TEN THINGS LAWYERS CAN DO THAT WORK AT MEDIATION

Matthew Shepherd Mediator, Arbitrator, Accredited Family Law Specialist

As a mediator I see lawyers use a variety of styles of dispute resolution advocacy. I have observed what works and what does not. Here are ten things lawyers can do that work at mediation (and in negotiations generally).

These ten things work because they recognise that the parties are the primary decisionmakers at mediation. The other party is your primary audience. What you say must make sense to them as they are one making the decisions – along with your client.

Mediation is not court – because your audience is different. At court the audience is the judicial decisionmaker who is not personally effected by the outcome. How they might be persuaded is quite different to how the parties to the dispute (who are directly effected by the outcome) might be influenced. By the time a dispute gets to mediation, legal arguments and analysis will already have been exchanged - perhaps repeatedly - without having resolved the dispute (otherwise there would be no need for the mediation). Effective dispute resolution advocacy needs more than just than repetition of legal arguments, and whatever else has already been discussed.

1. **Listen**
   Mediations, and all negotiations, are as much about listening as talking. The other side will not listen to you (and your client) unless you listen to them. Being listened to and acknowledged is part of the other side's needs, and listening does not cost your client anything. Listening does not mean you are agreeing. Listening allows you to discover what is important to the other side which may be less important to your client, and can therefore be traded for what is more important to your client.

   Listening carefully allows you to subsequently explain your client's proposals in reference to the stated concerns of the other side - and not just your client's needs. See 6 below.

2. **Ask questions**
   Asking questions is one of the most effective forms of dispute resolution advocacy. It makes the other side feel heard. Their answers tell you what is most important to them which might be less important to your client. Do not cross-examine as answers to closed questions do not give much information. Unlike at court, ask open-ended questions. Good questions do not need to be long or fully formed sentences. Try just repeating the last three words used by the other side with a rising inflection - they will hear it is a question and keep talking. Listen for, and repeat back, emotional and metaphorical language. It will prompt the other side to keep talking.

3. **Externalise the problem**
   Parties tend to attribute the cause of disputes to the intrinsic qualities of the other party – they are unreasonable, mad, bad, liars etc. Explaining disputes by reference to intrinsic negative qualities of the other side will elicit corresponding negative attributions from the other side to your side. It also leads to offers being predicated on the negative qualities of the parties which makes it impossible for such offers to be accepted. "*This whole situation arose from your deceptions and failures and therefore you have to agree to my proposal*". It does not matter how reasonable the proposal might be, the other party cannot accept the proposal as it also means accepting the characterisations of blame, deception and failure.

They will get stuck in a dispute about the characterisation of the problem and not move on to possible solutions.

The solution is to externalise the problem to something other than the intrinsic qualities of the parties:
"*It sounds like the unforeseen share market fluctuation has caused a problem…it seems like the banks have changed their lending criteria since the contract was negotiated… it looks like there are gaps in the data we are working off…problems in the communication channels between your companies have led to misunderstandings…ambiguities in how Parliament wrote the legislation is making this difficult for you.*"

Externalising the problem separates the people from the problem, and allows them to look at solutions.

4. **Explain your proposals before presenting them**
   If you present a proposal first, and then explain it, the other side will stop listening once they hear the offer and start thinking about their response - rather than listening to your explanation. The better approach is to explain the rationale of your proposal (why you think it might be of interest to the other side) before you state the proposal. The other side will listen more closely to your explanation, as they are awaiting the proposal.

5. **Do not criticise the other side's proposals**
   If you reject a proposal saying "*what! Why would my client pay you a $1M?*" you will make the other side feel obliged to give reasons why your client should pay $1M. The more times they affirm their demand for $1M, the harder it is for them step back and consider other options. By attacking the proposal you cause them to cling to it more strongly. Rather than attacking the proposal, try:

   - White-anting the demand by reframing it to just one possible idea "*well, I suppose that's one idea. I'm sure we can come up with many more options and ideas during the course of this mediation*", or

   - Asking questions about their proposal - what information have they relied on, why do they think your client might be agreeable to it, what are the benefits for your client. Asking questions does not mean that you are agreeing. Asking questions about their proposals may cause them to make concessions before you even need to make a counteroffer. At the very least, you will learn more about what they want and what they might be prepared to concede.

6. **Explain proposals in reference to what the other side has said**
   Typically, lawyers explain proposals in reference to how it meets the needs of their own client. This will not be the primary concern of the other side who will be more concerned about their own needs. It is better to explain your proposals in reference to the stated needs and concerns of the other side - "*We have taken into account what you explained this morning* (here you need to specifically repeat some of what they said earlier) *and because of that we thought you might be interested in this proposal*" and then explain the proposal. If you explain a proposal in reference to the stated needs of the other side, it is more likely

that the other side will carefully consider the proposal rather than if it is just explained in reference to your client's own needs.

7. **Frame subsequent proposals as a modification of an earlier proposal of the other side**
   Once proposals have been exchanged, you have two ways to put forward further proposals:
   - You can modify your own earlier proposal - "*your offer is not accepted. We are prepared however to modify our proposal (*explain how*) and ask that you accept it"*
   - Alternatively, and preferably, modify the other side's proposal to make it acceptable to your client - "*We have carefully considered your proposal and we are agreeable to it subject to some modifications"* then explain the rationale of the modifications, and state the modifications.

   The substance of either new proposal might be exactly the same. Framing a further proposal as a modification of an earlier proposal of the other side will cause them to give it more favourable considering than asking them to reconsider your earlier proposal albeit it with some modifications.

8. **Put proposals in the alternative**

   Consider putting forward two or more alternative proposals within the one offer - especially where there are multiple issues to be resolved. "W*e would be interested in knowing what you think about either XXX or YYY?*"

   By doing so, you do not signal what is really important to your client that the other side might leverage. Alternative proposals are less likely to elicit competitive positional responses from the other side. They may perceive you to be flexible and accommodating, and respond in the same way themselves. The alternative in which the other side shows the most interest (they may not accept it, but they might suggest a modified version) will indicate what is most important to them.

9. **Refer to the other side by name – not as the Applicant, Respondent, the Husband/Wife etc**.
   If you want the other party to behave defensively, simplistically, reactively and not listen to you; there is no better way than by de-humanising them by calling them by their technical role in the proceedings. If you want them to act reflectively, openly and thoughtfully, call them by their name. Get their permission first before using their first names.

10. **Let the mediator control the process**
    That is what your client is paying the mediator for. If you have chosen the mediator wisely, they should know what they are doing and why they are doing it. If you are unsure of the mediator's process, give them a call before the mediation or even before the mediator is chosen.

    One function of the mediator is to control the process. This frees up the parties and lawyers to focus on outcomes. Mediation avoids lawyers and clients arguing about how to have the conversation – and focus on substance not process.

    Letting the mediator control the process includes your client having a pre meeting with the mediator if the mediator requests. Pre-meetings allow the mediator to develop rapport and

goodwill with your client, and to gain an insight into their specific needs and concerns. There may be things best said by your client to the mediator privately - not in the presence of the other parties at the mediation. Pre-meetings result in parties being more focused, engaged and motivated at the mediation session itself. They allow the mediator to customise their usual process to meet the circumstances of the particular parties.

For more suggestions for lawyers at mediation, click here.