



**THINK FOLEY'S COMMERCIAL LAW PODCAST
7 December 2021**

Topic: Best Practice Negotiation and Mediation Skills

Seminar Outline

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A. Case Preparation

(i) Know your case:-

- Facts;
- The Law
- Prepare a proper opening.

(ii) Legal cost to date:-

- Solicitor/Client costs to date;
- Preparation to trial;
- Costs of trial;

- Recoverable costs -

(iii) Preparation of Draft Terms of Settlement

(iv) Research ability to recover judgment & costs from the opposing party.

B. Client Preparation

(i) Explain the mediation process

(ii) Explain the Court process

(iii) Clients need to be heard and understood. Prior to the mediation ensure clients have opportunity to discuss & canvas underlying issues.

(iv) Identify and assess parties attending:-

- Mediator;
- Opposing Solicitor/Counsel;
- Opposing Client;
- Non-parties;

(v) Clients' expectations:-

- Monetary;
- Non-monetary;
- Best Case;
- Worst Case;

- Be flexible.

(vi) Run through your/Counsel's proposed Opening with the client prior to the mediation.

C. Mediation Preparation

(i) Selection of Mediator is important - people skills essential - knowledge and skills in the area of law advantageous.

(ii) Inquire about the Mediator - website - colleagues.

(iii) Contact Mediator prior to mediation - give verbal summary of present position in the proceeding.

(iv) Know opposing Solicitor;

(v) Know opposing Counsel;

(vi) Know the advice own Counsel providing at the mediation;

(vii) Ascertain who from the other side is attending the mediation and ensure as far as possible those with knowledge of the dispute will be in attendance;

(viii) Prior to the mediation, ensure opposing lawyer/clients have unfettered authority to settle the dispute at mediation

D. Negotiating

(i) Initial offers should be made having regard to where your client wishes to be at the conclusion of the mediation and also to feel out the other

side's position;

- (ii) Use the Mediator where there is a difficult and intransigent lawyer or client;
- (iii) Analyse best case/worst case scenario for your client and the other side having regard to the claim, recoverable costs and non-recoverable costs.

E. Breaking an Impasse

- (i) Never give up;
- (ii) Decision makers meet alone;
- (iii) Lawyers meet alone;
- (iv) Prepare written Terms and simply handover;
- (v) Get Mediator to ascertain in confidence final position of both parties and then advise whether worth continuing;
- (vi) Split difference with small gesture e.g. corporate offer plus personal guarantee;
- (vii) Reconvene joint session with emphasis on continued risk, additional costs and non-recoverable costs

F. Summary

Knowing your client, your opponent and the Mediator and being properly prepared with a client who is fully informed, will greatly enhance the likelihood of a successful outcome for your client at mediation.

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