Representing clients at a Mediation

a talk by

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Before I start I feel I ought to tell you a little about my background. I am a Solicitor by profession and I was accredited as a Mediator in 2002. Since then I have mediated around 400 disputes and I retired as a Solicitor three years ago to concentrate on my Mediation practice. I am also a Chartered Arbitrator and a Deputy District Judge dealing with civil claims.

The purpose of this session is to provide you with an overview of the role of a lawyer at a mediation. Advising and guiding a client through a mediation is very different to appearing as an advocate at a trial where your focus will be on the Judge. The mediation process is flexible and fluid, unlike a trial where everything tends to happen in a set order, and the outcome you are looking to achieve is a settlement rather than a judgment. At a mediation you will interact with your client, the Mediator, and the other party to the dispute (through their lawyer if they have one), and although there will be opportunities to use your advocacy skills it is your opponent you need to persuade not the mediator.

Getting the best out of the a mediation takes practice and in my next session [tomorrow] we will present a fictional mediation that will give you an opportunity to consider some of the problems that might arise.

What is Mediation?

Voluntary

I am aware that the Judicature (Mediation) Rules 2013 mean that in Uganda (unlike England) the parties to a dispute will be required to mediate claims that exceed a financial threshold unless their dispute turns on a point of law, but the extent to which the parties engage in the process (beyond turning up) is voluntary. No-one can be compelled to reach an agreement to resolve their dispute if they do not want to but if the parties view a mediation as a positive way to resolve disputes the chances of them reaching an agreement are significantly improved.

Confidential

A mediation is protected by the without prejudice rule that applies to all negotiations aimed at resolving disputes and as a result the communications that pass between the parties during a mediation cannot be relied on or referred to in a subsequent court hearing, with the exception of a settlement agreement. The without prejudice rule can be waived by the parties without the agreement of the Mediator (*Farm Assist v Secretary of State for Environment [2009] EWHC 1102)*. As yet the common law has not recognised 'mediation privilege' in the way that it recognises 'legal advice privilege' but most mediation agreements refer to the mediation as confidential and the Court should refuse to order the disclosure of documents and communications that came into existence for the mediation (*Cumbria Waste Management Ltd v Baines Wilson [2008] EWHC 786)*.

Informal

As I mentioned earlier the mediation process is flexible. Although the training that mediators receive suggests that there is a model process that should be followed most experienced mediators can adapt to meet the parties needs. For instance if the

relationship between the parties is so hostile that a joint opening session with everyone present will simply result in them becoming angry with each other rather than listening to what each other has to say a lawyers only opening session might be more productive.

Practical

Although there is bound to be an exchange of views on the merits of each others cases the focus of a mediation should be a search for a real world solution that both parties can live with rather than a dry run of a trial for the benefit of the lawyers. The parties can agree whatever works for them and do not have to restrict themselves to outcomes that could be ordered by a Judge.

Why mediate?

An alternative to litigation

Civil litigation has a long history. It is the only non-violent dispute resolution process that someone with a civil claim can initiate unilaterally but it has its limitations. In common law countries the process is adversarial with the result that positions quickly become polarised, pushing the parties further and further apart. The focus is on the detail of the dispute rather than a solution. The whole process is dedicated to a stranger (the Judge) deciding the dispute for the parties. In a mediation the focus is on the parties finding their solution to their dispute (with assistance).

Certainty

Proposals put for ward at a mediation, such as an offer to pay an amount of money on a particular date, represent certainty if they are agreed. By comparison the outcome of litigation is always uncertain until you get a judgment from the Court. Even if a lawyer

believes his client has a good case they will not guarantee success. The only certainty in litigation is that the parties will expend time and money on the process.

Client orientated solutions

It is for the parties to the mediation to find the solution that works for them. Providing it is agreed it operates as a compromise of their dispute and brings it to an end. The agreed solution may or may not be similar to the sort of outcome that a Judge could have ordered.

Benefits

The benefit of mediation that is mentioned most often is the saving in time and money but there are other benefits, principally that it is a safe place to reach an agreement. The other benefits will be different for each client but the one that is mentioned to me most often is 'I want my life back'. Clients can find litigation very stressful and begin to feel that it is taking over their lives. A mediation offers them a realistic way of concluding their dispute on terms they can live with.

Mediation in England and Wales

Brief history

Mediation in its current form has been promoted as an alternative to litigation in England and Wales since the early 1990s. The first mention of mediation in the procedural guidance issued by the Courts comes in 1994 when the Commercial Court required lawyers to consider ADR when advising their clients. It has taken time for mediation to be accepted but it is now seen as one of the principal tools available to a dispute resolution lawyer and something that they need to discuss with their clients at an early stage. It took familiarity with the mediation process, the availability of a significant number of experienced mediators, and official encouragement to get to this point. There are now

several distinct types of mediation process. In addition to civil claim mediation (which is the subject of this talk) there is family mediation, employment mediation and neighbourhood mediation.

Effect on litigation

At first civil litigation lawyers were reluctant to promote mediation. How could they recommend an untested process to their clients, why did they need a Mediator to run a settlement meeting, and what would happen to their fee income were all questions that were asked. In the last ten to fifteen years everything has changed. Issuing proceedings may be the way that you get your opponent to take your claim seriously but trials happen when you have been unable to settle at a mediation. The mediation process is now trusted and clients have mediation explained to them at an early stage, and dispute resolution lawyers (as litigation lawyers now call themselves) who have adapted to the new landscape can still earn a good living.

Compulsion and sanctions

The Pre-Action Protocols, the Civil Procedure Rules and associated Practice Directions and the Procedural Guidelines issued by the specialist Courts, such as the Commercial Court, all emphasise the role that mediation now has in dispute resolution. The message is quite clear. The state is not going to provide limitless funding for the civil courts and the parties to civil litigation are expected to accept responsibility for resolving their disputes wherever possible. In family and employment claims it has gone a step further in that financial applications cannot be made following a divorce until the parties have attended a mediation assessment and before you can make an application to an Employment Tribunal you must notify ACAS who will see if the claim can be resolved by conciliation.

Although there is no direct compulsion for civil claims there have been costs sanctions for a failure to mediate for many years. The leading authority on this point is *Halsey v Milton Keynes NHS Trust [2004] EWCA Civ 576* although a similar point had been made in the earlier case of *Dunnett v Railtrack plc [2002] EWCA Civ 303. Halsey* contains a clear statement that the Court of Appeal expects lawyers to advise their clients about the benefits of mediation so besides being authority for the proposition that a party who unreasonably refuses mediation should be penalised in costs it also introduced the idea that a lawyer who fails to tell his/her client about mediation will be negligent. The effect of the *Halsey* decision was to shift the balance in favour of the proponents of mediation. It now had the approval of the Court of Appeal and ever since the emphasis has been on the parties obligation to consider mediation (or other forms of negotiation) as the primary means of resolving their dispute.

When to mediate

Sooner

The client benefits accrue earlier and the settlement premium is bigger. Funding the settlement is easier when the litigation costs are lower and therefore less of an obstacle. Emotions might still be high but positions are less entrenched and the bigger picture has not become lost in the detail of the dispute. There is often less risk of irrational escalation for fear of losing face or of cognitive bias, and there is a greater possibility of there being a collaborative solution. But lawyers are cautious by nature and many will want to wait until they are sure they have seen all the evidence (and your client will be encouraging you to find the missing evidence they are sure is there to support their case but has not yet been disclosed by the other side). There will be further questions you will want the other side to answer (which you hope they will find difficult and embarrassing) and you will want to pin

down their position on every issue. It is easy to say it is too early to mediate, I do not have enough information to advise, even if that is not strictly true.

Later

If you wait until you are satisfied that you have all the evidence you are ever going to see (and your client has given up hoping that the elusive bit of evidence will turn up) and everyone's position on every possible point has been established you will find that positions have hardened and costs are a significant obstacle to settlement. Concessions will be harder to negotiate and the negotiation is more likely to be adversarial. The settlement premium has been spent on litigating and if you do not get an agreement you may find that the costs protection of any formal offer to settle is minimal.

When?

Assessing when to mediate is a matter of experience. In England and Wales there is an obligation to set out your case in correspondence before you issue proceedings and the issue fees (up to £10,000) are high enough to encourage early settlement. The result is mediations before the issue of proceedings. The important point is that the lawyers who are advising feel that they have enough information to formulate and respond to offers and their clients are ready to enter into a mediation. Both sides will have put the essential elements of their case on the table so there should be no surprises. The settlement will be a compromise and providing everyone is comfortable with looking for one that is the time to mediate. Remember a mediation is not a contest to see who will win but an opportunity to find a solution that both parties can live with.

Who should propose mediation?

An offer to mediate is no longer seen as a weakness. I am used to seeing letters of claim (formal letters written within a pre-action protocol) that stress the strength of the claim but contain an offer to mediate once the intended defendant has responded. There may be a suspicion that the offer of mediation has been made early to ensure that an adverse *Halsey* costs order will not be made but the principle that the parties will try to resolve their dispute by mediating is on the table from the outset.

Appointing a Mediator

Qualifications

If you are proposing a named Mediator you (and your client) will want to satisfy yourself that they have sufficient experience to be able to run the mediation in a satisfactory way. Mediation training on its own may not be enough. This makes it difficult for newly accredited mediators to get established and one solution is to encourage experienced mediators to bring pupils to their mediations. Please say yes if you are asked if a pupil can attend. Be prepared to try a new mediator on a small dispute and you will increase the pool of experienced mediators. As a lawyer you will probably want to ensure that the Mediator has experience of litigating the sort of dispute you are going to be mediating but sometimes other practical skills might be more useful. Some of the most successful Mediators of construction claims have a background as Quantity Surveyors.

Style

Although most Mediators receive the same training they tend to develop their own approach to mediation. Some are more interventionist than others, some are purely facilitative and will not express a view on the merits of a case while others are more evaluative. If you have a choice of Mediator think of the approach that will be most

effective for the dispute to be mediated. Will it be necessary for the Mediator to have a robust approach to reality testing or would something gentler be better. Do not assume all Mediators are the same and chose on cost alone.

Independence

You should be able to assume that all accredited mediators who are prepared to accept an appointment will be independent but make sure you tell him/her enough about the parties and the dispute at an early stage for any conflicts to be identified. Let your client know who is being considered and check with them if they have had any previous connection with the person being proposed. Ask for a CV if the mediator is not known to you and ask the Mediator to confirm that they have no conflict of interest before making the appointment.

Panels and registers

Asking a trusted third part for their recommendation is sometimes way of finding a suitable mediator, especially if you are unable to think of one or you cannot agree on who should be appointed. If you need to delegate the appointment try to avoid a panel that simply appoints the next Mediator on their rota unless you have no other choice. If the Mediator turns out to be unsuitable it can reflect on you.

Preparing for the mediation

The mediation agreement

Although you can mediate without first entering into a written mediation agreement taking your client through an agreement to mediate marks a change in the process and is a way of reinforcing some of the concepts that will apply, such as confidentiality. As a minimum the mediation agreement should identify the parties and the dispute, appoint the Mediator and specify his/her fees, the venue, confirm that the mediation is being conducted on a

confidential basis, say whether the costs of the mediation form part of the costs of the litigation, and provide for a written settlement agreement. Some Mediators will ask for provisions that limit their liability and restrict the parties ability to call them as witnesses if their is any dispute about what was agreed.

Yourself

Resist the temptation to prepare for the mediation as if it is a trial. You do not need to polish the case and rehearse your arguments. You should be preparing your client for the decisions that they will need to make and thinking about negotiation strategy and settlement options. Your client will need realistic advice about the risks of litigation, an honest appraisal of their position and a willingness to challenge any cognitive biases that they are prone to. You should be considering what you and your client want to achieve, what are your client's priorities, what the other party might need from a settlement, and how you might balance the two. Does your client need to involve anyone else, such as an insurer, in the decision making. Are you going to produce a position statement and if so is it for the Mediator's eyes only. What opening offer are you going to suggest. What are your client's costs to date and how much more will they have to spend to the end of a trial.

Your client

First of all ensure that they understand what a mediation involves and what the role of the Mediator is. Get them to think about settlement and compromise. What do they see as the benefits of settling. Does your client need approval from anyone before they agree a settlement and if so should that person attend the mediation. With corporate clients will their representative have limited authority to settle and if so what is the process for authorising a settlement at a higher level if that becomes necessary. Get the client to identify their priorities and to think about what they can concede in order to achieve those

priorities. Avoid creating fixed ‘red lines’ but identify the sort of settlement your client can live with, and consider how realistic it is. If your client expects to be the paying party what are their resources.

Pre-mediation analysis

You should consider with your client

- the risk/reward ratio of the litigation (factoring in prospects of success and how the ratio will change once offers are received)
- what the client wants to see in a settlement agreement and the cost/benefit ratio of settlement
- the impact of winning or losing at trial
- the impact of settling or not settling
- the client’s present and foreseeable needs and resources
- the client’s appetite for risk
- the net cash position (taking into account costs) of a good day in court, a bad day in court and a middling day where the client succeeds or loses in part.
- how a settlement might be structured to suit the needs of both parties
- if there are any tax consequences that need to be factored in
- the offer you will make to open negotiations

The Mediator

It is a mistake to expect a Mediator to review what amounts to a full trial bundle and prepare a detailed analysis of the dispute with view to telling the parties who has the better case or where they should settle. Both of them will disagree with him/her and the Mediator will have lost all credibility with both sides. The Mediator needs enough information to understand the background to the dispute, issues in the dispute and the parties positions.

They will also need to know what offers have been put forward already and what responses were given to those offers. Beyond the pleadings the Mediator will require little more than the core documents, such as the contract that is at the heart of the dispute, the correspondence containing offers and responses and any position statements. If you include anything else be sure it has a purpose.

Let the Mediator have those papers in good time so that they can read them and contact you with any questions that arise before the day of the mediation.

At the mediation

The phases of a mediation

Mediations generally have three distinct phases

- the initial phase - which can be dominated by unnecessary advocacy
- the problem solving phase - where the parties with the assistance of the Mediator look for common ground and the basis of a settlement
- the negotiation phase - where the building blocks of a settlement identified in the problem solving phase are tuned into a settlement and the detail of the agreement is worked out

The opening session

This is your opportunity to engage with the other side and it should not be passed over without a very good reason. You should consider with your client who will speak. If you are going to speak as your client's representative you should avoid reading your position paper and you should start by engaging with the people on the other side of the table. Let them know that you understand their position before you tell them that you disagree. If there is anything your client is prepared to acknowledge for the purposes of the mediation

tell them. Asking questions can show that you are engaging with their arguments if you ask them in a non-pejorative way and avoid the temptation to cross examine. Hold out an olive branch if you can and avoid table banging, finger wagging and threats. If you attack the other side as your opening gambit (as your client might expect you to do if you have not spent time preparing for the mediation) they will disengage and stop listening, and you will have missed your big chance to make an impact on them.

If your client wants to speak how angry will they seem to be. They may want the other party to understand the impact of the dispute of them or how they feel but they may come across as desperate or unreasonable and they may simply antagonise the very person they need to make peace with. Think very carefully before allowing the client to give full vent to their feelings at an opening session.

When the other side speaks be seen to listen. Small acknowledgments such as making a note and eye contact can go a long way. Do not conspicuously disengage, for instance by looking out of a window. If you get an opportunity to make any concluding remarks summarise and acknowledge common ground before identifying differences.

Private sessions with the Mediator

The opening session sometimes spontaneously moves on from the initial phase of the mediation to the problem solving phase but it is usually followed by private sessions with the Mediator where the problem solving phase begins. The more you can trust the Mediator and be open with them the more likely it is that you will be able to find the building blocks of the settlement. Be prepared to share your pre-mediation analysis of the possible solution with the Mediator, let them know what your client needs from a settlement and, if there are red lines where they are. Your client will probably want to try to

recruit the Mediator to their cause and when they return from the other room to explain how your opponents are thinking there will be a temptation to shoot the messenger. Try to avoid both these natural reactions. The parties positions will have become polarised before the mediation and the Mediator is looking for the common ground that can be used as the basis of a solution. Taking a polarised position in the private sessions will not help him/her.

Once there are proposals on the table be prepared for the Mediator to invite you to take part in an analysis (in the privacy of your own room) of the benefits of the proposal you have received and the risks of turning it down. The Mediator is not taking sides if they play devils advocate or begin reality testing.

When the Mediator brings information from the other room your client will probably dismiss anything that does not fit with their view of the dispute but you should listen carefully. You may hear something useful about their thinking or the needs that the solution has to satisfy if there is to be an agreement.

Use the time when the Mediator is in the other room productively. Review progress and options with the client. If your analysis is changing introduce the client to those changes and explain them.

Negotiating strategy

Assuming you have carried out a pre-mediation analysis with your client the first step is to ask your client what they heard the other side say at the joint opening session. They may have missed something you heard and vice versa or you might feel that something your

client missed was encouraging. The object of this conversation is to check and update your pre-mediation analysis and to start looking for the building blocks of a settlement.

Before long you will get to the point where the Mediator is looking for offers. Who goes first will depend on the dynamic of the mediation. There may have been an offer made before the mediation that has to be answered before the mediation can move on, but to get things started it is often easiest to exchange offers via the Mediator so that both parties put forward an opening offer at the same time.

These opening offers can send a powerful message about your intentions, especially if you attach a reasoned explanation. If you start with an offer that is clearly at or above your best case scenario in Court you may find that attitudes harden and there is not a lot of movement from the other side after that. An offer that is insulting or derisory can result in the the recipient disengaging from the mediation. On the other hand a well pitched offer that is structured to acknowledge the recipient's needs can produce a favourable response and movement towards a settlement on acceptable terms.

Impasse

There will be times when your client becomes fed up and frustrated. They may feel that the mediation is not making any progress. Be prepared to review the situation with the Mediator and ask for suggestions. If no-one is threatening to walk away stick with it.

If you reach the point where both sides say there will be no better offer and there is no agreement there are still steps that should be taken before the mediation ends. First of all is a meeting attended by the lawyers and the Mediator to review where they all believe the mediation has got to. This will ensure that there has been no misunderstanding and focus

minds on the gap that needs to be bridged. By now the gap between the parties positions is likely to be less than the future costs of litigating and there needs to be a frank conversation about the possibility of bridging that gap. Before that meeting speak to your client to find out if there is anything that might be offered if the other side will make further concessions. Sometime this is when a meeting between the parties without lawyers will close the gap and on other occasions it turns out it is all about who gets the last word.

The Mediator may be prepared to put forward a middle ground solution for the parties to consider so neither feels the other has dictated terms.

The settlement agreement

Once there is an agreement do not let the parties leave without them signing a settlement agreement. If you do not record what was agreed there is a real risk that the mediation far from producing a solution will result in more litigation. It is also important that the parties sign the settlement agreement, after it has been explained to them, to signify that it is their agreement.

Do not try to improve the deal when it is being drafted. This is usually seen as bad faith and there is a real risk it will result in the agreement collapsing. It is important to include everything that will go into the settlement agreement in your proposals. If it mattered why was it not included.

Drafting a settlement agreement always takes longer than expected and a well prepared lawyer will have considered what it should contain as part of their own preparations. An initial pre-mediation draft will probably contain just the parties details, the recitals and definitions and some standard paragraphs such as full and final settlement. As the shape

of the agreement emerges this can be added to. This approach can help you think through what the settlement needs to contain, so nothing is overlooked, and creates a useful note you can use to review progress with.

What if there is no agreement?

Review

Before you continue with the litigation review the progress made at the Mediation with your client. Once they have had time to reflect are they prepared to take one last step towards settlement.

Repeating offers

If a formal offer may provide your client with some protection against an adverse costs order do not forget that the offers made at the Mediation cannot be mentioned in Court. You need to repeat the one your client intends to reply on.

Dos and don'ts

- Prepare for a settlement. Conduct a pre-mediation assessment with your client and work out the numbers
- Start drafting a settlement agreement as part of your mediation preparation
- Make sure your client understands the costs position
- Avoid over identifying with your client. They will need a detached settlement coach at the mediation. Be frank with them about the risks of litigation
- Do not turn up in advocacy mode with case law and textbooks
- Treat the other side as you would like to be treated

- Focus on persuading the other side to compromise rather than telling them they do not know the law or boasting about what you will do to their witnesses when the case gets to trial
- Avoid putting on a show, being deliberately rude or making aggressive and sarcastic comments
- Do not lose your temper (or pretend to) and always be polite
- Do not exaggerate too much even if you are confident about the strength of your case
- If you are bluffing think about what you will do when your bluff is called
- Avoid saying ‘never’ it closes down the mediation. Use ‘if’ which allows it to continue
- Do not give up. There is almost always a difficult phase when a settlement looks unlikely just before an agreement is reached.

Suggested reading

When mentioning cases I have used neutral references and you should be able to find them at **http://www.bailii.org** which is free

- Advising and Representing Clients at Mediation by Stephen Walker and David Smith (Wildy, Simmons and Hill Publishing) ISBN: 9780854901210
- The Jackson ADR Handbook by Susan Blake, Julie Browne and Stuart Sime (Oxford University Press) ISBN: 9780199676460
- Mediation Advocacy: Representing Clients in Mediation by Stephen Walker (Bloomsbury Professional) ISBN: 9781780437927
- How to Master Commercial Mediation by David Richbell (Bloomsbury Professional) ISBN: 9781780436821