How Lawyer-Mediator cooperation creates successful outcomes. By Kevin Smyth

Dispute Resolution Lawyers and Mediators, and many are both, know from long experience that timely and thorough preparation significantly enhances the chances of good outcomes being achieved whether it be at a trial or a mediation. This blog focuses on that required in the case of the latter, and particularly so when it comes to need for lawyers to work closely with the mediator prior to the mediation day.

I cite below what I and other experienced mediators consider to be akin the 10 Commandments!

Allow sufficient time for <u>all</u> to prepare thoroughly.

I emphasise the word 'all' because if one party and/or his lawyer, or indeed the mediator, comes to the mediation under prepared, it follows that the prospects of it providing a successful outcome are very likely to be much diminished. Inadequate or late preparation by one side or team will prejudice the efforts the other, and the mediator, when it comes to ensuring that the arrive at the mediation fully prepared for it. Ideally a period of one month prior to the agreed mediation day should be allowed from the date when the mediator is appointed. In this regard it should be borne in mind that soon afterwards he or she will very likely set a suggested pre-mediation preparation timetable for the parties' lawyers to agree. This will specify 'by when dates and times' for:

- The mediation agreement to be signed.
- The mediation bundle to be agreed.
- It to be delivered to the mediator and copied to the other party.
- Position statements to be prepared and exchanged (if required, which is usually the case).
- The mediator's post reading, pre-mediation final discussions with the parties' lawyers and/or the parties themselves, ideally not less than 72 hours before the mediation day.
- If the mediation is to be conducted online, if advisable, agreeing a date and time for a Zoom practise session pre-mediation.

Be readily available to the mediator.

The tighter time becomes in advancing the pre-mediation preparation process the more important it is to respond quickly to requests made by the mediator, or indeed the other party's lawyer. That may be stating the obvious but often a mediator's attempts to ensure that things that need to happen in a timely fashion come to naught, which is unhelpful to the process and thus everyone involved in the mediation.

Provide a brief synopsis of dispute and the key issues.

Ideally this should be agreed between the lawyers and set down in print on no more than one side of A4 before it is submitted to the mediator very soon after his or her appointment has been made. Armed with that, the mediator will be better placed to prepare and circulate the suggested pre-mediation preparation timetable; and quite possibly also to identify the existence of 'hurdles' that may need to be jumped prior to the mediation day. Moreover, that synopsis (or alternatively by way of one party's lawyer sending the mediator 'for his eyes only' synopsis) should alert the mediator to the existence of matters that need to be catered for from the word go: for example that one party will want the other to provide a written apology as part and parcel of any settlement agreement, that one party will want support at the mediation from a family member or friend, that any agreement reached will have to be approved by a third party such as an insurer etc., etc.

Everyone to work from one documents/correspondence bundle and prepare it early.

Documents and correspondence produced in a confetti like fashion before or at the mediation will possibly complicate matters, bring about frustration, quite probably vexation too and inevitably prolong the duration of the mediation which may well have adverse costs consequences for the parties. As with a trial, the bundle should be paginated, have an index to it and be submitted online with a password. Additionally, where the character of documents permits, they should be the subject of OCR (optical character recognition). This is the process which turns the document from a mere picture of a document to one in which the text can be read as text so that the document becomes 'word-searchable' and words can be highlighted in the process of marking them up.

Deliver Position Statements in good time.

Almost always it is helpful to the mediator and thus the mediation process for the parties to prepare and exchange position statements simultaneously, providing the mediator with copies at the same time. There are though some cases when there is little need for this; an example being when a trial or an appeal hearing is imminent, and the parties have already exchanged detailed skeleton arguments. What the mediator needs to know though is what each party's position is regarding to individual issues and what their approach is going to be when participating in the mediation on the day that it takes place. That does not mean to say though that information need be provided regarding any intended or possible forthcoming settlement proposals, but it is helpful for the parties to summarise what, if any, settlement offers they've made in the past and, if so, on what basis i.e. open, Calderbank or Part 36. The parties' lawyers should also have it in mind that it is open to them to provide the mediator with written information 'for his or her eyes only' heading that documentation accordingly. Whatever though, it is critically important that position statements be exchange in good time prior to the mediation and not at the 11th hour! The mediator will certainly want to have seen them before he or she engages in their post reading, pre- mediation day discussions with the lawyers and/or the parties 72 hours or so beforehand– see below.

Make sure that the mediator has all that he/she needs at least 72 hours before the mediation.

The mediator will of course want to come to the mediation well prepared and for that to happen, much needs to be done in the last 72 hours or so before the mediation. By way of example, the mediator will want to consider not only the legal and evidential issues that are at large but also the nature and extent of the financial and perhaps reputational risks that each party is at were the mediation to fail and litigation be prosecuted to a fully contested trial. To that end it is likely that the mediator will want to prepare some BATNA -V- WATNA comparatives (if the mediation were to fail to result in a settlement and there were to be a trial, what each party's best alternative to a negotiated agreement is likely to look like when compared with his, her or its worst alternative to a negotiated agreement, such being expressed in monetary terms) to be shared privately with each party, probably during the early part of the mediation.

Confidentially or otherwise, provide the mediator with relevant costs information.

The BATNA -V- WATNA comparison referred to above cannot be prepared by the mediator prior to the mediation unless beforehand he or she is provided with details of each party's estimated costs, inclusive of VAT and disbursements, up until the end of the mediation day; and were there to be no settlement secured at it, the like estimates from then until to the end of an actual or notional trial. Often it is the case that this information is not provided in a timely fashion, or at all, which usually proves to be most unhelpful and on occasions patently prejudicial to the chances of a settlement being reached on the mediation day. Court Ordered Costs budgets will not of themselves provide to the mediator a sufficiency of information for him or her to come up with realistic split costs estimates for each party pre and post the mediation.

Be readily available to the mediator to conduct his or her substantive pre-mediation discussions.

Many reading this blog will conclude that I'm doing no more than to state the obvious, but I would ask them to take it from me that there are occasions when lawyers are very hard to track down and make themselves available: and until recently I used to be a practising one and hence, I know what the pressures are like! Be that as it may, it is nearly always the case that the final discussions that a mediator has with the parties' lawyers, or indeed the parties themselves, immediately prior to the mediation day prove to be crucial in the context of enhancing prospects of success.

Brief your client upon the mediation process or invite the mediator to do so direct.

Again, it will appear that I am doing no more than to state the obvious but like me, many mediators find that surprisingly lay clients often come to a mediation as one of the parties believing that it is the mediator who is going to decide the rights and wrongs and provide a result in the form of a judgement.

Together with your client, carefully think through the 'ifs' and 'buts', your client's 'on the day' mediation strategy and come to the mediation with top line and bottom-line thoughts on settlement offers.

Also, obvious but often absent or lacking!

And now a final thought to ponder. Post Churchill, Court ordered mediations are now a reality and timelines for them are likely to be tight in which case early dialogue with the chosen mediator, or with a practitioner who might be asked to mediate the case, is likely to prove to be very beneficial.

[MAY 2024]