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Précis Paper

Mediation

Paul Caporale and Elizabeth Ramsay discuss the role of lawyers and confidentiality in mediation – from the perspective of the mediator.

Discussion Includes

- Preparing the client for mediation
- Effective position papers
- The role of an expert contributor
- Identifying and exploring issues, options and offers
- Dealing with difficult parties or lawyers
- What is confidential and what is not
- Admissions, offers, notes and agreements
- Enforcing confidentiality

Précis Paper

Mediation

1. In this edition of BenchTV, Paul Caporale is interviewed by Elizabeth Ramsay on the topic of mediations. Mr Caporale is a LEADR Advanced mediator who has mediated in the region of 1000 disputes.

What Should Lawyers do to Prepare their Clients for Mediation?

2. Lawyers should discuss the following matters with their clients in order to prepare for mediation:

   a. **Risk analysis**: This involves assessing the strengths, weaknesses, opportunities, and threats (SWOT analysis) of the client's case. Lawyers should also discuss with their clients the best alternative solution, the costs to date, and the costs going forward.
   b. **Negotiation strategy:** This involves considering the approach to be used in order to influence the other parties to come to your client's point of view. The most appropriate negotiation strategy depends on the matter and type of dispute.
   c. **Client's participation in the mediation:** Lawyers should inform their clients about active listening skills and constructive negotiation. In particular, Mr Caporale notes that whilst it is fine for clients to bring strong views to the mediation, this becomes problematic if these strong views are all that they bring to the mediation.
   d. **Mediation process:** Lawyers should inform their clients about what a mediation involves, the role of the various individuals (i.e. the parties, solicitors, barristers, mediator, and potential third parties, such as support persons), and the difference between open and closed mediation sessions.
   e. **Potential emotional issues:** The handling of emotions should be discussed, particularly in cases of death or serious injury.
   f. **Client's willingness to change their minds:** Mr Caporale notes that the willingness to be flexible and open to other positions is the most important matter for lawyers to discuss with their clients, especially where their clients are 'lay people'.

How Would you Anticipate Failure for the Client?

3. Where settlement has not been reached at mediation, lawyers should underscore the importance of other progress made during the mediation, such as the acknowledgment of suffering, an apology, and any other concessions made as these factors in and of themselves can be of significant relief and benefit to a party.

4. The lawyers should further explain to the client that even though no settlement was reached on the day, the parties have taken the first step on the path to resolving the matter and as a result of the mediation, the matter is usually resolved in the near future when parties go home and reconsider the matter.

What Makes up an Effective Position Paper?

5. Whilst there are no strict rules regarding the length of position papers, Mr Caporale believes that 1-2 pages is generally appropriate as the position paper should be 'punchy'. The document should state the client's legal position, the grounds relied upon to support this position, and the contested and uncontested facts for each of these grounds. Additionally, the document should conclude by noting the client's willingness to negotiate and discuss possible solutions in good faith.

Foreshadowing Difficulties for Particular Clients

6. Mr Caporale notes that additional difficulties arise for clients that have a particular psychiatric condition which affects their capacity to agree to a binding resolution or clients that possess significant emotional issues or a difficult personality.

Role of Support Persons in Mediation

7. Whether support persons play a positive or negative role in the mediation often depends on the dynamic of their particular personalities. Whilst some support persons are difficult and unconstructive in achieving a resolution, others are absolutely critical to achieving a resolution.

Different Roles of Lawyers in Different Mediations

8. There are generally five different types of roles that a lawyer may adopt in mediation sessions:

    1) **Absent adviser:** In this situation, the lawyers are only present in the mediation in a support capacity in order to provide advice on any legal issues. However, the legal issues in these mediation sessions are generally of secondary importance compared to the relationship issues between the parties. Therefore, the main participants are the parties themselves in these sessions.

    2) **Adviser/Observer:** Lawyers generally adopt this adviser/observer role in early-stage, complex, commercial matters where the parties are often two commercial clients with

sophisticated negotiation skills. Hence, the lawyers typically only participate when advising on the legal issues.

3) **Expert Contributor:** Lawyers commonly adopt this role where the matter involves highly complex legal issues and these issues are of great importance to the parties. Consequently, these mediation sessions involve much greater participation from lawyers.
4) **Supportive Professional Participants:** Lawyers play a more collaborative role in this capacity, with a good example of this role being in-house counsel attending mediation with company management.
5) **Spokesperson:** In this role, lawyers speak on behalf of their clients, with their clients mainly observing in silence. Lawyers generally adopt this role where there is a power imbalance between their client and the other parties to the dispute.

9. From Mr Caporale's mediation experience, the most common type of lawyer in common law mediation is a mix between the 'Expert Contributor' and 'Spokesperson'.

Effective Opening Statements

10. It is very important for lawyers to state matters in their opening statement which are important to their client in relation to the dispute. When these opening statements are being delivered, it is important for the other party to listen respectfully and attentively. Mr Caporale notes that opening statements are critical as they provide the parties with insight into where the other party is coming from. This consequently affects the tone of the mediation, the parties' strategies, and option generation during the mediation.

How does a Mediator Deal with a Difficult Lawyer or Client in the Opening Session?

11. In Mr Caporale's experience, lawyers have on some occasions 'eyeballed' or intimidated the other party during the opening statement. In these circumstances, the lawyer should be reminded, by either the other party's lawyer or the mediator, that the other party is legally represented. Therefore, the lawyer should be told to address the other party's lawyers, and not their client.

Apart from the Position Paper, how does a Mediator Identify the Most Relevant Issues once the Mediation has Commenced?

12. The best way for mediators to identify the most relevant issues is through the parties' opening statements as these statements detail whether the issues are legal or factual, the common ground between the parties, and the points of contention.

13. Furthermore, following these opening statements, the mediator should prepare the agenda for the mediation. The agenda items should be written in open-ended and unbiased language to avoid further tensions between the parties.

What are the Mechanics of the Mediation after the Opening Statement when Parties are in Different Rooms?

14. After the opening statements, Mr Caporale provides the parties time to privately discuss and digest what they have just heard with their lawyers. Following this discussion, the parties commence negotiation.

15. Depending on the type of dispute, Mr Caporale will then take an opening offer from a particular party. For example, in insurance law claims, Mr Caporale generally takes an opening offer from the plaintiff's lawyers to the defendant, without first engaging in a private mediation session with the plaintiff. When he takes the plaintiff's offer to the defendant, he engages in a private mediation session with the defendant before taking the defendant's counter-offer to the plaintiff. Mr Caporale will then have a private session with the plaintiff, their support person, and their solicitor and/or barrister in order to gauge the plaintiff's personality. This involves determining whether the plaintiff is difficult to manage, whether the plaintiff listens to legal advice, and whether the plaintiff is too emotional or stubborn to absorb anything. Mr Caporale believes that this first private session with the plaintiff is very important as he generally attempts to work with the plaintiff's lawyers to ensure the client is listening to and absorbing what the other party is saying.

Role of Lawyers during Private Sessions

16. The best role for the lawyer to adopt during these private sessions is that of 'Expert Contributor'. In some situations, lawyers can be part of the problem rather than the solution as they adopt an adversarial approach, rather than a problem-solving one. Mr Caporale states that good lawyers work with their clients, not for them, to achieve a solution. Additionally, he notes that good lawyers are well-prepared, quick to react to changing perceptions and expectations from their client, and bring reason and calmness to clients who are totally overwhelmed by the whole mediation experience.

How to Deal with Difficult Lawyers where their Client is Calm and Intelligent

17. Mr Caporale asserts that he would personally avoid splitting a client from their difficult lawyer given his role as an independent mediator. Rather, he would rely on his collegiality with the lawyer to gently engage in 'reality testing' in order to bring the lawyer into line and provide

them with some perspective. In engaging in this conduct, Mr Caporale emphasises that the mediator must be highly sensitive to the different vibes and insecurities of the parties.

How to Deal with an Absent Client or Instruction-Giver

18. Mr Caporale recalls a particular matter where the plaintiff became lost in finding the mediation venue and were consequently running very late. In this situation, Mr Caporale nonetheless formally opened the mediation session with the plaintiff's solicitor and made progress on the matter. When the plaintiff arrived, he was informed of the earlier discussion and progress on the matter, resulting in a resolution shortly thereafter. Apart from these isolated incidents, absent clients or instruction-givers are very common in international cases due to time differences.

Dealing with Stubborn Parties that are Unwilling to Negotiate in Good Faith

19. In these situations, the difficult and stubborn party needs to be challenged on their intention in attending the mediation. If that party's lawyer does not challenge them, the mediator should intervene to challenge the client's very rigid approach to the matter.

Clients or Solicitors Disclosing Confidential Information to the Mediator

20. Given the mediator's independent role, it can be personally challenging and difficult for the mediator to hear confidential information with 'a straight face' and maintain the information's confidentiality, particularly in circumstances where the mediator believes the negotiated settlement is deeply unfair to one of the parties who are not privy to that confidential information.

Do you Encourage Lawyers to have Private Sessions by themselves without their Clients Present?

21. Encouraging the lawyers to have private sessions by themselves can be 'absolutely necessary', especially where there are difficult and stubborn clients. At the very least, these private sessions allow the lawyers to understand where the other party's lawyer is coming from and their particular predicament with a difficult client. Based on this understanding, the two lawyers can then work together to break the deadlock and achieve a resolution.

Is there Capacity for Mediators to be more than just an Independent Arbiter?

22. Mediators need to be well prepared by familiarising themselves with all the legal and factual issues on the matter. Therefore, if there is deadlock between the parties, the mediator can

use their knowledge of the matter to position, persuade, and engage in some 'reality testing' with the difficult party.

23. Furthermore, it is also helpful to break a tense and serious atmosphere with some humour, such as a self-deprecating comment. This humour will help set a more friendly tone for the mediation, rather than a toxic and adversarial one. Mr Caporale notes that mediators are in a special position to be able to set this tone and atmosphere given their role as an impartial, mutual party.

The Art of Making Offers in Mediation

24. The art of making offers depends on the dynamics of the mediation session and the personalities of the parties involved. Some lawyers adopt unconstructive strategies by beginning with unrealistically high or low offers which subsequently results in an unrealistic counter-offer from the other party. However, mediators can be critical to avoiding these poor lawyer strategies and habits by encouraging the parties to start with genuine and realistic offers in order to maintain good faith.

Where Parties Declare the Matter Unsettleable at the End of the Mediation

25. Although parties may declare the matter 'unsettleable' at the end of a mediation session, there is still a prospect of settlement later on when the parties go away and further reflect on the matters raised in the mediation. In fact, in Mr Caporale's experience, the majority of cases that do not settle at mediation generally settle within a month after the session due to the subsequent work of the lawyers.

What Makes a Good Mediator?

26. In Mr Caporale's opinion, the best answer to this question comes from a scenario detailed by Jared Diamond, a Professor of anthropology at the University of California, Los Angeles (UCLA). In Professor Diamond's analysis of various tribal societies, he found that tribes with greater than 1000 members generally appoint a tribal chief. In addition to other tasks, the tribal chief is responsible for dealing with disputes between the tribe members. Professor Diamond labels this tribal chief the 'weak leader' as they have no power other than the power of persuasion. As part of the dispute resolution process, the tribal chief first waited to allow the tensions and emotions between the parties to settle before attempting to develop a 'face-saving' resolution that both parties would be happy with, enabling them to continue living together in the same tribe. Mr Caporale deems this tribal chief's role as very similar to that of a mediator as the only power both individuals possess is the trust and empowerment

that the disputing parties vest within them. In this sense, Mr Caporale believes that a good mediator is the 'weak leader'.

What does Confidentiality Mean in Mediations?

27. Confidentiality in mediations is primarily determined in accordance with the terms of the mediation agreement. Regard must also be had to the common law position on confidentiality in mediations and any relevant statutory provisions. Both of these are further discussed below.

28. There are several advantages to maintaining confidentiality in mediation sessions. In fact, one of the biggest selling points of mediation compared to public trials is their private nature. This allows the parties to negotiate in an open, safe, and honest environment as there is no public scrutiny. Parties are also able to provide confidential apologies and concessions. Furthermore, unlike in a public trial, the parties have a better opportunity to assess the other party's interests and underlying concerns. Given these benefits, confidentiality enhances the prospects of successfully resolving a matter. Additionally, confidentiality aids the mediator's impartiality as they cannot be called on to give evidence against either party.

What Information is Confidential in Mediations?

29. Most mediation agreements will specify that all information is confidential except for those exemptions provided by law. Some statutes will also stipulate the confidential information in a mediation agreement, such as s 131 of the *Evidence Act 1995* (Cth) and s 288 of the *Legal Profession Uniform Law* (NSW).

SECTION 131:

Exclusion of evidence of settlement negotiations

(1) Evidence is not to be adduced of:

(a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute; or

(b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.

SECTION 288:

Exclusion of evidence of settlement negotiations

(6) Neither evidence of anything said or admitted during a mediation or attempted mediation under this section of the whole or a part of the conduct that is the subject of a complaint nor a document prepared for the purposes of the mediation or attempted mediation-

(a) may be used by the designated local regulatory authority in making a determination; or

(b) is admissible in any proceedings in a court or before a person or body authorised to hear and receive evidence.

What Information is not Confidential?

30. In order to enforce the agreement between the parties at mediation, the terms of the agreement will need to be disclosed, thereby removing their confidentiality. Furthermore, confidentiality is also removed in the following circumstances:

a. Where evidence at a trial is likely to mislead a court unless confidential information is disclosed;
b. Any information relating to liability for costs in a Commonwealth matter; and
c. Fraud or an offence.

31. The exceptions to confidentiality at common law are much vaguer, with Mr Caporale noting that confidentiality at common law is determined in accordance with the 'without prejudice' privilege and legal professional privilege. These privileges are further discussed below at paragraph 38.

Who is Bound by Confidentiality?

32. The parties to the dispute, their lawyers, and the mediator are all bound by confidentiality. Additionally, third parties, such as support persons, who have attended the mediation and signed a confidentiality agreement must also comply with their confidentiality obligations. Where the instructing client is not present, Mr Caporale usually asks the client's legal representative to sign on their behalf.

Information Disclosed at a Mediation which is Beneficial to One Party

33. If the only way you can prove a fact disclosed at a mediation is through the mediation itself then that fact is confidential. However, if that fact can be proved through alternative means,

such as evidence gained through additional investigation, then this evidence may be admitted into court.

34. Mr Caporale notes that if these facts were excluded from being adduced at trial, then it would result in parties 'sterilising the evidence' by disclosing these facts during the mediation session in order to prevent the possibility of the other party separately discovering and admitting this evidence at trial. This issue was examined by Justice McDougall in the case of *789Ten v Westpac Banking Corporation* [2004] NSWSC.

The Validity of a Confidentiality Agreement

35. The validity of a confidentiality agreement may be challenged if the settlement is called into question itself. For instance, there may be allegations of misleading and deceptive conduct by the parties in reaching the settlement. In these circumstances, the conduct of the parties at the mediation may be examined by a Court. Furthermore, if fraud or an offence has been committed or threatened, the confidentiality agreement may also be lifted by a Court. In some jurisdictions, Courts can also examine the offers made at settlement to determine liability for costs.

Breach of Confidentiality Agreement

36. It can be difficult to enforce confidentiality agreements and the loss arising from a particular breach of a confidentiality agreement can be difficult to quantify. Nonetheless, Mr Caporale notes that Courts are generally very reluctant to remove the confidentiality undertaking regarding the conduct of parties at mediation. This is due to public interest reasons since mediation resolves over 80% of disputes which would otherwise come before the Courts. If the Courts began examining the conduct of the parties at mediation, this would undermine mediation confidentiality agreements which are one of the biggest selling points of mediation.

How is the Mediator Protected by the Confidentiality Agreement?

37. Mediators are protected by confidentiality agreements in the sense that they will not be called to give evidence at trial between the parties should the mediation session fail to result in settlement of the dispute. Additionally, a confidentiality agreement allows the mediator to effectively perform their job without fear of future recriminations or cross-examination in Court.

How does the Common Law Impose Confidentiality Duties on Parties to a Mediation?

38. The common law imposes two main duties of confidentiality on parties to a mediation, being legal professional privilege and the 'without prejudice' privilege. Legal professional privilege protects communication between lawyers and clients in relation to legal advice provided as well as in relation to anticipated or current litigation. The 'without prejudice' privilege generally applies to correspondence stating their 'without prejudice' status or conversations which are preempted with "without prejudice". Such correspondence and conversations are confidential where they involve statements made between parties to a dispute in a genuine attempt to settle that dispute.

In What Circumstances are Third Parties Bound by the Confidentiality Agreement?

39. Whether third parties are bound by a confidentiality agreement depends on the terms of the confidentiality agreement in question and the agreement to comply with those terms by the third party. The NSW Law Society standard mediation agreement specifically extends to third parties. However, other mediation agreements tend to have a separate confidentiality agreement for third parties.

Steps for Mediators to Avoid Giving Evidence at a Subsequent Trial

40. To avoid giving evidence at a potential future trial, Mr Caporale does not leave a mediation session where the dispute has been settled until the agreement has been put into writing and signed by all relevant parties. However, this can be a difficult process where the dispute involves more than two parties and the agreement involves non-monetary obligations.

Should Mediators Retain their Notes for some Period after Mediation?

41. Mr Caporale generally destroys all his notes within 24 hours of the mediation session and he notes this is likely an added protection for mediators in order to avoid being called to give evidence at trial.

BIOGRAPHY

Paul Caporale

Paul is a solicitor with 25 years experience in insurance law and Commercial Litigation. He headed the Insurance Law department at Henry Davis York Lawyers in Sydney. He now is the principal of Caporale Mediations, and has acted as mediator in over 1,000 mediations. He is a LEADR Advanced Mediator.

Elizabeth Ramsay

Elizabeth Ramsay is managing partner of A R Conolly and Company. She has over 27 years experience in litigation, dispute resolution and mediation.

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