that can be gathered from the client will have been gathered in, though there is always the problem of the client holding back embarrassing information even from their representative. What your client does tell you may not even be that reliable.

A further problem lies in gaining uncoloured information about the other side, since the client's picture is unlikely to be objective. No doubt the representative will already have communicated with the other side and be in possession of such disclosures as they have been prepared to release. This involves relying on information provided by that other party's representative, who as an experienced lawyer will be skilled at giving away no more than is absolutely necessary to their cause. Asking the other party directly is not permissible. True one can become an investigator in true Perry Mason style, but that owes more to Hollywood than to reality in most cases. The only other way of gaining information for a trial is through discovery. The process is formal, expensive and cumbersome. Mediation provides a representative with the opportunity to ask the other side direct questions and even to inform the other party of realities which their representative might not have given them and for the representative to discover facts that his client has not disclosed to him, whether intentionally or inadvertently.

Encounters with the other party before a mediation hearing can deliver up vital information. Whilst it would not be ethical to deliberately engage in pre-hearing cross questioning, casual meetings in the waiting room or corridor prior to a hearing have often resulted in one party gaining invaluable insights into the hopes, expectations, fears and dissatisfactions of the other party. Take particular care if nothing else to observe the demeanour of the other parties. It can reveal much about their confidence or otherwise regarding the prospective conference. Remember however, that the converse is also true. Watch what you say and to whom before a mediation and try and ensure that your client does the same.

The Mediator : How much information is disclosed to the mediator before a mediation conference depends both on the extent to which either of the parties cooperates with the mediator, procedures for information exchange that are built into the mediation process by the appointing body and whether or not the mediator has the facility to chase up information in advance.

The applicable mediation rules may have built in opportunities for the mutual exchanges of information and for such information to be forwarded to the mediator. Where this occurs, it helps to ensure that both parties and the mediator have access to as much of the information needed to prepare effectively for the conference as circumstances might allow. For the parties this may be less of a problem than for the mediator, in that where the mediation takes place in the shadow of pre-filed litigation, any exchanges required under the governing procedural rules will have provided the parties with useful information. There is however no guarantee that this will be shared with the mediator. A mechanism that ensures the mediator is fully informed can therefore be very useful.

There are differing views as to whether a mediator should engage in direct communications with either of the parties prior to the mediation conference. One view is that absolutely no bilateral communications should take place between a mediator and either party and that if any communication occurs, it should be a three way conference call on the telephone, or alternatively if by mail, all correspondence should be carbon copied to the both sides simultaneously. These are the standard requirements of adjudicatory processes and perhaps hold good for conciliation and expert determination, but others see no reason why this should apply to mediation. After all, the private session or mediation caucus will involve direct private communications between a party and the mediator. So, the theory goes, why shouldn't the process commence early? The opposing view is that the mediator might rush to early and unbalanced judgement and result in the mediator favouring one party over another.

Depending upon the governing mediation rules, a mediator may have to communicate directly with each of the parties privately in order to make arrangements for the mediation, setting up the time and locations and perhaps also the financing of the venue. The question therefore may arise as to how extensive such communications should be and whether they can include any discussions about the actual dispute rather then be restricted to arrangements. Some mediators will use the occasion as an opportunity to gather

information, to find out whether there are any outstanding documents and to prompt disclosures of documents to themselves and exchanges of documents. Highlighting what documents are desirable could be viewed as assisting a party especially if the party is not represented, though from another perspective, such documents would have to be produced in court in any case. However, if the mediation conference is organised by an appointing body, the mediator may have to rely entirely on such documents as are provided by the organisers and may have no ability to contact either party in advance.

Gaining information in the mediation session.

The Opening Session : Most mediations[2] will start with an opening session where all participants are introduced and to a greater or lesser extent, the background to the dispute and the aspirations and views of the respective parties are either established or, where this has already been done in paper, reiterated either in depth or as a brief summary. In as much as some mediators do not conduct private session, there may be no natural break between the opening session and the developmental stage of the mediation.

The Mediator : The opening session is primarily about the mediator ensuring that the parties understand how the process works and why, about setting the grounds rules for the conduct of the process, about establishing the mediator's presence as a figure to be trusted and respected and finally about establishing the differences between the parties. The latter may have been achieved already by exchanges of documentation and formal statements of case, enabling this to be a very short element within the session. However, where this has not occurred this aspect of the session may be considerably extended.

There is a distinction between establishing the differences which separate the parties, that is to say the parameters of the dispute and exploring the feelings of the parties. In social mediation, the conference may well serve as an alternative to a day in court. It can be used to discharge emotions. To give the parties the opportunity to let the other side know how they feel and even to provide an opportunity for a party to convey some form of apology or empathy, particularly where one party feels victimised. This can have a cathartic effect which enables the parties to then progress towards settlement. The danger is that it also provides an opportunity for the parties to wind each other up and can do more harm than good. There is a potential for violence in such situations (*to each other or even the mediator*) which accordingly need to be carefully managed. A mediator will need to try and assess from the demeanour of the parties whether or not there is a possibility of this occurring. If not, the mediator may invite each party to say how they feel, If it is a possibility, the parties may be asked to limit their statements to what they want to get out of the process and no more. Before inviting the parties to set out their case, a mediator will often wish to set some house rules, in particular requesting that each party listen courteously to the other, reminding them that they will have their own opportunity to speak thereafter. Thus a general "NO INTERRUPTIONS" rule may be set down, with a request that standard rules of decorum be observed.

It is useful to set an order to participation with the cooperation of the parties, stating who should make the first opening statement, be it claimant or defendant followed if agreed by the parties either directly after their lawyers opening presentation or after the lawyers have concluded their presentations as opportunities to add to the legal viewpoint. Some parties will wish to let their lawyers speak for them. Some lawyers will not be very enthusiastic about their clients taking an active role at the outset, which is why an inquiry is better than a direction.

The Parties : The opening session enables both parties to convey the impact that events have had upon them and to make it clear to both the mediator and the other party what they hope to get out of the process (*or at least what their opening gambit is*).

Conversely, it is also an opportunity to get a clear understanding of what the other party feels about events and wants out of the process. At the end of the opening session both parties should have a clear understanding of what is on offer and hence what might be at stake if the conference fails to produce a settlement, since the scene is likely thereafter to be set for litigation.

[2] Some social mediations where relations are very strained are conducted entirely or at least initially as a private session, sometimes with the primary objective of getting the parties into an appropriate frame of mind to enable a joint session to occur.

Note that conveying and gaining are not the same. It is as important to listen as it is to speak. Hopefully this is a time for lucidity and brevity, though this is not necessarily always the case. Coherence and structure can often be a problem where one or more of the parties is not professionally represented.

Private Sessions : The commencement of the private sessions is the primary opportunity for the mediator to gather any outstanding information from each of the parties in turn. There are parallels here with the initial interviewing sessions that a lawyer will engage in with a prospective client. This is the safest environment possible for the mediator to let the clients let off steam and get any underlying emotions off their chest, since there is no danger of interruption from the other party. Mediation is unique in that the parties play an active role in the process. In a trial the proceedings are carefully choreographed, with the passively observing proceedings except when on the witness stand. The principal roles are played by lawyers and the judge. However, in mediation the clients get to participate in all conversations and their views are solicited since it is the client that has to agree to any settlement terms. The mediator will at all times need to know and understand what each of the clients wants and is prepared to offer and or settle for.

The parties to mediation conferences may not be used to talking openly in public. The private session is a closed environment, with only three people present, the mediator, the client and representative. At the start of the session the mediator should seek to engage the client to fill in the background information. Open questions that enable the client to "tell it as he sees it" are often used to start each of the private sessions in turn. It is a time for the mediator to listen, while the client gains confidence in the process. It is important that the clients get both the opportunity to speak but also for them to gain a sense that they are being heard. The most frustrating factor here may be if a party has virtually nothing to say, so that the mediator has to start digging for information.

A difficult factor to gauge for the mediator may be when to start to impose himself on proceedings especially if once started the client does not want to stop, especially if what ensues is an unstructured rant. It is one thing to garner information, another to be exposed to a litany of demands and reassertions of rights and entitlements.

The mediator will want to first ensure that he has a full understanding of the situation from the client's perspective. He will wish to get a clear idea of what the client believes has occurred. If there are any doubts in the mediator's mind about event, he will have at some stage to move to targeted questions about events. Again, if these can be kept as open as possible, that will optimise the chances of gaining information. If there are any remaining doubts about events then the mediator can move to closed questions that will elicit YES or NO responses. If this is done too early, there is a danger of the interview turning into an interrogation session, which may get the client's back up and be counter-productive, losing the cooperation and trust of the client.

At some stage the mediator will need to start to formulate a legal view of the situation and to gain some sense of where the dispute is going from a broader perspective, but too much haste in moving towards this stage of the process can be damaging, particularly if the mediator rushes to judgement. Ideally, this stage should be delayed until the mediator has heard both sides of the story. Thus the mediator should not move to this stage until after he has completed the first private session with both parties.

The mediator acts as a conduit for information between the parties, a form of human telephone line, but with a difference. The mediator is not obliged to pass information on unless he deems that it is beneficial to do so, and provided that he does not convey misleading half-truths. Nonetheless, un-diplomatic statements can be filtered out and nothing may be conveyed to the other side without consent. The mediator has to decide at what stage to pass information on. It may be a mistake to rush to do this. Thus, if a mediator uses his initial private meeting with the second client to pass on information at the outset, the opportunity to listen and gain information will be lost and replaced with reactions by that client to the news. This is not recommended practice.

However, once the information gathering stage is completed, the mediator may move onwards to the next stage of information gathering, namely exploring issues that the parties have not raised themselves but which their protagonists have brought to the mediator's attention. The mediator will have to decide whether

the next stage is a continuation of the second interview or whether to continue to rotate the sessions immediately. This will be dictated by circumstances.

At the end of the opening stage of private sessions the mediator should be able to make an initial assessment of what the rights and wrongs of the situation are. The second stage of private sessions will involve an exploration of the respective threats and opportunities of the parties to determine whether or not the mediator's initial impressions are either borne out or shared by the parties. This is the time when the mediator will tentatively start to introduce a reality check on the stances adopted respectively by the parties. Depending upon the circumstances, the reality check process will be factually, socially or legally based.

There are two potential avenues for conducting the reality check process :-

- The first will be to explore the take of the other party against that of the interviewee asking them to consider and explain how they would counter the assertions of the other side.
- The second is for the mediator to invite the parties respectively to objectively examine whether or not they are able to persuade an independent third party, who might sit in judgement, of their views regarding both facts – including the quality of evidence and the application of law to those facts.

If the above results in a stale mate or produces insufficient movement towards convergence, the mediator can move to a third avenue :-

- To invite each party to consider whether or not the costs of further litigation are justified by the risks and whether or not a compromise would be as effective or more effective.

If there has been no movement, or in order create greater movement the mediator can move to a fourth avenue :-

- The mediator can use lateral thinking to produce broader issues, ranging from the emotional impact of continuing the dispute, via the value of closure and lost opportunities through to examining the scope for future collaboration and new opportunities for the parties.

Which, and how many if any, of these approaches is adopted, and the order in which they are undertaken will depend entirely on the circumstances of the case and the personalities of the parties. In addition, the mediator may repeat the process a number of times, dealing sequentially with issues or even separating entitlement from quantum. It is possible to deal with quantum first, especially if there is little to dispute since that may make it easier to consider risk analysis on a quantified basis.

Closure : Once the mediator has reached a stage where there is no further scope for movement on either side, the mediation will enter its final stage, which is closure and the drafting of a settlement agreement. If the difference between the parties is considerable as the mediation enters the final stage, it is unlikely that a settlement will result, whereas, even if there is no actual convergence, the dominating factors of the unquantifiable risks of trial, the costs and how the parties might cope with a continuation of the dispute will factor in the final rounds, which may be a rapid fire haggle and rush to a settlement figure and any finessing of settlement terms. Often the best way to achieve this is to bring the parties together face to face since they may be able to address each other directly at this stage, without the mediator risking losing control of the process.

There are times when a joint session can be used at an interim stage to finalise terms on an interim issue, such as entitlement, before moving on the private sessions on other aspects of the dispute.

The crucial factor at the end of the process is that the settlement, if any, is reduced to writing and signed off by both of the parties. This may be done as a joint drafting session, or the mediator may propose a draft, modify if necessary and then produce a final draft. Clarity is the byword for such a document. The last thing needed is a vague document that could lead to a dispute about interpretation of the terms.

Participants : A party representative may believe that they know what their client's concerns are, but be it a trial or a mediation, often the representative only finds that out during the trial or mediation. The same applies to the facts. Such discoveries are potentially less damaging in a mediation conference than they might be in a trial. Even if the mediation fails the representative is then in a better position post mediation to proceed to trail once forewarned of the client's actual concerns.

The reality check process can, and if successful will, modify the expectations of the parties. Thus what the client wants will be reshaped and moulded by the mediation process. How much this is a matter of remoulding rather than an acknowledgement of reality is another matter. Mediation is a form of negotiation. It will involve gamesmanship on both sides. Thus what the parties say they want and what they expect to get are quite different matters. A common tactic is to pitch high, leaving room to negotiate downwards towards the figure that a party genuinely believes is achievable. The mediation may simply result in the parties getting to the point that they both expected to get to in any case, but had been incapable of reaching without independent assistance. However, there is often genuine movement on one or more sides.

The way that information is deployed may be critical to the outcome. The objective of each of the parties will be to set out their case in a compelling manner which, through the good auspices of the mediator, will be conveyed to and taken on board by the other side. There will be a desire to ensure that the other side actually hears the awkward facts that to date they have chosen to ignore and the consequences that flow from those facts. A party can attempt to dictate the pace by concentrating on specific issues where that party feels most confident. However, the mediator does not have to allow either party to control the agenda.

Where mediation differs from direct communications lies in the fact that the pace of the negotiation and the priorities will be established by one of the parties, so that the negotiation is led in specific directions as any given time. By contrast, the alternating private conferences may proceed in different directions, without either party setting an agenda. This rather is done by the mediator. The mediator can allow a party to explore any avenue that they wish to be explores, but then redirect the direction to another matter raised by the other side to seek clarification. Thus a mediator can deal with two matters at a time, where as only one issue can be dealt at a time in direct negotiations, thereby diversifying the agenda.

When it comes to questioning the opposition and passing on information to the opposition the mediation process is in one respect cumbersome since everything has to be channelled through the mediator. The benefit of so doing lies in that

a) the mediator can ask for information to help him gain a better understanding of events, whereas where a party asks the other directly they may be evasive or defensive, refusing to answer obvious questions that the inquisitor *"already knows the answer to*" since even if the answer is obvious to the other side it might not be to the mediator, and

b) the mediator can state how the other party sees things without associating himself with the assertion or its veracity. Thus he can say *"Whether it is right or wrong is besides the point, this is how they say they see it. Either you deal with it now, or a judge will later."* Then the party can evaluate the implications, if any, of the assertion, without anything having to be determined.

c) the mediator can act as a filter, conveying information in a more diplomatic manner than might otherwise be the case, or even filtering out information that would not be helpful to the process at that stage.

The objective of the mediator will be to ensure that the parties actually hear and take on board the messages sent from the other side, though what they then make of that information is another matter altogether. Nonetheless, receiving information is as important to the mediation process as sending it.

CHAPTER SIX

Using Mediation – a US Lawyer's Guide.

Trial lawyers know better than anyone that the trial of a lawsuit consumes money and the energies of many people. Consequently, the Legislature acted in 1986 to provide to the people of Texas another option, appropriately titled the Texas Alternative Dispute Resolution Procedures Act, better known as the "ADR Act". The judiciary now realizes that the ADR process rapidly settles cases, permanently removing them from the judges' dockets, so ADR is now a reality to all litigators. Therefore, to best represent clients, we must become knowledgeable about the types, processes, tactics, and techniques of ADR. The effective advocate must adjust his or her perception of cases, modify presentations, and prepare clients in a different manner depending on whether the case has been referred for mediation, a mini-trial, a moderated settlement conference, a summary jury trial, or arbitration. We offer the following suggestions to trial counsel for consideration in preparing for a mediation.

MEDIATION

Mediation is the least formal and by far the most commonly employed form of ADR. The Act defines mediation as follows:

(a) Mediation is a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them.

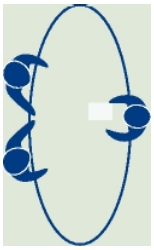
(b) A mediator may not impose his own judgment on the issues for that of the parties.

This definition envisions an informal and non-adversarial process. The rules of evidence do not apply. Neither do the rules of civil procedure. No testimony is taken, though you may bring anyone or anything you think can assist the parties in settling the case. The client is free to speak directly to the mediator and the other side(s). Everything said or done in the mediation is confidential. This is true even if the case does not settle (Section 154.073). Finally, a mediation usually costs less than a physician's deposition!

The mediator helps the parties reach a settlement by enhancing the communication between the parties. This is accomplished by asking questions and exploring in depth each party's real interests, their perceptions of the case, and the basis for their views. The mediator essentially assists the parties to educate themselves on the facts, issues, and the position(s) of the other side as well as the rationale for their position. The mediator cannot legally or ethically impose his view or judgement on the parties. Instead, the mediator is an "agent of reality". As such, the mediator thereby assists the parties in examining all the aspects of their case, enabling them to make a truly informed evaluation. This frequently leads to greater flexibility, which substantially enhances the prospects for settlement.

The Mediation Suite

Party Conference Room | Joint Meeting Room | Party Conference Room



THE MEDIATION CONFERENCE

Mediation is informal. However, a general procedure is usually followed. It consists of the steps below.

1. An introduction by the mediator and agreed ground rules (a joint session).
2. Case presentation by counsel or the adjuster and comments by the parties (a joint session).
3. Private meeting(s) between the mediator and each side. (*These may include specific confidential disclosures*.)
4. Continued negotiations between the sides (a joint session).
5. Additional private meetings, if necessary.
6. Settlement agreements (a joint session).
7. A written agreement or memorandum.

TRIAL COUNSEL'S PREPARATION FOR MEDIATION

The preparation necessary for mediation is, paradoxically, both simpler and more complex than that required for either a trial or a deposition. There is absolutely no substitute for preparation. Happily, the odds are more than 80 percent that you will resolve your case at the mediation. Consequently, that will probably be the last time you will work on that file.

The following steps are the minimum any good lawyer should take to properly prepare a client for mediation:

1. Explain to the client what mediation is, especially is informality and flexibility.
2. Explain the advantages of mediation.
3. Ascertain the client's true needs in the litigation
4. Rank and prioritize the client's needs.
5. Ascertain what, if any, discovery is necessary.
6. Ascertain what facts, if any, are yet unknown to the other side but which may be necessary or helpful to disclose to best negotiate a settlement.
7. Discuss with the client the possible ranges of settlement. Keep in mind that these may have to be modified based on what occurs at the mediation.
8. Attempt to determine the client's future litigation costs, if the case proceeds to trial.
9. Clearly delineate which items and issues are negotiable and which are not.
10. Assure that the client attends the mediation. The client's presence is critical to success.

The preparation of counsel representing a party in a mediation should include at least these actions:

1. Review the entire file thoroughly.
2. Conclude all legal research on relevant legal issues.
3. Conclude all legal research on damages.
4. Have copies made of any research you wish to use at the mediation session
5. Review the probable jury instructions relevant to the issues in the case. Make copies for use, if desired.
6. Ascertain whether any informal or formal discovery is still needed.
7. Determine whether rulings are needed or desired on any outstanding motions.
8. Review the digest, reporters, advance sheets, and anything else relevant to obtain a realistic range of potential verdicts or settlements.
9. Decide whether rulings are needed or desired on any legal issues yet unresolved.
10. Analyze the client's ability and desire to pay for the costs of additional litigation.

11. Meet with the client to discuss your negotiation strategy.
12. Determine with the client the tactics to be employed at the mediation session
13. Realistically review and ascertain the strengths and weaknesses of your client's case.
14. Realistically review and ascertain the strengths and weaknesses of the other side's case.
15. Discuss with the client whether a mediated settlement or continued litigation is in the client's best interest.

TACTICS AND STRATEGIES FOR MEDIATION

Presenting a case in mediation is different than a trial. Mediation is informal, and the rules of evidence do not apply. Consequently, you should seriously consider permitting your client to speak during your presentation. This enables the client to dramatically emphasize the impact of the events upon him or her and the damages sustained. It also allows you to show your client's effectiveness as a witness.

Since mediation is informal, your client's comments are more like a discussion than a court proceeding. The same is true for the comments of any experts or other witnesses you my use. If it would be helpful to you, consider videotaping key fact witnesses' or experts' presentations. You can use demonstrative evidence with dramatic and often devastating effect at the mediation session.

Mediation is an opportunity to use your imagination, advocacy, and negotiation skills in new ways to benefit your clients. It is now the most effective, efficient, and inexpensive tool you can use to settle cases faster and keep satisfied clients referring cases to you.

Self Assessment Exercise No 6 (a)

1. Consider what preparation is required for a party to get the best out of the mediation process.
2 Consider what preparation is required for a mediator to be able to effectively serve as a mediator in a mediation conference.
3 Consider the tactics that can be adopted by a mediator to ensure that he has sufficient information to engage effectively in the process.
4 Consider the differences between the control of information in a trial and a mediation conference.
5 Consider the role of information in trial and medication processes.

ADDITIONAL READING

WEB-LINKS

Mediation Essays. http://adrr.com Steven Marsh
Mediate.Com : www.mediate .com

MANAGING ARRIVAL OF CLIENTS

1. Registration

Where the mediation conference is held in a court, a dedicated dispute resolution facility or otherwise in facilities provided by an organisation, such as a law firm or trade organisation the arrival of clients will probably be recorded and managed by the facility managers. The mediator can check in with the manager and ensure everyone is present before commencing the process. However, where private rooms are used in a Hotel or one of the parties provides rooms for the conference arrangements may be quite loose and ad hoc.

The mediator will not want to find himself in a situation where he is in the same room as one client, waiting for an extended period of time for the other to arrive. The aim should be to start with both clients at the same time.

2. Rest room

The availability of a rest room / waiting room or waiting area is desirable since the chances that both clients will arrive just in time is unlikely, though waiting areas may not always be available.

It is preferable that the clients are not forced into each others company before the event, since this could result in damaging the atmosphere of the conference even before it starts.

Where witnesses will be involved accommodation and containment will be needed for the periods of time when the witnesses are to be excluded from the process.

3. Meeting and greeting.

In a larger facility it may be possible for an usher to meet the clients or for an announcer to direct the clients to the conference room just before the start of the process.

Alternatively, the mediator may take the opportunity to introduce himself to each of the clients in turn, to put them at their ease and to invite them to join him in the conference room. This, where used also gives the mediator to take some initial soundings and make an emotional impact assessment of each of the clients in turn.

4. Remuneration. Have you been paid yet?

If the clients have paid an institution prior to the mediation, this may not be an issue. However, if, as is common, the parties pay equal set fees to the mediator, (*at least for the first session*), then there may be severe problems getting the money in after the event. After all, once a settlement has been brokered, the parties no longer need your services. Since they make the agreement, your role may not be seen after the event, as having been that significant, and the incentive to pay may be quite low on their agenda. To avoid this, a clear policy of advance payment should have been put in place and communicated to the parties, whereby payment can be made discretely in advance. You may choose to double check with the relevant administrator that both parties have paid, and where this has not occurred, quietly invite the non-paying party to see the administrator or if none is available take them to one side and procure payment. It is important to avoid embarrassment at this stage.

5. Files and exhibits

Have the parties exchanged documentation and provided the mediator with copies? Will the court provide case files? Where either of these is the case, procedures need to be put in place to ensure that everything needed for the conference is made available as and when needed.

CHAPTER SIX

MANAGING THE OPENING SESSION

The commencement of the mediation session is a crucial time, when the mediator will set out to establish his credentials, establishing his authority whilst at the same time putting the parties at ease. The opening session sets the tone for all that is to follow. The importance of getting this right cannot be over-emphasised, since a badly managed opening session may destroy any chance of achieving a settlement, even before the process "proper" has commenced. Efficiency here is vital. It needs to be direct and targeted, not longwinded.

Some mediators develop an "introductory patter" which they deliver at high speed, without any sense of conviction – simply covering all the basics in a matter of fact manner. This is a mistake since it contributes nothing towards building an atmosphere conducive to cooperation. The opening session is an exercise in team building, where the objective of the team is to negotiate a settlement. The communication skills of a team manager are required here to make the session a success.

Factors to be addressed in the opening session, in no particular order.

1. Introductions

- ***Welcome – congratulations – confidence building***
  This is an opportunity to generate a positive feel good factor – welcoming participants to the process and congratulating them for choosing to use mediation to settle differences – and by building confidence in the process as a mechanism for achieving settlement – using a few statistics if appropriate.

- ***Credentials***
  The mediator will need to introduce himself, but can also build confidence in his ability to facilitate the process by first setting out what his function is, namely to help the parties to broker a settlement, and secondly by saying a little about his relevant experience in mediation and the subject matter at hand.

- ***Whose who – round robin.***
  Since often many of the parties present, lawyers in particular, will be strangers to each other and to the mediator in particular, a quick introductory round robin is useful. It is best to avoid issues at this stage. It allows everyone the opportunity to get used to the idea of participating, which is useful for the clients, to make them feel part of the process. It helps to distinguish the process from litigation.

- ***Commitment to process***
  Take the time to build the settlement team. Remind the parties of why they are there, what they want to achieve, why they wish to achieve it, the consequences of failure and ask for each in turn to commit themselves to best endeavours to broker a settlement. If a conspiracy to settle can be established the process will benefit considerably from that mindset.

- ***Authority to settle***
  It is essential that there is someone present from each side with full authority to settle. This should have been made clear in advance and needs to be confirmed before the conference proper gets underway. If a party has only partial authority, he should be made to either procure full authority before starting, or otherwise demonstrate that someone with full authority is readily contactable, throughout the process (*though is not ideal*). In the absence of such authority the mediation should not commence and should be rescheduled, with the party responsible for the failure covering the costs of the aborted session.

- ***House rules – decorum and mutual respect within the process***
  Communication is central to mediation – both sending out and receiving information. It provides a forum for both parties to state what they want, how they feel about the situation and each other and what they are prepared to bring to the session. It provides an opportunity for both parties to learn. The key house rule is to listen without interruption - to respect the other parties role in the process in the knowledge that there will be an opportunity to respond.

- ***Process outline – objectives of stages***
  - **Joint statements of case and defence**
    The aim here is to establish, if not already achieved by written statements of claim, counterclaim and defence, what separates the parties; what each wants out of the process – is looking to achieve and what each has brought at the outset to the mediation table.
  - **Private session**
    The main objectives of the private sessions are to enable the parties to privately discuss the situation with the mediator and for the mediator to explore with them the various aspects of the situation and avenues for settlement. More time may be spent with one party than another are different stages of this process. Nothing should be read into how much time and attention is given to one party or another at any point in time. Private sessions will progress by stages.
    - **Background - familiarisation**
      The mediator will wish to gain a deeper understanding of the background to the dispute from each parties perspective. This is the mediator's information gathering stage. Judgement, comment and planning outcomes should be suspended until the mediator has gained an all round view if the situation.
    - **Exploration of avenues for settlement**
      Here the mediator plays *"Devil's advocate"* exploring the options of the parties in the worst possible event scenario – i.e. the *"what if?"* exercise or alternatively to determine what a parties answer / response to the others assertions is.

      The reality check game should bring about some narrowing of the gap between the parties by eliminating wilder / unrealistic aspirations, moving from the parties opening gambits towards what is actually wanted, downwards towards what they are prepared to settle for.

      This will be followed by exploring opportunities generated through lateral thought processes by the mediator – finding out there can be an exchange of things beneficial to one party that are cost free to the other. What are the real costs of litigation in terms of net as opposed to gross potential gains?
    - **Development of settlement terms**
      Assuming the parties gradually move towards convergence, the final stages may involve haggling to the exact point of settlement – which may involve commitments as well as cash. Here the costs and risks of litigation can play a central role.
  - **Joint settlement conference**
    Drafting of and formal signing of settlement document.
- ***Role of the mediator – facilitator not adviser***

  The mediator will need firstly to establish clearly what he can and cannot, will and will not do. Will the mediator give any assessment or express an opinion, and whether or not the parties agree to that course of action. If the mediation stalls, should the mediator give a pre-trial assessment or even make a decision (i.e. *act as a conciliator?)* or make a recommendation?

  The mediator should make it clear that irrespective of the above, he is not there to give legal advice or to act as an advocate for either party. That is why each party has representation, but even if they are not represented, this cannot change the position.
- ***Confidentiality - privilege***

  Whilst mediation enjoys the benefits of negotiation privilege, this should be brought to the attention of the parties, making it clear that neither party should disclose anything said or done within the process to third parties, apart from the terms of the settlement.

The mediator will not disclose anything discussed in private sessions with the other side without the express permission of the party.

All offers made within the process are privileged and cannot be disclosed in court in subsequent litigation if the mediation process fails to broker a settlement.

The mediator will not give evidence to a court about anything that occurred in the mediation conference (*bad faith and fraud excepted*) and cannot be called as a witness by either party.

The mediator may take notes as an aide memoir during proceedings but will not retain notes after the session. All notes will be shredded and likewise any documents given to him will be shredded or otherwise returned to the parties.

- ***Orientation – health and safety***
  Layout of the facility – rest rooms – waiting rooms – facilities including food, drink, office equipment – smoking policies and emergency exists etc.

2. Statements of case and defence

Assuming the mediation involves private session, this should be a relatively short statement involving statements from each of the parties regarding their positions, what they want from the process and what they have brought to the process – i.e. the parties opening gambit terms, with perhaps a short statement of how they see / feel about the situation.

Here the mediator will need to ensure that protocols are followed and make sure that it does not descend into a cross table argument. A careful balance needs to be maintained between affording an opportunity for one or more of the parties to let off steam, for a party to get things off their chest, and tell things as they see them and violent recriminations that create further bad blood souring the atmosphere within the process.

Emotional discharge is highly valued by some mediators and can play a valuable role where individuals are involved but it also represents a potential flashpoint – especially where the other party vehemently disagrees with the viewpoint of the other party. Remember that open admissions of guilt play no part in mediation and such an admission cannot be a pre-requisite to continuing the process. Thus any assertion that a party *"will not talk to the other side until they admit responsibility"* is not acceptable.

A simple technique to diffuse such a situation would be, in the absence of any conciliatory language from the other side, to invite the other party to agree that what has happened is to be regretted and was not something they had wanted to happen – i.e.. a form of condolences

3. Recapitulation, agenda setting and movement forward to private sessions

- **Recapitulation**
  The mediator should restate each parties terms in short form, to gain their confirmation that he has fully grasped the situation.
- **Agenda Setting**
  Depending upon the complexity of the situation, the mediator may set an agenda for dealing with different aspects or issues, which may be interspersed by joint sessions at the conclusion to each issue.
- **Closure of joint session – movement to private session.**
  At the end of the opening joint session the mediator will need bring the session to close, reinforce what is to follow and why, set the rotational order for the joint sessions and ensure that each party knows where to go.

Self Assessment Exercise No 6 (b)

Prepare a model opening statement for use in a mediation.