



MAKING THE BEST OF MEDIATION: WHAT MARKS OUT LAWYERS WHO DO REALLY WELL FOR CLIENTS IN A MEDIATION?



*A conversation with Core Solutions,
which has conducted hundreds of
mediations over the past 14 years, with
hundreds of lawyers acting for their clients*

Preparation is key. Effective lawyers will have worked out with their client what the client really needs to achieve. In doing so, they will discuss the legal and factual aspects, of course, and assess strengths and weaknesses and possible outcomes if the matter ended up being decided by a judge, adjudicator or arbitrator, for example.

But they will have done much more than that. They will have understood the clients' underlying concerns and motivations, business and/or personal objectives, and commercial and other risks. They will have carried out a rigorous analysis of costs, not just in legal and associated spending, but in loss of opportunity and use of time. They will have assessed the risks of publicity, and to reputation, health, business and other relationships, and balanced these with certainty, control over outcome and the opportunity to create different options.

This will all have been done openly with the client, often with some sort of checklist or decision-tree analysis. And good lawyers will regularly update and review these points with the client as the negotiation proceeds and new information is forthcoming, both before and during the mediation process. They know that to take a position or have a fixed "bottom line" approach will simply constrain their ability to be flexible and get the best overall outcome.





How should lawyers engage with the other side in a mediation?

The key here is openness with the other side. It is always intriguing to see lawyers struggle to speak to or discuss in detail the realities of the dispute with their opposite numbers. Some feel that to do this is a weakness, or perhaps they carry the scars (imaginary or real) from previous dealings, whether directly or transmitted in folklore. It is usually essential to be able to speak with the other side, even when a mediator is involved. Of course, that is often why a mediator is called in: for some reason or other, there has been a communication breakdown and a bit of help is needed to restore that, or to bridge the communication chasm which has opened up.

We find that an early meeting or, more usually, a telephone conference call or calls for the mediator and the lawyers involved helps to address both preparation and communication. It sets a frame of reference for preparation and can provide a platform for the lawyers to collaborate on exchanging information, focusing on the real issues for, and the objectives of, their clients, finding common ground, and crucially, gaining an understanding of where others are coming from.

Occasionally, all that is required is such a call: the lawyers find that the conversation enables them to move ahead without further intervention from the mediator. That is the point, of course: the mediator is there to assist parties and their advisers to find a way to work together towards a solution. Sometimes, a call is all that is needed...

We should not forget that communication is why most disputes resolve without the need to go to court, or indeed call in a mediator. Effective lawyers are usually able to do all of this themselves.

What are the key moments in mediation?

Undoubtedly, the early engagements are crucial. For everyone, mediator included, that is when people take stock of each other and build credibility and

confidence. Even the first few moments of meeting someone for the first time can make a huge difference. Then, feeling comfortable about talking in private about difficult issues, whatever these may be, is really important.

When the parties themselves first meet together is a key moment. Often, we arrange for the clients, as principals, or as key decision-makers, to meet privately early on with the mediator. This can be hugely helpful in breaking down barriers and (re-)humanising what may have become quite a dehumanising experience. Just being able to talk for a few minutes may be really helpful, under the mediator's experienced and watchful eye.

Again, the lawyers often play a useful role by encouraging this and providing support before and after. No one should underestimate how much a good lawyer can do in the margins by smoothing the way for engagement in all sorts of ways.

What about lawyers working with their own clients in mediation?

Another important time is the period when the parties set out how they see things. In mediation these days, this is no longer simply a restatement of what has gone before (in pleadings or mediation summaries), but a real opportunity to say something new, or to emphasise key points, to enable the other party to understand the realities of a situation or to ask questions of that party about where they are coming from. Really skilled lawyers work in combination with their clients to make the best use of this time, seeking to engage the other decision-

makers and lawyers, some at least of whom may not have heard or seen these views expressed so clearly or directly.

Never underestimate the value of the careful, courteous, face-to-face meeting. This is all about influencing. The really effective lawyer will think hard about who speaks, when and about what. He or she will dovetail with the client, often giving the client the primary role. Some of the best lawyering is by those who appear to sit back and let the client take centre stage. This can be wise counsel, giving the client their place and enabling the lawyer to assess the situation.

Done well, this will give the other party plenty to think about. Usually, the mediator will arrange for an adjournment to allow the listening party to take stock, reflect, distil and come back with their own thoughtful responses and their own view on things. Here again, the lawyer's role in working through with the client what to deal with and what to leave to the side is important strategically and can set the tone for later stages. Good lawyers have an eye to the overall objective and can, for example, help a client to disregard matters which may have seemed contentious but which are irrelevant in the big picture.

What about the final stages?

There are many other key moments, but perhaps none more so than the end game. This is where small scraps can seem like large pieces of a jigsaw. Again, the ability to separate out what is important from what may be irritating or a nuisance is a critical function now. After a long day, with blood sugars low, a client may lose sight of all that stands to be gained with an emerging resolution.

The effective lawyer will leave scraps on the table, focus on the material points, work hard to overcome any drafting impediments, and maintain good relationships with his or her opposite number no matter how things seem to be going. They remember that both sides may be feeling the pressure at this stage. And they continue to use the mediator to help bridge gaps. 🧩



For more tips on mediation and other topics, read Core's blog at www.core-solutions.com/blog/

To discuss mediation, contact Miriam Haboubi at Miriam.haboubi@core-solutions.com or 0131 524 8188.

“I wish
we’d had this
conversation
earlier...”



better conversations
better outcomes

*“Thank you enormously
for your contribution—
it has saved vast
expense, energy, and
doubtless nervous
exhaustion for all.”*

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For training, contact Jolene Robinson on
0131 524 8188 or Jolene.robinson@core-solutions.com