

mediation checklist for legal advisers

By Mini vandePol, Baker & McKenzie Solicitors

The mediation checklist below has been endorsed by the ADR Committee of the LIV Litigation Lawyers Section.

1. Educate yourself on the process and techniques of Mediation.

The best education for a legal adviser is to participate in a practical training course on Mediation. This gives the practitioner the confidence to use the process to their clients' best advantage and assist the Mediator to give direction to the negotiations.

Continue your education or refresh your Mediation training by reading:

- **Mediation – A Guide for Victorian Solicitors** (Law Institute of Victoria publication).
- **Getting to Yes: Negotiating Agreement Without Giving In** (Fisher & Ury, 1981, The Guernsey press Co.)
- **Getting Past No** (Ury)
- **Notes from Mediation training courses** (eg. LEADR and Bond University courses).
- **Mediation: Principles, Process, Practice** (Laurence Boulle, 1996, Butterworths).
- **The Mediator's Handbook – Skills & Strategies for Practitioners** (Ruth Charlton & Micheline Dewdney, 1995, LBC Information Services).

2. Choosing the Mediator.

The Mediator:

- Should be chosen for his/her communication skills, training and

experience in the techniques of mediation as well as their genuine desire to assist parties to reach a resolution.

- Should not be chosen solely on the basis of their charge rate.
- Does not have to be a male senior barrister, hold an aggressive personality, nor be an expert in the specific subject matter of the dispute.
- Should not be easily frustrated, given to tantrums, or take pleasure in berating the parties.
- The lawyers practising as Mediators have a wide variety of skills temperaments and abilities. There is no one right "type" of mediator.

3. Mediation Agreement

Both the Law Institute and the Victorian Bar have published standard Mediation Agreements and Undertakings of Confidentiality for execution by the parties, the Mediator and all participants.

The Mediator should circulate a draft Mediation Agreement to the parties as soon as possible after the Mediator's appointment.

4. Pre-mediation Conference

- Preferably all parties who will attend the Mediation should attend the pre-mediation conference. If this is not possible, a telephone conference may be a good alternative.
- Confirm all house-keeping matters to ensure that time at the mediation is spent only on the dispute.
- The Mediator should submit a draft

Mediation Agreement to the parties well prior to the scheduled date for the mediation, to give sufficient time to the parties to read it and if thought appropriate to obtain advice. Any issues arising under the draft Agreement can be discussed at the pre-mediation conference.

- Parties and their advisers should settle which documents (if any) need to be exchanged between the parties or provided to the Mediator.
- Settle arrangements to meet any special requirements of the parties, eg: medical needs, personal needs or time constraints.

5. Preparation for Mediation

Preparation for mediation is the key to success. Although the process is informal and client participation is encouraged, practitioners must have done their own homework. Matters may settle, however your strength in negotiation is to know your opponent's case as well as your own. This maxim applies just as well to mediation as it does to trial. The end result of such preparation may be a far more favourable settlement for your clients.

- Take time to explain to your clients the process of Mediation, the structure of the day, the role of the Mediator (see the Law Institute publication, "Mediation – A Guide for Victorian Solicitors" for assistance).

Know your legal case

- Appraise and update yourself thoroughly with the facts and law concerning the dispute – obtain

advice from counsel or experts if necessary to assist you to assess strengths and weaknesses of your clients' case.

- Speak to relevant witnesses to further assess their likely credibility and the impact of their evidence.
- Calculate costs to the conclusion of the mediation and give your clients advice under Rule 12(2) of the Professional Conduct and Practice Rules 2000.
- Estimate the legal costs which would be incurred by your clients from the completion of the mediation through to trial if the matter does not settle. Advise your clients as to what portion of such costs will be recoverable should they ultimately be successful.
- Calculate the costs which your clients may be liable to pay if they are unsuccessful at trial and have a costs order made against them.
- Provide detailed advice to your clients about their case and advise them on the inherent risks of litigation.

Identify and understand your clients' personal issues

- Discuss the issues your clients identify as being at the heart of the dispute. Remember these issues may well go beyond the issues pleaded in the proceeding. Whilst not being "legal issues", their resolution may be very important to the settlement of the case.
- Explore with your clients all the possible options that may result in settlement between the parties. Think laterally. This may involve detailed investigations into the financial capacity of your clients and their opponents, financial proposals, assistance from outside sources, obtaining independent valuations of securities or other assets, independent assessment of damages, searches into property holdings and

interests in companies. The options should be graded from worst to best case scenarios. Be realistic.

6. At the Mediation.

- Consider whether your clients ought to express their point of view and show their feelings and emotions. Each case is different. In some mediations a free exchange between the parties may be productive. In others your clients may be better advised to restrict their communications, until a private session with yourself or the Mediator.

Remember however this is the parties' forum, not the lawyers'.

- Be receptive to the options put by the parties.
- Ensure your clients understand the discussions taking place. Try to avoid holding too many "lawyers-only" caucus sessions.
- Discuss with the Mediator the way the process is going. Voice any concerns you or your clients have.
- Some Mediators separate the parties and move between them conveying points of discussion and settlement proposals. This is one technique and not a compulsory part of Mediation. The Mediator should be encouraged to be flexible. Endeavour to remain in joint sessions if it assists the parties to communicate and explore options together.
- If your clients reach a point at which they wish to settle, respect their decision but take the time to provide detailed advice regarding the terms of settlement and satisfy yourself that they fully understand their obligations and rights under the arrangement reached.
- Think positively – ensure that you bring a draft settlement agreement or at least a list of draft terms which

you would wish to have incorporated in any settlement deed.

In conclusion:

Mediation, whether voluntary or court ordered is an integral step, to be considered when dealing with a client with a dispute.

Educate yourself about the techniques and the process of Mediation.

Decide on the mediator, keeping in mind that he/she should be chosen for his/her communication skills, training and experience in the techniques of mediation.

Initial meeting (also known as pre-mediation conference) is where all administrative arrangements are made to ensure that the parties can focus on the issues between them at mediation.

Assess your client's case thoroughly in respect of the facts and law – obtain advice from counsel or experts if necessary to assess strengths and weaknesses of your client's case and the opponent's.

Tell your clients about the opportunity they have at mediation to express their views and feelings directly to the other parties and how mediation gives them control over the outcome in a way which a court hearing will never provide. Talk to your clients about the strengths and weaknesses of their case and the risks and costs of litigation.

Investigate both the legal issues as well as the personal issues and concerns of your clients which have given rise to the dispute.

Options to resolve the dispute should be explored fully, ranging from worst to best-case scenarios.

Negotiate a resolution at mediation that your clients can live with.

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