

Representation Skills for Successful Mediations

Talk by

Phillip Howell-Richardson,

Mediator and Consultant in ADR with SJ Berwin LLP

The successful outcome of a mediation depends as much on a mediation advocate and his client as it does on the mediator. In this talk I will focus on how the mediation advocate should approach the mediation and the mediator.

The essence of the mediator's role which need highlighting from the perspective of the mediation advocate is:

1. The mediator is not the arbiter of the dispute. He does not decide the outcome. This means that he is generally not interested in which side is right and which side is wrong. All he is interested in is whether the parties can reach their settlement.
2. The mediator employs various techniques to achieve the negotiated settlement. These techniques are often described as forms of reality testing or forcing the parties to assess the risks that they face in continuing with the litigation as opposed to the virtues of settlement.

A mediation advocate needs to keep in mind the fact that the primary objective of the mediator is working with the parties to enable them to reach a settlement. The level of the settlement in itself is of no concern to the mediator. However for the mediation advocate the terms and the level of settlement are of key concern.

The mediation advocate should:-

1. Prepare pre mediation

Prepare the client

- Explain the process
- Explain the psychology which will come into play in the mediation
- Explain the mediator's role
- Open up the areas of risk and possible outcomes

Prepare the case

- 99% perspiration and 1% inspiration
- Know the case as though it were to be presented in court

Prepare the mediation strategy

- Be aware of best case and worst case outcomes and strengths and weaknesses
- Analyse the negotiation style and objectives of the opposing decision maker
- Find the initial zone of settlement (always subject to review during the mediation)
- Think ahead to the likely concessions to be given and strengths to be maintained

2. Use the phases of mediation

Use the opening plenary session

- Open your negotiations positively
- Set the atmosphere for the negotiations
- Put out the first two or three negotiating points that the other decision maker is to think about
- Put the case that is to be dealt with
- Listen
- Be prepared to stay in session to exchange information and develop argument

Use the exploratory sessions

- In the first meeting with the mediator review the opening session and start creating a working relationship with the mediator
- Ask for and give information to enable you and the other party to understand
- Present the legal issues clearly and decisively.
- Challenge precisely any errors and differing perceptions if it is essential to do so in your negotiating strategy.

Use the bargaining and decision making phase decisively

- Enter the negotiation and decision phase as soon as your strategy allows. Do not avoid decision making.
- Do not be afraid of deadlock and use the mediator to break deadlock
- Thoroughly review and understand the style of negotiation and positions used
- Try to use principled negotiation in the final phase

3. Some don't's

- Insult the other party
 - Offensive comments anger the recipient and stop communication
- Give up
 - Take time and persistent questioning to counter frustration at progress
- Focus only on pounds
 - Humans are interested in more than money
- Gag the client
 - Use the client in the opening session to showcase strength or bring the past to life
 - Let the clients take part in any brainstorming on ideas or on deciding negotiation tactics.

- Baulk at emotion
 - Use the opportunity to allow the client to express emotion and you will often achieve a greater understanding of the underlying issues
- Give an ultimatum
 - Avoid the negatives of
 - producing a reflex reaction thereby ending discussions
 - putting yourself in a bind and loosing credibility
 - Loosing flexibility of thinking and opportunity
- Misunderstand the mediator's role
 - Do not convince the mediator convince the other parties. There is no judge about.
 - The mediator is in charge of the process but is not a policeman
 - The deal makers are the parties. The mediator only coaches.

The successful mediation advocate enhances the mediation for everybody and will give greater opportunity for settlement and achieve better outcomes for their client.

Phillip Howell-Richardson

20.3.2007