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WHAT IS MEDIATION AND HOW DOES IT WORK?

A presentation to a Conference for NZ Asian Lawyers

In partnership with:
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WHY WOULD A HIGH COURT JUDGE FEEL QUALIFIED TO TALK ABOUT MEDIATION?

- **40 years litigating in small, medium and large law firms and at the Bar; for Crown & defence in criminal cases; civil & commercial cases, including in employment area**
- **10 years hearing and deciding cases in NZ High Court and Divisional Court of Appeal**
- **Appeared as counsel at many mediations and acted as mediator many times, particularly since retirement from the Court; week-long course at Straus Insitiute, Pepperdine University, Malibu**
- **I've learned three things –**

1. **It is clear that some cases require a 3rd party decision:**
   - **genuine dispute about a material question of law – one or more of the parties wants a ruling as a precedent**
   - **one or more party not in a position to settle – the Crown sometimes averse**
   - **one party wants to make a public showing of its position, irrespective of the outcome**
2. **Most cases are capable of settlement, no matter how toxic the relationship, or how complex the problem, or how large the sums of**

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money at stake AND no matter how far apart the parties may seem at the outset.

There is almost always a hook or an incentive for a litigant to settle – it's often just a matter of working out what it is.

3. There is no doubt that a negotiated outcome that all parties can live with is more enduring and satisfactory than one determined by a third party.

WHAT IS MEDIATION?

1. A process in which a neutral person facilitates communication and negotiation between the parties to a dispute, to assist them to reach a mutually acceptable agreement. The essential components of a mediation facilitated by me are:

   a. a structured, voluntary and confidential negotiation process

   b. involving a neutral and impartial facilitator (the mediator)

   c. who focuses on issues, needs and interests rather than positions, and

   d. who enables the parties to reach a settlement of their dispute.

THE QUALITIES OF MEDIATION

- VOLUNTARY (usually – employment law and family exceptions; some commercial contracts require mediation as the initial approach to resolving a dispute)
- STRUCTURED
- THE PROCESS IS OWNED BY THE PARTIES – nothing takes place without agreement
- CONFIDENTIAL and WITHOUT PREJUDICE
- MEDIATOR IS NEUTRAL AND IMPARTIAL
- MUTUAL IDENTIFICATION OF ISSUES
- SHIFTS FOCUS FROM POSITIONS TO NEEDS AND INTERESTS. Can address issues and agree outcomes outside the scope of the pleadings or the court's jurisdiction.
- Encourages and assists the parties to EVALUATE THE RISKS inherent in litigation

- **THE PARTIES DETERMINE THE OUTCOME – nothing is imposed by a 3rd party**
- **FINALITY**

HAVING THE DECISION-MAKERS IN THE ROOM

Not always possible, but it creates real difficulties if the people with the ultimate authority to settle are not participating in the mediation – mediation is a dynamic process

FACILITATIVE MEDIATION (the "pure" form)

Focuses on assisting the parties to negotiate by restoring communication between them and helping to create options for resolution. Does not involve the mediator expressing any view of the facts or a disputed matter of law.

Does not preclude the mediator from undertaking the important role of assisting the parties to identify litigation risks and evaluate alternatives to a negotiated agreement.

Avoids any element of coercion in encouraging the parties to arrive at a settlement.

EVALUATIVE MEDIATION

Allows the parties to test the reality of their predicted outcomes with a mediator who will express substantive opinions on the merits. The parties must be warned that the value of any opinion expressed by the mediator is limited to expressing views on matters of law without considering full submissions and predicting an outcome on the basis of what will be, at best, a rudimentary knowledge of untested facts.

I ONLY express a tentative view on the merits when asked by a party to do so and in the absence of any other party; NEVER when my opinion has not been sought and NEVER in the presence of all parties

IT IS OPEN TO THE PARTIES TO CHOOSE WHICH APPROACH THEY PREFER but whichever it is needs to be agreed between the parties and with the mediator. And sometimes the type of mediation that is best suited to getting a good outcome will change during the process.

In reality, especially with senior counsel or retired judges mediating, the facilitative approach may involve an element of evaluation at times. The parties need to be open about asking for it.

But the mediator should NEVER GIVE LEGAL ADVICE.

PREPARING FOR THE MEDIATION

Pre-mediation conference between mediator & lawyers/representatives

Does not usually involve the parties themselves. Primarily an administrative discussion:

- **Names of parties and list of attendees**

- **Date(s) of mediation – allow for pre-mediation meeting with parties and possible adjournment to a second day**
- **Venue – number of breakout rooms required**
- **Catering**
- **Exchange of documents**
- **Exchange of opening statements**
- **Who will meet the mediator's fees and costs, and the costs of the parties?**

Pre-mediation meetings between the mediator and the parties with their lawyers/representatives

Commercial mediation intended to settle litigation – may be unnecessary for the mediator to do much more than meet with the parties on the day of the mediation for 10-15 minutes prior to commencement

Complex disputes or disputes involving estate/trust issues, relationship property, employment matters care of children – parties often not familiar with mediation process or may be anxious about meeting the other party/parties in person. 45-60 minutes with the parties on the day before the mediation is frequently a game-changer.

THE MEDIATION PROCESS

In the hands of the parties and all are different. But, usually, an opening position statement is made on behalf of each party, uninterrupted; opportunity for questions in clarification.

It may be possible to reach agreement on the issues to be determined and how they should be approached.

Joint sessions v. caucusing

Usual to begin in *joint session* – PEP TALK FROM THE MEDIATOR then opening statements followed by identification of the issues; parties encouraged to talk to each other; to educate.

> **Agree on an order of addressing them?**
>
> **Are there issues that can be easily resolved?**
>
> **Are there issues that need to be resolved first, because of flow-on to other issues?**
>
> **Pleadings assist the identification of issues where they exist, but often there are issues between the parties that are not addressed in a legal proceeding and that will not be resolved by a judgment –**
>
> - **history of relationship that underlies the dispute but may not be relevant in evidential terms**
> - **need for, or prospect of, ongoing relationship**
> - **why did the parties enter the relationship, and why did it go wrong?**

Keep parties together in joint session as long as possible? That may depend on the nature of the unresolved issues.

Caucusing **– mediator meets parties separately in private. Usually, the start of the negotiation phase but can occur as adjunct to joint session.**

CONFIDENTIALITY OF COMMUNICATIONS WITH MEDIATOR

Confidentiality is a key element of impartiality – important for the parties to speak freely and frankly to mediator. Mediator can't give sound advice or discuss strategy/tactics unless fully and honestly informed.

Frank discussion needs care – mediator shouldn't be too keen to learn a party's bottom line too soon:

- **almost certain they'll have to revise their early views**
- **can undermine the obligation of mediator to speak honestly to the other side**

Some mediators like to encourage frankness by saying: ***except when you direct me otherwise, I will not disclose anything to the other side unless you approve it expressly*****.**

Some mediators say: ***I may share anything you tell me with the other side, unless you direct otherwise.*** **Why? PARTIES OFTEN LIE OR WILFULLY MISLEAD.**

Although it doesn't help the process for a party to lie to or wilfully mislead the mediator or to another party, IT IS NOT UNCOMMON. But a party should never ask a mediator to lie or wilfully mislead on their behalf, and a mediator must never do that if asked. To do so is fundamentally at odds with the integrity of the mediation process and the need for the parties to trust the mediator.

MY ADVICE: A MEDIATOR SHOULD NOT SAY THAT A PARTY'S OFFER/POSITION IS FINAL, UNLESS THE MEDIATOR IS SATISFIED THE PARTY MEANS IT AND IS PREPARED TO WALK AWAY IF THE OFFER/POSITION IS NOT ACCEPTED.