

Russell Kennedy Government CPD

Practical preparation tips for mediation, and doing it well when you're there

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Webinar housekeeping

- All attendees will be on mute and their cameras turned off for the entire webinar
- We have BD tech support live to assist with any technical issues
- Use the chat function for any comments/technical issues
- Use the Q&A function for specific questions related to the webinar content – Questions will be addressed at the end of the webinar
- There will be a post webinar survey link sent at the end of the webinar. We value attendee feedback
- We will also have a QR code linking to our feedback survey towards the end of the presentation so you can provide instant feedback

Disclaimer

The information contained in this presentation is intended as **general commentary only** and should not be regarded as legal advice

Should you require specific advice on the topics or areas discussed, please contact the presenters directly

Introduction



Why preparation matters

- Successful or productive mediation outcomes don't 'just happen'
- *"If you fail to plan, you plan to fail"*
[Benjamin Franklin]

Why preparation matters

Goal of mediation

- To achieve an outcome that both parties can accept.

Such an outcome:

- is not always a “win/win” outcome, or even a “win” outcome (although nice when it is!);
 - doesn’t just “happen” where parties have entrenched positions; it takes preparation.
- A mediation is a carefully crafted theatre. The stakes are high, the time is limited and there is a high probability your opponent has thoroughly prepared. If you turn up without having done the same, you will be at a disadvantage.

Key Preparation Steps

- Be clear on what the parties actually disagree on (as distinct from the arguments)
- Identify your motivators
 - What is important to your position?
 - Why?
- Are you and your lawyer on the same page?
 - be aware of how your position will be presented
 - Avoid excessive detail or complexity in the opening statement
 - Who will talk? How will they talk?
 - Who will attend and what message does that send?

Key Preparation Steps

- Devil's advocate: Ask yourself, can you identify your opponent's motivators?
 - What is most important to your opponent?
 - What do they really want?
 - *How do they feel about the dispute?*
 - *How would they say you have behaved in relation to the dispute?*

Key Preparation Steps

- Having identified the parties' key motivators, use that information in the development of:
 - negotiation strategies for the mediation; and
 - settlement strategies and options.
- Mindset/set expectations
 - Accept that you don't have to convince the mediator or your opponent that you are right; you almost certainly won't!
 - Expect the unexpected; new information sometimes emerges in mediation and you may need to be agile.
 - remember mediation is not a process for assigning blame

Key Preparation Steps

- What are the costs to date to the department or organisation in addressing the issue?
 - diversion of resources (staff and funds)
 - reputation
 - precedent
 - legal costs

- Consider, if the dispute does not settle:
 - What happens next?
 - What might it cost?

Using the negotiation process to its full advantage

- Follow the ground rules:
 - don't interrupt when the other person is speaking
 - resist deliberate “button-pushing” (personal attacks or insults)
 - respectful conduct (no hostile non-verbal expressions e.g., eye rolls, loud sighs, laughing, groaning when the other party speaks)
- Conversely, if the opponent is not respectful, don't take it personally – stay focused on the objective of an agreed outcome

Using the negotiation process to its full advantage

- Listen! The opponent might disclose more than expected.
- Be comfortable with silence:
 - it can prompt people to say more than they planned
 - it helps you avoid impulsive or reactionary comments
- Presentation of key issues needs to differ from past discussions. Use the mediator to help with this, for example they can:
 - give the parties structure
 - ask questions to clarify issues
 - re-focus dogmatic thinking
 - diffuse discussion around heated topics

Using the negotiation process to its full advantage

- Avoid absolutes (eg “*never*” and “*always*”), because they
 - constrain flexibility
 - invite contradiction
- Avoid impulsive comments, they’re rarely helpful.
- Demonstrate appreciation for offers made by the opponent which genuinely address your position/concerns (even if inadequate).
- Is the opponent being co-operative or competitive? Consider how this impacts what you reveal and how you may frame offers.

Using the negotiation process to its full advantage

- If you reach an agreement, take time to record the settlement carefully and accurately, preferably immediately
 - keep the communication open during this process so that new issues (legal, practical or logistical) do not derail the overarching agreement.
- If you don't settle, mediation is still a valuable information gathering tool – credibility of witnesses; individual motivations; dynamics between multiple opponents

Nuances for Government parties

- Reputation
 - political consequences; need for awareness of broader political ramifications of decisions
- Delegation and authority
 - advanced planning (departmental approval or council resolution required?)
 - sufficient delegated authority to agree a settlement
 - mechanism to obtain increased authority levels or scope if required on the day

Nuances for Government parties

- Policy considerations
 - Decisions need to be broadly consistent with departmental policy
- Regulatory framework
 - Consideration of any applicable statutory or regulatory constraints or process
 - Model litigant rules

Conclusion

- *“If you fail to plan, you plan to fail”*
- Know why you’re there and what you can do or accept to resolve the dispute
- Tailor and apply appropriate techniques to maximise the prospect of a constructive outcome
- Understand your political and regulatory context

Q&A – Your Russell Kennedy Contacts



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