

Opportunity costs — preparing for mediation

Professor James Brown and a LEADR panel advise lawyers on preparing both their clients and themselves for mediation.

Brian Bligh reports

This presentation was given as part of WA's Law Week and was hosted by the Law Society of WA.

It was facilitated by Judge Chris Stevenson, District Court of WA and a member of the WA LEADR Executive.

Guest panelist: Professor James Brown of the Law Faculty at Stetson University in Florida, US.

Other panel members:

- Graham Castledine, (solicitor and mediator)
- Scott Ellis (independent bar – Francis Burt Chambers)
- Robin Tapper (Family Law ADR practitioner).

The report is based on Brian's notes and so are not to be assumed to be direct quotations of Professor Brown or the other panelists.

Professor James Brown

How do we open the lawyer's eyes to expose the client's real disputes and hidden agendas?

- Does the client see the other party in two or three dimensions?
- How does the lawyer change the client's attitude from win/lose to mutual gain?
- How does the client see the expansion of the solution alternatives and the

risks of implementing these alternatives?

ADR/mediation

Traditionally, attorneys in the USA saw mediation and ADR as a diversion which threatened their bottom line. This is the attorney's greed coupled with the attitude that they are "hired guns" for their clients. This attitude has gradually been changing since the insurance companies lobbied the legislatures to put caps on damage recovery, particularly in personal injury.

Attorneys need to advise, explain and explore all the alternatives to the client's problem. This *includes* litigation.

This trend started before clients began suing lawyers for malpractice when the client did not like the litigation outcome.

Maximising client's interest

In civil matters there are multiple ways of providing relief to the client.

The attorney needs to remember that complex interpersonal relationships are involved. These are not necessarily dealt with best by a court (which deals with one off monetary payments).

Courts can't enforce compliance. Only willing parties on both sides working towards the same objective are likely to ensure compliance.

Lawyers must realize that ADR is not a threat to their profits. They need to educate their clients to the risks and rewards of seeking different types of remedies.

Lawyers must carefully evaluate the economics of the client and attorney relationship.

For example in a boundary line dispute, a landlord/tenant dispute with two property owners, or a parts supplier dispute, the lawyer needs to ask open questions such as: What do we need to understand about the client's culture? (Culture frames the context in which conflict occurs.)

The lawyer needs to ask a range of questions to understand the client's assumptions.

- What does the client really know about the trial process? (Have they been involved in another court trial or in ADR of any sort)?
- Do they have any legal education or legal background?
- What is the client's attitude? Would they blame the lawyer for time-wasting or/and increased cost? Does the client think in terms of zero sum game (i.e. win all or lose all? The other party wins therefore I lose to the degree they win.)
- Why does the client want the lawyer's help?
- Why do they want to litigate? (Is someone pushing them to litigate? Do they know someone who has been boasting about a large court settlement?)
- What is their level of confidence in their case? Do they underestimate the risk of a court loss?
- Has the client had any experience as a witness?
- Has the client had any experience in negotiation?

- Who else is likely to be called as a witness in the court proceedings?
- Is the client a control freak or a threatening bully?
- Does the client understand the whole process of interviews, interrogations, etc or has their perception of litigation been coloured by American television dramas?
- Is the client's view of litigation one or three dimensional? Are they aware of cost implications — the money required to be paid upfront and the time involved in litigation?
- What is the client going to do while they are waiting for the lengthy litigation process to unfold?

Essentially, have you, as the lawyer, spent enough time identifying the interests of the client and educating the client to the risks of litigation?

By asking these questions, the lawyer will come to fully understand why the client is there.

Graham Castledine

Mediation is not a point scoring exercise. However, it can be difficult to focus on what should be a problem-solving process (not an adversarial contest), if the other party's lawyer is a "gunslinger" lawyer?

We need to set the context, focus the client on problem solving and coach them in interest-based negotiation.

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Interest-based negotiation is not about compromise and concessions but about

the parties being creative and open in order to achieve an outcome of mutual gain. It is not about having a negative mindset.

Some clients do not want to get involved in negotiation or ADR because they see it as an admission of weakness. Others see themselves as victims and wonder why they should make an offer? However it is all about being creative.

Lawyers have to have the ability and fortitude to sit back and let the process unfold.

Q: In negotiation and ADR, what would be the ideal situation?

A: The ideal situation would be the lawyer fading into the background with the parties talking *directly* to each other. It is best if the parties themselves come up with the ideas and solutions. Lawyers have to have the ability and fortitude to sit back and let the process unfold.

Scott Ellis

There are different types of mediators. Some mediators don't want to hear from the lawyers but from the parties, or vice versa. Some mediators express their views on the merits of the two cases. In order to prepare themselves and their clients properly, lawyers need to find out what sort of mediator they are getting.

Lawyers must prepare their clients for how the mediation is likely to go. Client's need be aware that mediation takes a long time, and they need to know what to expect. The client needs to be prepared for the long haul.

Clients need to realise that the other party might say things that they will not agree with, that may be a criticism of themselves.

The lawyer needs to prepare themselves and the client for negotiation rather than for a court appearance. This is not advocacy in the court sense.

They need to know that the mediation might come to an impasse and the lawyer needs to prepare for this eventuality.

The lawyer should be prepared to listen because:

- The other party may simply want to be heard. This might be the most significant factor in the litigation for them;
- You may learn something to assist you in framing your offer or preparing your case.

Robin Tapper

What are the qualities of a good lawyer in preparing for mediation?

Robin surveyed three judges, two barristers and three solicitors in her search to discover the qualities of good lawyers in the adversarial process.

Are these the same qualities that lawyers need to bring to mediation?

The virtues of lawyers in the adversarial process included:

- Know your clients case by listening;
- Active listening and treating all parties with respect;
- Balance, objectivity and judgement;
- Professional judgement and a quality of humanity;

- Trust. The lawyer needs to be trustworthy with due regard to fairness of process.
- Honesty and integrity (this is not a game of deception).
- Persuasiveness. A lawyer needs self confidence in framing arguments.
- Diligence (not laziness).
- Not perceive themselves as a hero casting gloating glances to their client when they think they have scored a point.

The lawyer needs to think generally and *laterally*.

Education of the client

Some clients present as passive subjects thinking that their lawyer will solve their problem.

We need to ascertain the different qualities between the mediation and adversarial culture and lean more to the education of the client.

Taking the parallel of a doctor being asked to enhance the health of their patients rather than fight the disease, we can think of the lawyer as giving counselling and advice in conflict situations.

In this way, we can see mediation as part of a shift in legal culture. We need to ascertain the different qualities between the mediation and adversarial culture and lean more to the education of the client.

Comments and questions

Professor Brown: If we consider a boundary dispute, the party needs to think about the cost of litigation, for example, to move a fence three inches (a real case which proceeded over four years).

Is the \$10,000 and the court trial worth it? What is the next best alternative to court proceedings? For example, the other party apologising for ignoring the client for the past four years might be a large part of the settlement.

What is the crucial bottom line of your client? Is the answer: to execute a deed to change the title so that the boundary line is moved three inches with the cost of the filing in the court split?

At what point does the hammering at each other become not worth it?

The lawyer needs to determine what their client's bottom line is. That might not be what it appears to be.

For example, what if your client goes home and tells his wife that now he has a lawyer "so you can tell your mother that I do have back-bone!"

This is a possible hidden agenda. We need to understand the nature of the conflict hence we need skills in active listening.

Comment: Has the client learnt the art of negotiation? What would the client offer to meet their other party's concern? How does your client think the other party will react to any particular offer?

We need to have a system where both parties are stimulated to make offers and be creative in their ideas to solve the dispute.

Lawyers need to be objective (i.e. anticipate the other party's case and assess its merits objectively). The lawyer's objectivity is a vital aspect of the client's preparation for mediation or ADR.

Q: What if loss of face is a vital factor in the other party's deliberations?

Panel: Mentioned a book by Richard du Cann, *The Art of the Advocate*.

Clients need to determine what is better than no deal at all and what the alternatives are.

Q: How is a lawyer to deal with the other lawyer in the mediation process when they may not have prepared *their* client in the same way as is being suggested here?

Panel: Try and create a dialogue with the other lawyer *before* mediation.

Try to engage the other client *directly* through the help of the mediator during the mediation.

Ask questions and actively listen.

Professor James Brown: In Florida only 2.5% of all litigation matters actually end up in court largely as a result of mediation.

Question: Do both lawyers come to mediation with a presumption that the dispute will have a mediated solution?

Lawyers have to decide the most important matters to be dealt with amongst all the trash that is thrown up.

Lawyers need to prepare their clients for the eventuality that both lawyers might need to leave the mediation room, forcing the parties to discuss the dispute alone and work out a unique solution to their joint problem.

Brian Bligh is a Barrister and Solicitor at Klimek & Co, a Perth law firm specialising in family law and related litigation. With a late vocation to the legal profession, Brian graduated from the University of Tasmania in Hobart with a Bachelor of Laws in 2002, followed by a Graduate Diploma in Legal Practise from The Queensland University of Technology in Brisbane. A native to WA, he was admitted as a Solicitor in the Supreme Court of Queensland in 2003 and commenced work as a Solicitor in Brisbane. Brian has also practised law in the Queensland border town of Goondiwindi.

In March 2008 Brian Bligh was admitted as a Legal Practitioner in the Supreme Court of Western Australia.

Brian had earlier worked in farming, education and administration in rural and urban Western Australia, Darwin and Brisbane.