THE ROLE OF LAWYERS IN MEDIATION
SINGAPORE CONFERENCE

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I began mediating in 1990 when the concept of ADR was very new to Australia. For the first few years there was some resistance to mediation within the legal profession. It was thought to be an innovation that might last for a very short period of time and would disappear from the scene. A solicitor who suggested that a piece of litigation be mediated rather than tried in court was regarded by his opposite number as probably having a very weak case. Some lawyers also feared that mediation would have the effect of reducing the length of trials and thereby reducing their income. This initial reluctance to embrace mediation is completely understandable, but within five or six years mediation had not gone away and contrary to expectations was becoming more and more popular; to suggest mediation to your opposite number was no longer regarded and is not now regarded as a sign of weakness.

Lawyers have developed a new set of skills in the field of negotiation - a skill set that was not taught at law school until recent times. We have reached the stage where many lawyers earn a significant income as mediators and a great many more earn significant income representing their clients in mediations. In my State of Queensland in the early 90's there was a three year delay in the court list. That has been reduced to about three weeks. Some judges have said by way of dictum that they consider a solicitor would be negligent in failing to advise his client of the availability of and benefits of mediation. The purpose of this paper is to make some comments on the role of lawyers in this fast growing area of practice.

Mediation clauses in contracts

The lawyer's role begins before a disagreement arises. In the commercial context, you should consider the option of inserting a mediation clause into a contract with a view to resolving disputes amicably rather than resorting to litigation. A draft clause is Attachment 1 to this paper. It requires

the parties to mediate prior to embarking on litigation.

Suitability for mediation

There is no hard and fast rule as to whether a case is suitable for mediation. With the exception of cases involving domestic violence and serious power imbalances, most cases are suitable for mediation at some point in time. The question is what is the best time to mediate.

The answer is that it all depends. Experienced mediators refer to a matter as being "ripe" for mediation. I want to focus on matters we should be taking into account when advising clients that a dispute is ripe for mediation.

To do that it is useful to go back to examine what advantages there are to mediation and why it has been so successful in the last decade. The principal advantages of mediation are these:

(a) it saves the enormous cost of litigation;

(b) it is quick. You can arrange a mediation today to be held tonight. The matter can be resolved before the parties go to bed;

(c) litigation is stressful. Parties are cross examined. Mediation involves a minimum of stress;

(d) mediation avoids the risk of litigation. The risk relates to the abilities of barristers, solicitors and judges and the abilities of witnesses to give evidence in a plausible fashion. A witness may be inarticulate but completely honest. Another witness may be totally dishonest but articulate and convincing. Anyone who has litigated knows that there are many pitfalls;

(e) mediation can result in a business relationship being maintained.

It is the five matters listed above that will form the basis of our decision as to when to mediate. I

will examine each of these matters in turn, but will begin with the last because I think it is in a class of its own. Those of us who are engaged in the litigation stream generally do not have the privilege of attempting to mend a relationship. Most of the time the clients we see, both as lawyers representing clients in the mediation, and as mediators, are clients who not only prefer not to do business together again but actually never want to set eyes on each other again. In many cases we are simply dealing with an insurer who has a job to do, and will do it professionally, but has no interest in any continuing relationship with the party on the other side of the table. However, when we are confronted by a party who would like to maintain a relationship with the opposing party, there is only one time to mediate and that is as soon as possible. The litigation process rarely drives people together. It serves to drive them further apart. The issue of proceedings alone can cause great bitterness and lead to an impaired relationship being permanently severed. We are often told in a mediation that the act of betrayal was the fact that one party issued a writ against the other before discussing the issues in a civilised fashion. The issue of proceedings is regarded as a declaration of war.

Let me turn to state some fairly obvious propositions in relation to the other four inter-related issues of cost, time, stress and risk:

(a) the longer the pre-trial preparation goes on, the higher the actual, and opportunity costs to the litigant;

(b) the greater the lawyer's knowledge of the dispute, the greater the cost to the litigant;

(c) increased cost results in increased stress to the litigant;

(d) high costs that have already been incurred are a significant bar to a satisfactory resolution, **BUT** high costs yet to be incurred are a great incentive to settle;

(e) a dispute becomes ripe for mediation when the parties each have a certain depth of knowledge;

(f) a dispute becomes ripe for mediation after the disputants have suffered a certain

degree of pain caused by stress, costs and delay.

(g) risk is always present;

(h) risk is affected by many things including the skill of the lawyers for each party; the skill of the tribunal; the credibility and presentation of witnesses, both expert and non-expert;

(i) risk is generally irrelevant to the time at which to mediate subject to this exception: one party may have a greater awareness of risk than the other party and therefore may choose to mediate at a point in time before the other party becomes aware of the risk. For example, in a private conference during a mediation I have been told something along the following lines: "The other party actually have a much stronger argument which they have not yet identified but doubtless down the track they will appreciate that their position is stronger than they presently think. Therefore we should settle this matter today." ;

(j) the stress of a trial is enormous. Some may say that stress is a very self-evident proposition. I suspect that, as lawyers, we tend to underestimate just how much stress is caused by a trial. As a mediator I have the benefit of talking to people in private meetings when the bravado displayed in the opening session by lawyers disappears. People are frightened about giving evidence and they are frightened about the costs involved in a trial whether they win or lose. The most common comments made to me, both verbally and in writing, after a successful mediation are along the following lines: "Thank you so much. This isn't a great outcome for me. I had hoped to do better but I am so relieved that I don't have to go through a hearing. I have been lying awake at night worrying about it and now I have made the decision, I know where I stand and I'm relieved not to have to give evidence."

These are the propositions that we must take into account in determining the best time to mediate.

Let us therefore consider the key points in a litigation process in which mediation might be considered:

(a) Just before or after the issue of proceedings;

- benefit: great saving of professional costs;
- detriment: knowledge may be very limited;
  - the issue of proceedings may itself drive parties further apart and in other cases may persuade one party that the other is serious and will not meekly submit;
  - at this point in time parties may be very angry and not yet prepared to consider a compromise.

(b) After pleadings close:

- benefit -
  - some costs have been incurred which may be a barrier to settlement but the bulk of costs are yet to be incurred
- detriment -
  - knowledge of the case is still fairly limited
  - parties are still carrying their initial anger and the delivery of pleadings frequently inflames that anger.

(c) After witnesses have been proofed but before disclosure of documents:

- benefit -
  - knowledge is substantial
- detriment -
  - the expense is substantial but the costs and delay plus the possibility of large future costs are likely to be causing stress.

(d) After disclosure or inspection:

- the disclosure process can be very expensive but leads to a very detailed knowledge of the case. By this time the costs and the delay are causing great

stress and sometimes lawyers are by this time considered as being a mutual enemy. This provides some common ground between the clients on which the mediator can build.

(e) After the matter has been listed for trial:

- at this point costs become an obstacle in settling the matter but on the other hand, the parties are still facing the costs of a trial. Sometimes the attitude is that they have come this far and might as well see it through. The knowledge level of the issues and facts is now very high so that quite accurate advice can be given. That is particularly the case after pre-trial conferences have been held. The stress levels become very high caused by the fear of giving evidence and the costs of the litigation expended and to be expended.

Knowledge v. speculation

We like to think of our adversarial court system as being a near perfect system. It is based on pleadings, discovery, experts and the hearing of oral evidence, tested by cross examination. It should get the right result in accordance with legally determined principle. The court will act on the evidence. The court will not speculate. Indeed, we instruct juries that they may not speculate and may only act on the evidence presented before them in the court room.

I believe that is not the case in mediation. We should speculate. After all, what use is experience? Experience gives us insight into what is likely to happen in a given scenario in the future. For example, if I as a mediator or as a lawyer representing a party have a valuation report saying that a piece of real estate has a value of $2M, and if I know that the other party would prefer a lower valuation, I can speculate that at some point in the future that party will obtain that valuation (regardless of what ethical rules are imposed on witnesses). It is part of our role to speculate on what might happen in the future, what might be the next step taken by the other party, what attitude a particular judge might take to a particular point. As we proceed down the litigation pathway, we

know more; and we speculate less. When we are advising clients we have to decide at what point we have enough concrete knowledge to enable us to speculate on what is going to happen down the track. Hence, experienced advisers may speculate (a) on what evidence we think we can probably get in the future; (b) what evidence we think the other party can adduce; (c) how a judge will react to a particular legal issue and to particular moral and factual issues and how a particular argument will be received in a trial. The process is not perfect. We proceed on imperfect knowledge. If parties need a Rolls Royce decision based on rights, then they have every right in a free society to have a Court determination. The mediation process focuses on interests as well as rights and is generally conducted in the absence of a definitive knowledge of ever fact. That knowledge is just not necessary.

Hence, a matter becomes ripe for mediation when the right amount of pain has been suffered by each party for legal costs, the right amount of stress has been imposed by virtue of the dispute itself or the litigation process, enough is known to enable intelligent speculation about the matters that are unknown to enable a reasonably informed decision to be made. I do not think one can be more precise. All of the above comments apply also to judges or arbitrators who have to determine whether a matter is ripe for mediation. There can be no hard and fast rule. The judge will have a feeling based on his lifetime of experience in the field and his knowledge of human nature and of the personalities of the lawyers involved to enable him to make a reasonable estimate of whether a point has been reached when a mediation order should be made.

Selection of mediator

Give some thought to the kind of mediator that you want.

$ Do you want a transformative mediator whose role is to assist the parties to change the way they act towards each other - that might be more appropriate in family mediation.

$ Do you want a facilitative mediator who will act in a very neutral fashion and assist the parties to reach a resolution? Again this is most often used in family mediation.

$ Do you want an evaluative mediator who may well use his or her legal experience and proffer some advice to the parties? This gives rise to a vexed issue. How evaluative should a

mediator be?[1]

In my view, a mediator should be like a chameleon and be able to switch from one form of mediation seamlessly into another form. I think it is flying in the face of experience to suggest that senior lawyer mediators dealing with senior members of their profession should not, in private conference, proffer (if they see fit) some advice.

Preparation[2]

Although not necessarily as extensive, preparation for a mediation is just as important as preparation for a trial. If the mediation is unsuccessful, experience indicates that most of the preparation is not wasted and is useful by way of trial preparation. It is assumed that you will have given general legal advice on issues such as liability and quantum. When litigation has been commenced, the definition of the problem between the disputants is circumscribed by the pleadings. However pleadings pose or characterise an issue in legal terms. In many cases lawyers can help to define the problem in commercial terms from a business perspective which will involve a much broader picture than the straightforward legal issues.

Risk analysis

You should also assist your client in completing a risk analysis. Set out below is a general form of risk analysis which can be adapted to a particular scenario. It is based on a document by Professor John Wade in his handbook "Representing clients at mediation and negotiation", which I commend to you.

It is suggested that a risk analysis be given to the client for completion and then discussion by the legal team with the client.

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[1] See I. Hanger: "A discussion of some ethical issues that have arisen in mediation" with comments by Sir Lawrence Street: Asian Dispute Review, April 06.

[2] See generally a very useful guide for lawyers in mediation published by the Law Society of New South Wales at http://www.lawsociety.com.au/uploads/filelibrary/1098240091625_0.9820372869515228.pdf).

Your client must do his/her best to place dollar values on the following items. Some are intangible (eg stress); others are capable of reasonable estimates (eg fees of experts). In respect of the intangibles, your client may need family help. In respect of others your client may need your professional advice.

ACTUAL COSTS	**Is this relevant? T/ X**		**FOR ME**		**FOR OTHER DISPUTANTS**	
	For some	**For others**	**Low**	**High**	**Low**	**High**
1. Costs to date						
2. Legal costs to end of a trial						
3. Costs of experts' reports to a trial						
4. Value of my time in preparation for court						
5. Value of my time during trial						
6. Value employee time in preparation						
7. Value employee time during trial						
8. Effect of a costs order in my favour						
9. Effect of costs order against me						
10. Other matters you or your lawyers consider relevant - possible hollow judgment - loss of value of assets - forced sales - credit rating - ability to pay						
INTANGIBLE COSTS						
11. ... years of stress on me						
12. ... years of stress on family						
13. ... years of stress on my employers						
14. Risk to reputation if I win/lose						
15. Opportunity cost i.e. opportunities lost because of preoccupation with litigation						

Your conference with your client

- discuss and explain the mediation process. Emphasize the without prejudice nature of the negotiations and the confidentiality aspects of the mediation.
- discuss Best alternative to a negotiated agreement (*"BATNA")* and Worst alternative to a negotiated agreement (*"WATNA")*
- determine a walkaway outcome - that is not a figure that need be communicated at any time to anyone. It is simply your true bottom line.
- discuss with your client and at a later point in time in a preliminary conference with the mediator, just who will do the talking in the mediation. Some mediators, lawyers, and clients prefer the opening statement to be made by a lawyer and to involve the client in the discussions that subsequently ensue. Others prefer the opening statements to be made by clients and to involve lawyers more in the subsequent discussions. Opinions differ on which is the better way to go. It must depend upon the complexity of the dispute and the articulateness of the client.

Preliminary conference with the mediator

Ideally there should be two preliminary conferences.

The first may be between the lawyers and the mediator to determine date, time, place, fees, persons attending, the mediation agreement, documents to be exchanged, documents for the mediator—all of the bread and butter preparation for the mediation. You must at a very early point in time establish and document the rules about confidentiality of the process. Rules on this vary. One option is to agree that the confidentiality commences at the time of the preliminary conference and relates to the entirety of the mediation process from that time including correspondence outside of meetings.

The second preliminary conference (s) should be between the mediator and the client (lawyers attending if they feel so inclined).

This second preliminary conference(s) with the mediator in the absence of the other parties:

(a) enables the mediator to again explain to the client the process;

(b) permits the mediator and the client to get to know each other and enables the client to build up a level of trust in the mediator;

(c) enables the mediator to explore some preliminary issues should that be desired and enables the party to raise any issue (s)he would like to discuss with the mediator before the mediation proper;

(d) enables the legal advisers (if they attend) and the client to discuss with the mediator the format of the mediation and how the mediator proposes to structure the mediation;

AT THE MEDIATION

The mediation is not adversarial. It should be approached as a problem solving exercise. It involves an identification of issues and the underlying interests of the parties , the resolution of those issues in accordance with interests and provides a forum which frequently allows parties to map out a future relationship. Lawyers should attempt to modify their traditional roles. They are good at problem solving but should appreciate that a legal solution is not the only solution.

A different skill set is useful for a lawyer in a mediation. An ability to listen (even to material that is irrelevant to a piece of litigation) is important. Appreciate that it is not the other lawyer that you need to convince. He or she may already be convinced. It is the client on the other side of the table to whom you should speak and you must gauge the level at which you speak. Your address may be very basic or it may be very sophisticated. Your skill lies in adopting the most appropriate mode of address. You should listen courteously and perhaps summarise the arguments brought against you to show that you understand them. You are more likely to get a better deal for your client with rational persuasion which is understood than by a bullying or aggressive approach. It is your task to ensure that the other client hears what you say and understands it and processes it. An aggressive or bullying approach acts as a barrier against comprehension. Even in the most contentious piece of

litigation, the best lawyer negotiator carries an iron fist in a velvet glove. The emphasis should be on the velvet glove.

Never mislead and be careful of puffing.

Be cautious about painting yourself into a corner by making a final offer. The danger in making a final offer is that the other party may respond by saying, "What a pity that is a final offer because if you had offered $1,000 more it would have been accepted". It may be better to make an offer that you believe is your final offer and to remake the same offer in the next round of negotiations.

If possible bring to the mediation a draft settlement agreement. At the very least have one drafted that is available on line.

If the mediation looks like being unsuccessful, try to resolve some issues that might advance negotiations at a later date or shorten a trial. If that occurs at least the parties will feel that something has been achieved by the process.

Instilling a culture of mediation in the legal fraternity

The mediation process needs to have the indorsement and encouragement of the superior courts. In the 20 years that mediation has been significantly utilized in Australia, a number of steps have been taken that have the effect of educating lawyers about and encouraging lawyers to use the process:

In the early 1990s, Settlement Weeks were held in various States. For one week those lawyers who were trained as mediators offered their services for a small fee to mediate matters that were on the court list. This involved the court writing to litigants advising of the availability of the service and encouraging their participation. It required some administration, either by the court or by an employee of the Law Society or Bar Association. The newspaper gave the Settlement Week some

publicity. The result was that many cases were settled, the public learned about the mediation process and those lawyers, most of whom had little or no experience in conducting mediations, were able to put their newly acquired skills into practice for a modest fee.

Over the decade beginning in 1990, Supreme Court Acts and Rules of Court were changed to provide rules for the conduct of mediations; to give mediators some immunity and to enable a court to order any matter to mediation against the wishes of the party. The power was used frequently and particularly in relation to large commercial matters that would take weeks or months of the time of the court. More often than not the mediations were successful.

By way of a response to the insurance crisis that occurred in 2001, legislation in various States required there to be a compulsory conference prior to initiating an action for personal injuries. At the end of that compulsory conference the parties had to make written offers of settlement. At the conclusion of the trial the judge would have regard to the offers on the issue of costs. These conferences were taken so seriously that frequently a mediator was involved.

Each of these matters has instilled a culture of mediation into the legal profession, but at present the National ADR Advisory Committee to the Federal Attorney-General is charged with the task of making recommendations that would encourage even further use of mediation.

Schedule 1

Amended Version of NSWLS Clause: Model Clause for publication by NADRAC

Dispute Resolution[3]

1) If a dispute arises from or in connection with this contract, a party to the contract must not commence court or arbitration proceedings relating to the dispute unless that party has participated in a mediation in accordance with paragraphs 2, 3 and 4 of this clause. This paragraph does not apply to an application for urgent interlocutory relief.

2) A party to this contract claiming that a dispute has arisen from the contract ("***the Dispute***") must give a written notice specifying the nature of the Dispute ("***the Notice***") to the other party or parties to the contract. The parties must then participate in mediation in accordance with this clause.

3) If the parties do not agree, within seven days of receipt of the Notice (or within a longer period agreed in writing by them) on:
   a) the procedures to be adopted in a mediation of the Dispute; and
   b) the timetable for all the steps in those procedures; and
   c) the identity and fees of the mediator; then,,

   the **[independent appointment body or person[4]]** will appoint a mediator accredited under the National Mediator Accreditation System, determine the mediator's fees and the parties will pay those fees equally.

4) If the mediator is appointed by **[independent appointment body or person]** in accordance with paragraph 3, the parties must mediate the Dispute:
   a) in good faith; and
   b) in accordance with the Practice Standard articulated in the National Mediator Accreditation System

5) If a party commences proceedings relating to the Dispute other than for urgent interlocutory relief, that party must consent to orders by the Court in which the proceedings are commenced that:
   a) the proceedings relating to the Dispute be referred to mediation by a mediator; and
   b) if the parties do not agree on a mediator within seven days of the order referred to in paragraph 4.1, the mediator appointed by the **[independent appointment body or person]** will be deemed to have been appointed by the Court.

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[3] NADRAC acknowledge the assistance of the Law Society of NSW in the drafting of this clause. The clause is based on the precedent clause prepared for the Law Society of NSW and published on their web site www.lawsociety.com.au

[4] NOTE the independent appointment body could be the an organisation such as LEADR or IAMA, a Law Society or Bar Association or some other association trusted by the parties with the capacity to appoint a suitable mediator to the dispute. It is advisable to appoint the president or chair or CEO of the organisation to make that appointment. Alternatively the parties to the contract can appoint a trusted independent person to make the appointment.

6) If a party :

a) refuses to participate in a mediation of the Dispute to which it earlier agreed; or

b) refuses to comply with paragraph 5 of this clause, a notice having been served in accordance with paragraph 2; then,

i) that party shall not take any steps to recover its costs whether by way of obtaining or enforcing any order for costs, and,

that party shall consent to an order of a Court of competent jurisdiction that it will specifically perform and carry into execution paragraph 3 and 4 of this clause.