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Mediation in uncertain times

ADOBE STOCK

UNDERSTANDING THE POWER OF A WELL PREPARED AND CONDUCTED MEDIATION CAN MAKE THE DIFFERENCE BETWEEN A LENGTHY, EXPENSIVE AND STRESSFUL PROCESS AND A TIMELY OUTCOME. BY THE KATO COLLECTIVE

Mediation is being recognised, more than ever before, as a powerful and flexible tool for resolving disputes. Already living in uncertain times, the COVID-19 global pandemic turned our world, both business and home, upside down.

Despite shutdowns, disputes did not go away. In fact, in many cases they were exacerbated. The effects of the pandemic were also responsible for many new disputes – and continue to be so.

The agility of mediation to move online made it a primary dispute resolution tool for many, particularly for those who needed swift outcomes and could not access courts and tribunals due to backlogs and restrictions on in-person attendance.

The "tech-savvy" embraced the new online models, and many believe they are here to stay – part of the tool box of all modern-day dispute resolvers.

Although life is beginning to return to "normal", we are still feeling the ongoing impact of the pandemic. Many are struggling with financial, emotional and health concerns as a result of the past two years. These stresses have made matters even more difficult for those in dispute.

A stubborn or irrational response to a dispute may in fact be founded in these stresses generally, rather than be particular to the case at hand. The ability to decipher motivations has become a skill that is all the more important for dispute resolvers. With uncertainty impacting our daily lives, even some of the most solid business and personal relationships are being destabilised.

While some have stumbled across mediation in situations where it is mandatory, there are others who don't realise that it is always an option available to them, and then there are those who prefer mediation over other forms of dispute resolution due to its creative and commercial capabilities.

The exceptionally high rate of settlement[1] across many different mediation jurisdictions is widely recorded, which strongly supports attempting mediation before getting embedded in an adversarial litigation process. Even where a matter does not settle at mediation, mediation can encourage parties to clarify and reduce the issues.

Preparation

Participants are encouraged to properly prepare for mediation, otherwise the mediation may fail when it could otherwise have resolved. Key tips[2] to ensure you maximise the potential of mediation include:

- explain the mediation process and the role of the mediator to your client prior to mediation
- know who will be attending, consider potential conflicts of interest or confidentiality issues and whether there is need for support persons or interpreters
- ensure your client comes to mediation with full authority to settle
- prepare your client to come with an open mind, explain that mediation is a forum for exploring commercial outcomes which often involve compromise. Discuss best and worst-case scenarios with your client and ensure they understand the implications of not reaching a negotiated outcome, including the stress, time and expense of a court hearing
- consider both your client's and the other party's needs, interests and motivations ahead of time, it may uncover options for resolution
- turn your mind to position papers or a statement of issues. Any exchange should be within a reasonable time frame, briefly outlining the issues in dispute and providing key documentation so that each party (including the mediator) can mediate from a position of knowledge
- have template Terms of Settlement handy to save time and costs if the matter resolves
- contact the mediator prior to mediation to raise any issues of concern. There may be some specific aspects that might need to be drawn to the mediator's attention.

SNAPSHOT

- Being underprepared for mediation can be costly, for both you and your client.
- Don't forget to utilise the specialist skills of your mediator.
- Beware of treating mediation like court. Look to build mutual respect and rapport to enhance your ability to influence.

The 'flow' of mediation

- Flexible/adaptable process
- Unlock curiosity, creativity and collaboration

Mediators are trained in a structured step-by-step process to explore the underpinning theories of human interaction, conflict and negotiation. However, in practice, the mediation process is not linear. Mediators must bring an open mind and a readiness to embark on a journey with clients, often through unchartered waters, that is not planned nor based on structure or theory.

Mediators need to be flexible and adaptive to support the distinctive needs of those in the room and facilitate their negotiations – essentially, "going with the flow". Following the flow of the clients' journey requires following instincts and remaining open-minded and curious. Mediators must actively listen, clarify, ask questions, reflect, reframe and sometimes stay silent. Everything is said and done with purpose, steering the journey and shifting the conflict.

A mediator who is "present in the moment", impartial and patient, brings a sense of calm to the negotiation table which can significantly impact the resolution process. Being creative, mediators also help clients view the situation and conflict through a different lens, as there are always many perspectives. With the assistance of a skilled mediator, clients can work collaboratively towards their shared common goal – resolution.

Venue for ADR

- Online Dispute Resolution (ODR) – the new venue option
- Pros and cons of face-to-face and ODR

Adaptability is an inherent part of a skilled mediator's toolkit. Pre-pandemic, most mediators had never or rarely facilitated dispute resolution online. Overnight, the existing landscape had to change substantially. ODR has become a viable, comparable medium and is a convenient, accessible, cost-efficient and safe alternative to traditional in-person mediation. Importantly, it removes geographical constraints, benefiting clients in regional, rural and remote areas which are often under-resourced.

ODR can be more effective for clients who find direct communication intimidating and stressful, enabling participants to attend mediation from a familiar and comfortable environment. This can promote and support constructive conflict management by allowing space for self-regulation and self-care throughout the mediation process.

The technology also provides powerful tools allowing mediators to flexibly support clients in their conflict resolution journey – including quick links to participants who can join from a broad range of devices, starting and ending meetings, creating additional confidential breakout rooms on the go.

Conversely, ODR can limit participants to what they can see within the confines of their screens, and reduces direct human connection. In-person mediation brings a sense of formality, attention and commitment to the resolution process.

In-person, the mediator, in particular, benefits from seeing the whole person, reading and responding to body language such as eye contact avoidance, crossed arms and fidgeting. This may be hidden or missed online.

So, while face-to-face may have been considered the best mediation practice, arguably, now it is an equal partner to ODR.

The human element in mediation

While understanding parties' positions and perceptions is crucial, it is also important to recognise that, first and foremost, all parties to a dispute are human beings. Rational and logical arguments may have limited effect in the face of "human" factors such as anxiety, emotions, personality traits, power imbalances and communication issues.

Conflict is inherently stressful, which often gives rise to human emotions and responses. When overwhelmed by these, the capacity for rational thought and negotiation can be severely compromised, increasing the opportunity for cognitive biases to flourish and jeopardising the mediation. A mediator's ability to navigate these human elements and create a calm environment can mitigate this risk.

Arguably, the most effective tool for dealing with human factors is empathic and active listening. Skilled mediators are quick to pick up on subtle cues and have finely tuned listening skills which may include the exercise of non-verbal attendance, reflection, acknowledgement, framing/re-framing and curiosity.[3]

Good faith in mediation

Contracts often include dispute resolution clauses that require parties to participate in mediation in "good faith"[4] prior to commencing court proceedings. There are also legislative requirements, common law principles, industry codes and guidelines that include the obligation to act in good faith.

What does it mean to act in good faith in mediation?

As a starting point, all participants acting in good faith should attend on time, ensure they have the authority necessary to resolve the matter, be respectful, engage with an open mind and discuss substantive issues and options for resolution.

Our review of legislation, case law and academic papers has identified the following key features of what it means for practitioners to mediate or negotiate in good faith:

- willingly participating in the process
- acting honestly and reasonably, not engaging in deceptive or misleading conduct
- advising on alternatives and assisting clients to make informed choices
- not taking advantage of "obvious errors" if there is no basis in law or fact.

Sorry tales from disciplinary proceedings illustrate the importance of staying on the right side of good faith requirements:

***Legal Services Commission v Mullins* [2006] LPT 012**

One party relied on a medical report stating that the other party's life expectancy was reduced by 20 per cent but shortly before mediation the latter was diagnosed with cancer, which was not disclosed at the mediation. This was held to constitute professional misconduct on the part of the barrister and the instructor. The "without-prejudice" nature of the negotiation did not create an "honesty-free" zone for the practitioners involved.

***Williams v Commonwealth Bank of Australia* [1999] NSWCA 345**

The plaintiff provided an unsigned statement to the defendant during negotiations, without disclosing that the witness had refused to sign it. The Court of Appeal concluded that this amounted to a misrepresentation.

***Legal Practitioner's Complaints Committee and Fleming* [2006] WASAT 352**

During negotiations a solicitor referred to a document as "the will". In fact, the deceased had not executed the will in accordance with legislative formalities. The Tribunal found that the solicitor had breached professional conduct rules.

***Chamberlain v Law Society of ACT* (1993) 118 ALR 53**

A practitioner took advantage of a typographical error by an opponent, securing settlement and consent to judgment for a lesser amount. It was held that the practitioner used the opponent's mistake as an "element in a trap", which constituted professional misconduct.

Whether good faith has been exercised depends on the circumstances of each case, but the prospect of disciplinary proceedings is likely to encourage honesty and sincerity on both sides of the negotiating table. A skilful and tactful mediator can be an invaluable tool for encouraging genuine effort and engagement in the mediation process.

The mediator – interventions and impasse breakers

The role of the mediator requires much more than the ability to convey offers and understand the issues. The mediator must be able to build rapport and trust with all parties, as well as be able to segue into wearing the hat of "devil's advocate", encourage respectful robust communication, all while having the ability to cultivate exchanges to facilitate the exploration of options (even those which may at first seem unpalatable) to achieve a resolution.

Bravado, face saving and positional stances are common place in mediation. Mediators are required to use multiple techniques to encourage parties towards a state where they are open to listening and thinking of viable solutions.

Techniques such as active listening, brain storming, hypothesising, reality testing, role reversal and playing devil's advocate are often utilised to support constructive conflict management. An experienced mediator will follow the flow of the process and appreciate when the time is right to introduce a new strategy.

All mediators have their own style, but often they must have the ability to act like a chameleon, moving independently, looking in different directions at once, shape shifting, adapting and changing to meet the needs of the parties and circumstances as they unfold.

The skills of an experienced mediator are often underutilised by parties and their representatives. Parties and representatives should be encouraged to work with the mediator, consider giving the mediator their "good ideas". Often when floated by an independent neutral mediator, these ideas are received and heard rather than blocked and dismissed. Participants should be encouraged to use the mediator as a sounding board to help formulate and evaluate proposals.

Reinforcing concessions and acknowledgements, delving into needs and interests, applying interventionist techniques when required, having the ability to show compassion and knowing when parties and issues require time to breathe, are just some of the many techniques mediators use to bring a focus to moving forward and reaching a commercial outcome.[5]

Concluding thoughts

- Be prepared – know your case, your client and your opponent
- Manage your client's expectations ahead of mediation. Discuss what your client hopes to achieve and consider the alternatives and implications if the desired result is not possible
- Be flexible, adaptable and open to possibilities
- Put yourself in the other party's shoes, as well as your client's, to gain an understanding of underlying motivations and how both their needs and interests may be met
- Beware of treating mediation like court – that will result in parties focusing on defence and attack moves rather than exploring the various options available for a commercial resolution
- Be an active listener and problem solver
- Find ways to build mutual respect and rapport. If you do, you have a greater chance of influencing the outcome and reaching a resolution

- Have good precedents of Terms of Settlement handy to reduce drafting time at mediation and be ready to adapt them to incorporate agreed terms. Consider taxation issues ahead of time and be wary of settlement being documented in Heads of Agreement or Memorandum of Understanding, which may not be enforceable
- Trust and utilise the skills of your mediator – it is the mediator's job to protect the integrity of the process
- Remember, clients prefer a negotiated agreement to the stress, time and money that goes into protracted litigation and, most importantly, the uncertainty of a trial. After all, a happy client is a client for life. ■

The **KATO Collective** (www.katocollective.com.au) is a curated list of experienced and industry leading mediators across a broad variety of specialties.

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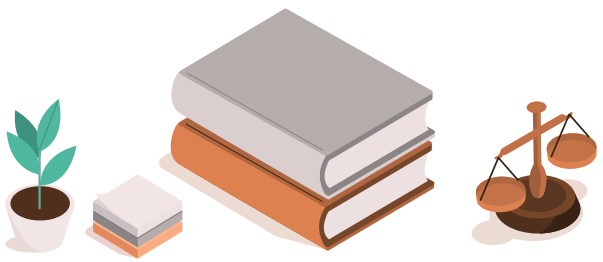
1. https://ama.asn.au/australian-mediation/#chances.
2. Adapted from "Ready Steady Go" – Preparing yourself and your client for mediation (*LIJ* April 2016 – Jonathan Kaplan).
3. Christopher Moore, *The Mediation Process*, 2014 (4th edn), published by Jossey-Bass, Roger Fisher & William Ury, *Getting to Yes: Negotiating an Agreement Without Giving In*, Random House 2012.
4. The Uniform Law including *Australian Solicitors' Conduct Rules 2015*; *Civil Procedure Act 2010* (Vic); *Competition & Consumer Act 2010* (Cth); *Competition and Consumer (Industry Codes - Franchising) Regulations 2014* (as amended); LIV Code of Ethics; National Principles of Resolving Disputes by the National Alternative Dispute Resolution Advisory Council (NADRAC); "Good Faith, Bad Faith? Making an effort in Dispute resolution" by Professor Tania Sourdin, *DICTIM* (*Victoria Law School Journal*) Vol 2 Iss 1 2012;"Ethical and legal obligations in mediations and other negotiations" by Steven Standing, *Brief* Vol 42 Iss 7 2015, Franchising Code of Conduct, *Small Business Commission Act 2017* (VIC), *Commercial Tenancy Relief Scheme Regulations* (as amended), Civil Procedure Acts, National Mediator Accreditation System Practise Standards.
5. Ruth Charlton, Micheline Dewdney, Geoff Charlton, *The Mediator's Handbook* (3rd edn), Lawbook Co, 2014.



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