



THE MEDIATOR'S VIEWPOINT: HOW YOU CAN BE SUCCESSFUL AT MEDIATION

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THE MEDIATORS

- Who we are
- Mediation Accreditation system
 - Resolution Institute
 - IAMA – Institute of Arbitrators and Mediators Australia
 - LEADR – Association of Dispute Resolvers
- Different types of mediation work, including
 - Post the commencement of litigation
 - Pre-litigation



REASONS FOR MEDIATION

- Supreme Court of NSW
 - Practice Note SC CL 7 - *Supreme Court Common Law Division - Professional Negligence List*
 - Practice Note SC Gen 6 *Supreme Court - Mediation*
- District Court of NSW
 - Practice Note DC (Civil) No. 1 *Case Management in the General List*
- Avoiding trial - generally speaking, no-one wants to go to trial - a helpful starting point

POSITIONS AND INTERESTS

Usually a tension – both interparty and intraparty

□ Positions

- What you want
- Generally: ie. verdict and judgment – plain on the position papers – breach/causation and quantum of damages – are legal based

□ Interests are other considerations

- Motivations, fears, needs – some are typical and unsurprising: ie. costs, delay
- Some are particular: ie. a party's own personal/family circumstances, cultural/other embarrassment, avoiding litigation of an issue



WHAT DOES BEING 'SUCCESSFUL' AT MEDIATION MEAN?

- Achieving an outcome that your client is happy with
- Avoiding an arbitrated outcome

HOW TO BE SUCCESSFUL – PREPARATION PRIOR TO MEDIATION

- Prior preparation is fundamental to achieving success
- Position paper – be clear – engage
- Prepare yourself
- Prepare your client – managing expectations
- Prepare the other side – communicate key position and interests



MATTERS TO ADDRESS IN ADVANCE OF THE MEDIATION

- ☐ What is your position?
- ☐ What is in your interest?
- ☐ What will you do if the other side behaves unreasonably?
- ☐ What are costs, disbursements to date and to end of trial?
- ☐ What are other obligations, Centrelink, NDIS, taxation, etc?
- ☐ (Where not just monetary outcome) what are the detailed terms of the settlement?

WHO IS ATTENDING

- ☐ Persons with authority to settle
- ☐ Support person
- ☐ Appropriately senior representative from Defendant -
apologies - acknowledgment - recognition - sometimes
all that is sought



CONDUCT

- ☐ Civility – play the ball, not the person
- ☐ Objective is mutual agreement – contrasted with robust interaction at trial
- ☐ Be consistent
- ☐ Be clear
- ☐ Be patient
- ☐ Be respectful – culturally aware
- ☐ Be cognisant of personality, personal circumstances, sophistication of other party
- ☐ Be encouraging/engage – with appropriate offers – by providing information sought
- ☐ Don't surprise



ETHICS - HONESTY

- ☐ Never lose sight of ethical obligation to be honest and frank
- ☐ Duty to court and opponent
- ☐ Solicitors' Rules
- ☐ Barristers' Rules



CONFIDENTIALITY

- Explain to client
- Purpose
- Issues
 - Party/participant not physically present
 - social media
 - other publishing
 - post-mediation enforcement



TERMS

- ☐ Consent judgment
- ☐ Deed of release
- ☐ Other terms
- ☐ Copies - hard/electronic





QUESTIONS?
