

HANDOUT

“A RIGHT MOMENT TO MEDIATE”

by John Anthony McGruther, Mediator

1 ‘The time for negotiation has arrived’

- The chosen moment has more often than not been too late rather than too early.
- Is there a wrong moment to mediate? The answer may well be, ‘yes.. but not too many’.

2 Methods of approach

- Apply lawyers’ experience and wisdom in the encouragement of clients, from the earliest moment of instructions, towards party and party resolution, not towards party and party separation or division.
- Litigation Pleadings Counter-productive to Mediation process / a lot of unnecessary reading for Mediator – a brief Issues Statement forces representatives to ‘think hard’ about central core of dispute and recording it briefly.
- Identify earlier not later the potential source of and course of conflict.
- Identify at all stages the barriers preventing resolution.
- Plant the seed of an ‘open to resolution’ mindset from ‘day 1’ of instructions.
- Professionally responsible to include ADR clauses in Contracts.
- Watch for every opportunity to negotiate/continue to negotiate.
- Keep Mediation simple – emphasis in the parties staying in control of the process/outcomes - not your process/outcome.
- File Audit Reviews
- Emphasise strongly what Mediation is not and what litigation is.

3 Benefits

- Encouragement towards Mediation is essential public relations – good for you and your Firm.
- Real Corporate value in PR terms– early resolution – e.g. insurance claims litigation settlement.
- Litigation not necessarily brave, simply amounts to “delegating” the dispute. But ADR always a brave and courageous initiative – successful and permanent.
- A better quality of closure as well as permanency of result.

- Relationship preservation. Often saves clients' own commercial relationships and can enhance solicitor/client relationships.
- Creativity/flexibility of settlement terms.
- Permanency of result if settled.
- Sense of personal or corporate achievement.
- Productive at every level.
- Saves the time money and expense of litigation.
- Frees lawyer up for other work. Leads to quicker bill turnaround.
- Research shows Company Directors favour Mediation over litigation.
- Courts frequently redirecting matters for Mediation – but you don't have to wait for Court to initiate it.
- Courts need not be primary decision-makers.
- Time management – Mediation contrasted to litigation wins hands down.
- Conducive to good health.

4 The Right Moment to Mediate – Responsibility

- Mediation offers progressive opportunities to resolve disputes more quickly, and opening the Court system up to truly unresolvable matters.

5 Statistics (not lies) – and a Right Moment to Mediate

- Initial litigation claim filing to 1st day of hearing occupies on average 2.1 years.
- Parties/solicitors/barristers attend Court on 6.1 occasions for directions, call-overs etc.
- But 72% of cases resolve within the last 5 business days prior to 1st hearing day.
- Mediations success rate is between seventy per cent (70%) and 80% and Mediations average not more than 3 hours.

6 That 'Right Moment' – In Summary

- Many “right moments”. Very few “wrong moments”.

7 In Conclusion

Lawyers play a vital role in conflict resolution. They offer a unique form of client service providing value for money and practical problem solving rather than expensive legal argument and arcane procedures, and offering their clients practical support, mentoring, counselling, risk assessment and respect.

John Anthony McGruther

ACCREDITED SPECIALIST IN BUSINESS LAW & NATIONALLY ACCREDITED MEDIATOR

John A. McGruther, Solicitor | Suite 201, Level 2 BMA House, 135 Macquarie Street, Sydney, NSW 2000, Australia
 T + 61 2 9247 0101 F + 61 2 9247 0202 E mcgrutherlaw@ozemail.com.au DX 198 Sydney