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MEDIATIONS AS AN ADVOCATE

Introduction

Mediations are commonly undertaken by solicitors, without assistance from Counsel. Many barristers have limited experience of mediation, or certainly used to, and many barristers are temperamentally unsuited to it, or so experienced mediators tell me. There is a tendency to be far too aggressive and confrontational, which is often entirely appropriate in cross examination, but rarely so in mediations. Solicitors are often much better adapted temperamentally to mediations, where an appearance of gentle friendliness and persuasion is often very helpful. There is rarely any point in attacking the other side, as it only gets their backs up and normally impedes settlement.

On the other hand, mediations are like trials in two other ways. First, detailed preparation is the key to both. Secondly, one requires a good measure of underlying ruthlessness. As a result, a barrister who has undertaken many trials may have something to bring to mediations. There has, I think, been a tendency over the last few years for more mediations to involve Counsel, particularly for the claimants, probably because their lawyers may lack the specialist expertise of many defendant lawyers.

Unlike many barristers, I have done many mediations since my first about 15 years ago, about 60, roughly half for claimants and half for defendants. I hope that solicitors continue to instruct me to do them because they think I have something to bring to the party, and I don't act in the confrontational way some barristers do. As a result of this experience, and a more recent course on mediation, I have a few suggestions to make as to how to conduct mediations successfully.

There are some books on mediations, which I read in my early days of mediating. They are helpful on the basics. But they don't tend to tell you very much about the techniques, which is what I am going to try to do. I will try to illustrate some of my points with a few anecdotes from mediations in which I have been involved.

Do you need mediation?

I think mediation is often used when it is not necessary to settle a case. The major problem with it is expense. It is inevitably more costly than the normal process of offers and counteroffers, or round table meetings.

Mediations can also be dangerous if there are serious weaknesses in your case, because the flaws in it are more likely to be exposed than in the normal process of making without prejudice offers. Inevitably, parties are likely to be better prepared for a mediation than they are when making offers in the normal way. Given that most mediations spend some time exploring the merits, those weaknesses can be exposed. Of course, if the other side has some serious problems in its case, mediation is likely to be good for your client.

Mediation is useful, broadly, in three cases. First, when the amounts at stake are very large. The additional costs of a mediator are then proportionately modest. It is worth the investment to achieve a sensible result. Secondly, where there are several parties. These tend to be cases which are quite difficult to settle. I had a case several years ago which illustrates this. I acted for the claimant, and there were three defendants. We were likely to succeed against one, but probably not against more than one. All three defendants argued, quite plausibly, that they were not liable. Two of them were prepared to offer sensible sums of money. The third was not, on the basis that he was unlikely to be found liable. He was only willing to offer a token amount. Eventually my client went away for slightly less than he wanted, the two reasonable defendants paid more than they should have, and the third paid considerably more than he was willing to do, but much less than everyone else thought he should. I don't think that case would ever have settled without a mediation.

Thirdly, mediation is useful when the other side has unrealistic expectations of the value of its claim or defence, or is badly advised. For instance, sometimes claimants and their lawyers to have far too rosy a view of breach, and the defendants are too optimistic with regard to the damages which are recoverable. A good mediator will be able to ask each party to answer the other side's points. If they don't have a sensible answer, the weaknesses in their case will be exposed and they should see that. They are also likely to take this better from the mediator, who is neutral, rather than from the opposing party.

But I don't think mediations need to be confined to these types of case. Let me give you an example. A while ago, I was instructed in a mediation in a complicated case with a lot of issue. There was a reasonable amount at stake, some hundreds of thousands rather than millions, but not enough necessarily to justify mediation, when the other side was well-advised by competent lawyers. The mediator managed to identify that there was a particular legal point, scope of duty, where the parties were actually in fundamental disagreement. She got me and the silk on the other side to discuss the point, without our clients. I don't think either of us persuaded the other to change our minds. But we did end up with a better understanding that there was another credible point of view. We ended up settling, which I don't think we would otherwise have done.

Choice of mediator

There are very many mediators about. Most are good, a very few are not. I have only come across one very bad one, the rest have been fine, but some are obviously better than others. Some may suit the way you wish to conduct a mediation, some many not. Some may be particularly good for some types of mediation. I have seen the best mediators able to get the other side to see that they don't have answers to the points we put forward. They can broker deals in cases where I never thought it was likely to be possible. They have a range of techniques available to assist in achieving settlement. Those are the mediators that I think you should be looking for.

I suggest you should be reluctant to agree to a mediator unless you or a colleague have experience of them. On the other hand, you don't have to reject the other side's choice of mediator on the basis that if they favour him or her, that mediator will be biased towards them. I have never found that. A partisan mediator does not get repeat business.

Here are the qualities I think are most important.

First, experience. Mediators learn from experience, just as we all do. Some have done hundreds, even thousands of mediations. The best ones not only have a range of techniques, but they have come across all sorts of litigants and have experience of how to deal with some of the quirky

types who end up litigating. In a very few cases, though, mediators who have done little else for many years can end up getting stale.

Secondly, a mediator should be personable. Many good judges are not necessarily particularly personable. They don't have to be provided they are reasonably polite. A very few of them, of course, are not even that. Good mediators are good with people. They can quickly get to know the parties, and establish a relationship of trust with them. The techniques are not particularly difficult. The mediator will generally start by discussing almost anything apart from the case, then talk about the case in broad terms seeking to understand the parties' recollections and views, and only later getting stuck into the issues when some relationship has been established. But some people are obviously better at this than others.

Thirdly, intelligence. I think this tends to be underestimated. Most of the cases I have dealt with have had relatively complex facts and law. A mediator really needs to be able to get on top of the complexities of the case to give substantial assistance to the parties. He or she needs to be able to work out what are likely to be the real strengths and weaknesses of the case, so that he can discuss those points by asking what the answer is to the other side's argument, which may have the effect that they change their position. In my experience, what separates the very best mediators from the others tends not to be experience or temperament, but intelligence.

Let me give you an example. I had a case on behalf of a plutocrat who was suing a surveyor for fraud. We had a reasonably good case. My client was easily able to afford to fight all the way to trial. He told the mediator that the claim was a matter of principle. That is not, of course, a very helpful attitude if you want to settle the case. When the other side had made an offer the mediator asked my client what offer he wanted to make. My client said that the other side had been forced to pay £1m into court, I cannot recall why, and he would take that. The mediator put his head on one side and said that he did not see how he could put that to the other side as a principled offer. He had effectively exposed the fact that my client's principles were secondary to the fact that he wanted a deal. After that it was plain sailing.

There is, of course, scope in some mediations for a rather different and more presidential style of mediator, who does not get too involved in the merits of the claim. That may not necessary, for instance if both parties are well-represented and realistic about the merits of the claim.

Preparation and the point of mediation

I think the key to a successful mediation is preparation. In this regard, mediation is not substantially different from trial. Good preparation tends to give you the edge over the other side. And I have seen many parties do worse than they should at mediation as a result of insufficient preparation.

I think first we need to consider what the point of mediation is. The normal answer is to settle the case in order to avoid the uncertainty and cost of litigation. That is part of the answer. But that ignores another important point. You want to settle on good terms, preferably better terms than the case really warrants, and certainly better than your client's bottom line. You get that largely through preparation.

There is one other point to some mediation. Often defendant solicitors use mediation as means of testing the other side. They don't intend to make any particularly realistic offer. They hope but don't expect that the claimant will accept a low offer. What they may want to achieve is that a failed mediation will cause the claimant to readjust his expectations. After all, most claimant's lawyers tell their clients at an early stage that most cases settle, and mediations tend to work. If the clients come out of the mediation believing that the case is now much more likely to go to

trial, they will tend to be rattled, and be more amenable to a poor settlement then or later. Further, defendants' lawyers often hope that telling the claimant face to face that their case is a bad one and why, and that they won't be offered much in the mediation, will assist in lowering their expectations.

But I think defendants need to be a bit cautious here, because this technique may not be helpful, and it can even backfire, for three reasons. First, claimants are often told about this. I certainly always advise my clients about it when I act for claimants. Secondly, you need to be pretty sure of your grounds before using it. The obvious response to make on behalf of the claimant is to press the defendant on the merits of the case. If the defendant's answers are weak, that may actually encourage the claimant. I had experience of this a couple of years ago, when the defendant solicitors employed this technique. They were very disappointed that my clients were not there, which plainly exposed the fact that they hoped to rough them up a bit at the mediation. And their answers to problems in their defence were not very good. Two months later the case settled on the terms we had expected. Thirdly, use of this technique can end up getting the claimant's back up. I came across this in a case where liability was very strong, and the real issue was how much the claim was worth, which was anything between, say, £200,000 and £2m. We had a mediation a month before trial when the last offer from the defendant did not even cover our costs. A few days later we got a part 36 offer which was sensible, albeit on the low side. By that stage my client was enraged, and determined to go to trial, where he eventually got over £1m. If the sensible offer had been made at the mediation, there was a reasonable prospect of getting a deal, probably for rather less than my client recovered at trial. That was ruined by overaggressive tactics by the defendant.

Turning to preparation, I think there are three reasons why good preparation is helpful. First, good preparation will mean that you work out what your case is really worth, and what are your strengths and weaknesses. And as a result, you will have a better idea of what your clients should pay or accept, and the reasons for that. Of course, you may change your mind in the mediation, as if it is well-run you and your clients may be persuaded to modify your views. But it is a good idea to have a well-articulated view from the start of what you think the case is worth. And of course your clients will want to know that.

Secondly, you cannot persuade the other side that their case is weaker than they appear to think unless you know your case well, and have thought through the merits and the arguments. The other side may well press some points which you will not have thought through fully, or even at all. That is reduced by good preparation. You will have thought of most of the points, and if unexpected ones do come up, you will be better placed to deal with them if you know your case well. That is much like what can happen at trial.

Thirdly, you are likely to do better if you have thought through a strategy of how you will play the mediation. What are your tactics going to be? What points are you going to focus on and why? When are you going to do so? What, broadly, are going to be your first and last offers? Obviously, your strategy will have to be flexible, just like in a trial. But it is easier to be flexible if you know your case and have thought through your tactics.

In summary, just like a trial, the best prepared party tends to have a tactical advantage. As a result, we can serve our clients best, by getting the best results out of a mediation for them. I am not suggesting that the case should be ready for trial before you mediate. Often one mediates at an early stage in order to avoid the costs of preparing a case mounting. It is important, though, to have considered carefully what evidence you do want before you mediate. Crucial witness statements or expert reports can be exchanged on a without prejudice basis. Then, on the

evidence you have when you mediate, I do suggest it is a good idea to spend many hours thinking the case through and reading the documents thoroughly.

Some people think that the point of mediation is for both sides essentially to have a chat to see if they can settle the case without either side really having thought their case through. They think that it is inappropriate to get stuck into the merits at the mediation. I think this is fundamentally misguided, as I have just argued, at any rate in most cases. I have attended several mediations where the other side has not thought through the issues. They have tended to do very badly. Ultimately, most cases settle largely according to the perceived merits of the claim and defence. If the other side is not properly prepared, they won't be able to respond to your arguments. If they say, we have a good case on point X, the obvious response is: why? If they cannot articulate why, their position is weakened.

When to deploy your points

There are three stages at which you have a chance to argue your case. The first is in the mediation statement. I think this should normally be a relatively short document which sets out in broad terms what you think the case is about. You want the other side to see broadly what you think are the main points of dispute, and where you think you have a good position. The parties can then engage at the mediation on the main issues. But it is normally a mistake to make all your best points, or any subtle and difficult ones, at too early a stage. You don't want the other side to have days to think through how they can respond.

The second time to deploy some arguments is at the plenary sessions. Most mediators love plenary sessions, although I think that this may be on the wane. Normally, each side will deploy one of their lawyers to make a speech. I tend to develop some of my better points, and respond to some of the points the other side had made in their mediation statement. I think it is helpful that the other side can see that you are confident and mean business. You might also persuade them that your case is better than they had thought it was, although obviously they won't say so.

Thirdly, it is often a good idea to have some arguments up your sleeve to use later. Normally, after the plenary session the mediator will shuttle back and forth between the parties relaying points they each want to make in response to what is said at the plenary session. Generally this takes most of the morning, and offers are not made until after lunch. I don't think this is time wasted. One may make some of one's remaining points during this process, but it may be sensible to keep a few back for later during the horse trading. In particular, the sort of points one makes in cross-examination are often best left to later. Often you don't want to give the other side any warning of them until trial. If the mediation appears to be working, then it may be worth throwing away that surprise in order to assist getting a good deal. For instance, you may have spotted a document which contradicts an important factual assertion of the other side. Or the Particulars of Claim and the Reply may be contradictory. If the mediation is unlikely to succeed, you may want to keep these points back for later. But if it looks like succeeding, then it may be worth deploying them late in the mediation. With a mediator I know and trust, I often given them a short shopping list of points to deploy when they think it is helpful to do so.

Let me give you an example. A few years ago I represented a claimant whose business had burned down. The relevant defendant was an insurance broker. Most of his points against us were bad ones, but he had one which was very troublesome to us and came up relatively late before the mediation. I think the broker's lawyers tried to be clever by saying little about it initially, and then reconvening a plenary session in the afternoon to make a big song and dance about this new point. We were very concerned about it, and had said very little about it so far in the mediation. But we had given it a very great deal of thought, and come up with some sensible arguments. At this second plenary sessions I was able to give the broker a series of points in

rebuttal which looked much more impressive than they were. That was always my strategy if the point was brought up, which it was likely to be. The other side were visibly shaken. My client got a better deal than the merits of the claim probably justified.

The plenary session

This is likely to be the only time you are guaranteed to meet the other side. Here are a few tips. First, be friendly. Shake your opponent's hands. Charm them. Call them by their first names. Take your jacket and tie off. Don't appear to dismiss their points as ridiculous even when they are. Crucially, don't attack the lay client's honesty, or their lawyers' competence, unless you have thought that through as a strategy. If you antagonise the other side, that is unlikely to assist in getting a deal.

I have only once laid into the lay client on the other side. There were good reasons to think he was a crook, and I explained in detail why that was so, and why he was going to be ripped to shreds in cross-examination. Indeed, I started the cross-examination of him until the mediator stopped it. We got a decent deal at the end of the day. I hope my strategy helped that. The claimant was plainly shaken by the attack, indeed that was the point of it. I think it would have put him off wanting to continue the case.

Secondly do not let your client say anything at the plenary session, save in exceptional cases. They may well say something that will not assist. They may appear to be too keen to settle, or too antagonistic, neither of which is helpful. They may show that they will make appalling witnesses. There are exceptions. I was once involved in a case some time ago where my client, a solicitor, had run some personal injury litigation immensely slowly. Fifteen years or so after the accident the original defendant had said that their cover was limited to, say, £2m, and that was all they would offer inclusive of costs, and could have been achieved nearly fifteen years earlier. Our best defence to the claim was that we only had cover which, inclusive of the claimant's costs, was significantly less than the claim, and the solicitor had no assets. This was not an attractive defence in the circumstances. The claimants came into the mediation, one in a wheelchair, and they were plainly angry, and justifiably so. At the plenary session my client apologised for what had happened, and said how he was deeply ashamed with what he had done. We had agreed before that this is what he was going to do after he suggested it. The claimants' anger dissipated. We got a sensible deal.

Thirdly, don't be afraid to make concessions when they are called for. If you have weak points, it may be sensible to accept them publically. You will then be taken more seriously when you say that there are other points where you think you are on strong grounds.

Fourthly, it is normally sensible to make clear that you are flexible. I think it is worth setting out what you think are your good points. But also say that we are willing to give serious consideration to any points you may wish to make. If you are well prepared, the other side won't actually have much to say that you have not thought of. If they do, then they can see that you then shift your position in a reasonable way.

Fifthly, do be sympathetic, even apologetic. If you have admitted liability as a defendant, an apology often helps smooth the way. Say your clients are sorry for the errors they have made, and they wish to make suitable compensation for the loss they have caused. There then follows, of course, a very big but, when you explain how no significant loss was caused by the negligence. I have seen this used by a number of defendant's solicitors, to good effect. Often the claimants feel very bitter about what has happened, and personal animosity to the defendants. An apology really can help. If the claimants aren't angry, that will help focus them on the risks and expense of the litigation, which they won't like, and that will help the defendants.

Sixthly, don't be too ready to respond to what the other side says at the plenary sessions. You may be fully prepared to do so then and there. But if they make points which you want to think through fully before you respond, then don't. I tend to say that we may come back to you later on some of the points you have made, that I think I know the answer but want to discuss them fully with my team first. We then have an opportunity in private to work out the best points in response which we wish to make. I often find that in discussing the issue, members of my team will add some useful points, or suggest that some of the points I was thinking of making may not be the best way to proceed.

Seventhly, if you are doing the speaking, ask your colleagues to pay attention to the reaction of the other side to what you say. The advocate is likely to be too busy to pay much attention to how the other side react. Quite often it can be revealing. The other side often look uncomfortable, or surprised, by what they are being told. That may reveal a weakness. The reverse is the same for your team: keep a gently smiling poker face.

Offers

What I have to say here applies to the normal run of cases. There, are rarely, some cases where a defendant will make an offer at the outset of the mediation, and explain that he is not prepared to increase it. There are, even more rarely, some cases where a defendant has no offer to make at all, often for good reasons.

Who should make the first offer? Mediators say this does not matter. I think it often does. Normally the defendant makes the first offer, unless there have been offers made before the mediation culminating in an offer by the defendant. If you can get the claimant to make the first offer, you have two advantages. You have already scored a hit: they have chosen to act in way which signals weakness. And you can craft your response better.

Let me give you an example, which may be contentious. Suppose you have a claim on behalf of a claimant nominally worth £1m, but you would in fact be prepared to settle at about £500,000. Obviously one would want to get a settlement somewhat higher, say £600,000 or so. If the defendant's first offer is £100,000, one might counteroffer, say, £900,000. The defendant will say that the offer is unrealistic, you can respond that they started it. If the defendant's first offer is £400,000, you know that you are likely to be able to get them over £500,000, as they have probably signalled that they think the case is worth more than £500,000. So the first counteroffer may be £850,000. The sensible first offer by the defendant in these circumstances, assuming they have a similar view of the case (which is I believe more common than one may think) is, say, £300k. The claimant should probably not respond with a counteroffer of £700,000, as that may signal that he may be prepared to settle for £500,000. A better counteroffer would be £750,000 or £800,000.

These are the sorts of discussions I think it is worth having with the clients: where do we want to pitch our first offer and why? Where do we want to end up? I don't think these are easy questions. Of course, what you then do often has to be changed given the responses of the other side.

The first offer

The first offer is important. As a defendant, it cannot be too high, or you do not have sufficient room to negotiate. But it cannot be too low. It is unlikely to get the other side to leave the mediation. But if you then have to go up leaps and bounds with your further offers, you may lose some credibility. Similarly, on behalf of claimants. It will be rare for an offer of, say, 90% of the value of the claim, to carry much credibility. Many years ago, I did a case where my client

solicitors had got a large clinical negligence case struck out through incompetence. The first offer we made, I should say on my leader's advice, although I did not dissent, was very low. The very grand leader on the other side, was attending the mediation in his short gap between two appearances in the House of Lords. He simply said to our offer that his client was a patient, and it was obvious he could not possibly justify a settlement on the terms proposed to a Judge. He said he was a busy man, he asked for a sensible offer, or he would leave the mediation. Our negotiating position was seriously damaged by our low first offer, which then had to be followed by a second sensible offer.

Reasons

Normally, the mediator will want you to come up with reasons for your offer. There is sense to this. It is likely to reveal the points where the parties are furthest apart and on which the mediator has to do most work to bring them together. I think this should be reversed-engineered. Work out what you want to offer and why, normally a proportion of what you are eventually prepared to pay if you act for a defendant. Then justify it. If your justification is not credible, then your first offer is probably too low. Make sure your justification accords with what you broadly think, and what you can glean from the other side's perception of the case. For instance, if a claimant appears quite concerned about contributory negligence, and you don't think it is a big point, do put in a reasonable deduction for that factor, because the claimant will take it seriously. You also have to be aware of what discounts you articulate which you would be prepared to increase. I think crafting the reasons for your offer is difficult and requires careful consideration. I have seen too many cases where the other side's reasons just don't stand up to scrutiny, and as a result they lose credibility. If other side's justification does not really make sense, then you know you should be able to beat them down. For instance, if there is a real risk of not establishing liability, and the claimant only give a 10% discount for that, you know there should be some room for manoeuvre.

Further offers

You as a defendant have offered, say, £400,000. The other side have offered, say, £600,000. What does this tell you? You don't know, but what it may well suggest is that the claimant is prepared to settle at £500,000. Where do you go next? If £500,000 is in fact acceptable, you might think of going to £450,000 then £475,000 then £485,000. One common scenario is that each side comes down by decreasing amount. The second offer is, say £100,000 more or less than the first offer, the third offer is £50,000 more or less than the second. You may soon reach a stage where the parties are still quite far apart, say at £400,000 and £600,000. It may well be that you are prepared to pay or accept significantly more or less, say another £100,000, so the parties would meet in the middle. If you suggest £500,000, which is splitting the difference, that may be bad tactics. You have been coming down, or up, in increasingly small amounts, and now you are proposing a big jump. The other side should then reject the offer, and perhaps suggest that they will make a significant change, but only of £50,000.

One solution is to get the mediator to do the work. One possibility is to ask him to propose £500,000, which is the deal if both parties accept it. But if only one side accepts then he will simply say there is no deal without telling either side whether the other was willing to accept it, so your negotiating position is not damaged.

Final offers

I do not think you should make a final offer, unless you mean it, for two reasons. First, I think that as a matter of honesty a final offer has to be the last offer you are prepared to make on the day. That does not mean you won't be persuaded to go up or down a little bit to get a deal. Nor

that you won't be prepared to make a further offer a few days later after thinking things through again. Secondly, a final offer largely ends the negotiations. If it is not acceptable to the other side, they may well walk away.

Be tough

Everyone knows that defendants normally attend a mediation in order to offer money, and that defendant insurers want to pay money to get rid of cases. Those are a defendant's weaknesses. But defendant insurers have strengths. They can afford to take the risk and fight a case to trial, whereas claimants often cannot, or at least not so easily. An insured defendant can use that strength.

I recall a settlement meeting in a small claim which ended with a final offer from the claimant of, say, £150,000. We, the defendants, had offered, say £135,000. £150,000 was a perfectly sensible settlement. I advised my clients to leave the mediation, leaving the £135,000 on the table until the end of the next day. The claimant did so. She was having to finance the litigation herself, which was a big ask for her. We therefore had the upper hand. Of course, it could all have gone wrong. But it was really very unlikely that the claimant would not in fact have been willing to do a deal for £150,000 a few days later.

Other points

A few other tips. First, have a settlement agreement already drafted, obviously with blanks. It takes a surprisingly long time to draft one at the end of the day. Everyone is tired and wants to go home, and there is a risk that tired lawyers will not draft as well as they are able to if fresh. If you want, for instance, a confidentiality clause, that takes some thought. The draft agreement may need to be refined, but it saves a lot of time if you have it in outline already.

Secondly, introduce your other terms early. Defendants often want a confidentiality clause and no admissions of liability. Introduce them at your first offer. They will normally be accepted in principle. If you only introduce them when a deal is done or nearly done, the other side may cry foul.

Thirdly, beware of costs inclusive offers. Defendant insurers like them. They can create dissension between claimants and their lawyers. That may be good or bad. I don't have strong views either way, it depends on the case. Generally, though, it is easier to settle cases by settling for a sum plus a sum in costs, particularly because the claimant's costs are often very high and are harder to settle than the claim. But if costs are a sticking point, the simple solution is to have them assessed. If time allows, you may be able to settle the claim including paying costs to be assessed if not agreed, and then, with goodwill from both sides, settle the costs too.