

# Negotiation Skills in Mediation

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## Introduction

In order to advocate or negotiate most effectively, how should parties attending a mediation and any accompanying legal counsel, union official, industrial relations advocate behave?

The strategies and tactics that parties and their advisers adopt in mediation will impact on the outcome. In a mediation, the stark reality for parties is that they find themselves seated across the table from someone with whom they are in dispute. In these circumstances their abilities to negotiate can vary widely, but when the need presents itself hopefully the skilled mediator can answer the call. What is surprising is not the understandable stage-fright of the parties, but the diversity of skills that mediators observe in those professionally retained to advocate or negotiate on the parties' behalf.

Some representatives, whether accompanying legal counsel, union official, or industrial relations advocates, can be superb in their role. However, to the extent in which they can debrief within the restrictions of confidentiality, mediators report a diverse range of mediation skills.

With this in mind, what follows is a list of "do's" and "don'ts" as a practical guide to a framework for the mediation process.<sup>1</sup>

## 1. How NOT to negotiate in mediation

Mediation is a delicate process where success or supposed failure can often hang in the balance. It is because of the tenuous nature of the process that participants ought to be particularly aware of aggravating factors. The underlying real interests and concerns of the parties may not necessarily be irreconcilable. However, the worst roadblock to a successful mediation can be inappropriate negotiation, whether this is imbedded in style or substance.

Some of the behaviours to be avoided are:

- **The representative dominating the proceedings**

Its axiomatic of mediation to state that the process is that of the parties themselves. If representatives are to participate in the mediation (and that is an issue in itself), it is paramount that their involvement should be one of effective support and not be to the exclusion of the party. Savvy counsel, union officials, and industrial relations' advocates will strive to have their clients lead as much of

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<sup>1</sup> Materials prepared jointly with Susan Freeman-Greene were used in preparation of this article

the process as possible. Invariably, when a party expresses themselves personally it conveys their point of view more effectively.

- **Negotiating or appearing to negotiate in bad faith**

Central to the new Bill, is the encouragement of parties to negotiate in employment relation matters constructively, reasonably and honestly. However, those activities that will now be declared illicit by the statute have never been part of the respected and successful negotiator's repertoire

- **Proving the other party is totally wrong**

Reasonably complex dynamics during the early and middle stages of the mediation will precede any agreement or conclusion phase. Through this sometimes apparent maze, the most successful negotiators walk a "tight-rope" of effectively expressing their own perspective, while at the same time "hearing" (and being seen to hear) the other party's point of view.<sup>2</sup> This underlies the cliché - the description of negotiation that it is a give and take process. The concept of exchange is central to a successful negotiation and it often has its origins in the seemingly insignificant early dynamics between the parties. For example, in reality most issues in mediation are not "black or white" - while a fact may be strongly asserted, a related perception may be more problematic to the process in actuality<sup>3</sup>. By openly acknowledging someone's perception of a fact, a small pebble of goodwill can become a small building block for later, more substantial, negotiation movements.

- **Moving too hastily**

Texts on mediation detail a segmentation of the mediation process and this can lead to a perception that the stages are quite distinct. In reality, mediations appear more like the computer windows screen with several applications or phases of mediation at work simultaneously. Fundamentally, mediations have three general phases:

- a) the expression of positions and interests;
- b) the exploration of underlying concerns, related facts and perceptions, and finally,
- c) the problem solving or agreement.<sup>4</sup>

The most obvious difficulty parties have in mediation is an inclination to want to move to the problem solving stage of the three steps before the necessary preparatory work has been completed.

- **Focusing on a proposed solution**

Classic positional negotiating rather than analysing interests and needs invariably leads to problems and deadlocks in mediation<sup>5</sup>.

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<sup>2</sup> Mayer B, *The Dynamics of Conflict*, Jossey-Bass Inc. 1999

<sup>3</sup> Yarbrough E and Wilmot W, *Artful Mediation: Constructive Conflict at Work*, Cairns Publishing 1995

<sup>4</sup> Heitler S, *From Conflict to Resolution*, Norton, 1990

<sup>5</sup> Meyer B *Ibid*

## **How to prepare for negotiation in mediation**

Parties and their representatives need to prepare thoroughly for the mediation process. There is an element of unpredictability about mediation, so that the preparation is more productive if it is focused on understanding the special nature of the process. A few of the most important considerations prior to the actual mediation follow:

- **Whether to have representation**

Mediation is fundamentally regarded as a party-driven process, and there has been fervent academic debate as to the appropriate level of intervention by mediators and representatives. Each year in the Tenancy Tribunal thousands of mediations are reported as being successfully concluded between parties who are specifically prohibited from being represented. Apprehension has also been expressed that the presence of advocates can actually exacerbate tensions and conflict. However, experience as a practicing mediator tends to allay these concerns, especially if the representative is genuinely committed to the process of mediation as opposed to some other more adversarial forum.

Often, when parties conduct the mediation on their own, an option is for them to consult an adviser prior to any formal signing of the agreement. However, a drawback of advisers remaining outside the mediation process, is that it can be difficult to communicate the nuances of understandings that may have been reached within the mediation.

- **Ensure a thorough understanding of the process of mediation**

Parties and representatives need to thoroughly understand the differences between mediation and any Court-related processes. What should be emphasised is that although the mediation/negotiation process may be difficult and may stall over seemingly intractable issues, the focus is one of problem-solving rather than the competitive atmosphere of Court processes. Cooperation within a non-threatening context is the hallmark of the mediation process.

- **Effective communication**

In the face of intense conflict, mediation can seem a daunting process, and there is a need to use different skills. In a mediation, the jury is not the mediator, but the other party<sup>6</sup>. The failure to appreciate this simple and fundamental of distinctions, is the most glaring inadequacy of some who are professionally retained to represent parties in mediation. It is necessary for an agreement to be reached between the parties. Confrontational language, or a persistent adversarial approach, is counterproductive. Effective listening skills, along with elicitive and open-ended questions are part of the necessary tool kit. Rather than being "soft-skills", they are the most utilised of techniques by the really successful negotiator who is capable of helping move seemingly intransigent

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<sup>6</sup> Arnold White and Durkee, *Advocacy in Mediation*, 22 Annual International Conference, Society of Professionals in Dispute Resolution, 1994

parties. The wise party and representative will use communication that demonstrates respect, understanding, and empathy, while at the same time not compromising their own significantly held position.

- **Preparation for the opening to mediation**

It is preferable that a party to mediation is the significant contributor to the process. Ideally, parties should play the central role, while representatives should guide and encourage their client. Strategies used by the astute representative in order to empower a apprehensive client could include: sharing the opening to the actual mediation, reassuring the client that any gaps of information will be filled in, the use of open-ended questions to elicit information from the party, and (if necessary) time-out periods.

- **Regular assessment of the issues from all points of view**

Preparation involves being sure a party and their representative have an understanding as to what motivates both parties. This may mean the representative needs to constantly pose questions that are variations on the themes, "How do you feel about this dispute?" and "What do you want to really accomplish?". These three questions can be helpful to focus the mediation process:

- a) What are my real concerns, interests, needs: (reasons behind positions)
- b) What are the other party's real concerns, interests, needs?
- c) Without compromising my fundamental needs, what can I offer in helping the other party to meet something of their needs?<sup>7</sup>

- **Be prepared to constantly re-evaluate the situation**

Negotiating in mediation is not about compromise but it does involve flexibility. Compromising or undermining important concerns and values will inevitably lead to poor agreements. However, a skilled negotiator will be prepared to constantly re-evaluate one's own goals and wants in the light of information as it emerges during the process. Good negotiators regularly ask questions and mediation issues ought to be constantly assessed in the light of these questions whether they be posed by either of the parties, their representatives, or the mediator. It is necessary to remember that surprises happen during mediation. Parties often hear differing perceptions, new facts, and contentions.<sup>8</sup>

- **Avoid "overdoing" expectations of mediation**

While ideally, mediation can offer win/win outcomes, realistically the essence of most successful mediation outcomes is "mostly okay/mostly okay".

- **Understanding the significance of the past, present, and future**

The more traditional methods of settling disputes focus exclusively on what occurred in the past, whose behaviour was the cause of something, and who suffered. Rather than focusing exclusively on the past and judging who is "right

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<sup>7</sup> Mares-Dixon J of CDR and Associates, LEADR Training for Advanced mediators, 1996CDR

<sup>8</sup> Arnold, White and Durkee ibid

or wrong", mediation is more about recognising that the parties need to settle the past to be able to "live their future"

- **.Understanding that mediation can be hard work**

Contrary to the popular belief, mediation is not a "soft option". Mediations invariably move through seemingly intractable stages and, in order to be successful, determination and a range of skills are needed from all participants. Keep in mind that some statistics place the dissatisfaction rate with Court-related process as high as 95 per cent for winners or losers<sup>9</sup>. Mediation does allow for parties' choice over outcome and opportunity for some real resolution.

- **Assurance of support during the final stages**

There is a possibility that representatives may have more active involvement during the latter stages of the mediation process. Support and assistance through assessing settlement options, preparing terms of agreement, etc.

## **Conclusion**

Mediation represents a bringing together of complex processes. Any success, whether in the form of some tangible agreement or improved understanding has their origin in the multi-faceted nature of the dynamics that occur during the process. The mediation is like a reservoir of water in which seemingly insignificant contributions can build a momentum into unforeseen and concrete resolutions. Similarly, negative communication along with an inappropriate mind-set erodes into any expectation or a reservoir of goodwill. This is why a different approach to preparing and conducting negotiations in mediation is so important.

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<sup>9</sup> Arnold, White and Durkee ibid