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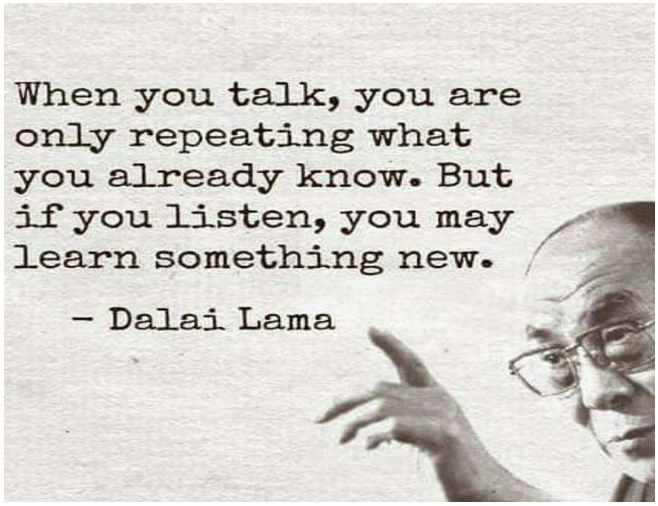

Position Papers and Joint Openings – Thinking About Your Approach in Preparing for Mediation

The premise of this discussion is that the goal of mediation is to negotiate a settlement and the best way of doing that is by constructive and respectful communication with the other side. This requires an entirely different mindset and approach than persuading the Judge at Trial.

Common sense supported by neuroscience: Human behaviour means that we all driven and triggered by these most basic principles:

Fairness, Community – a sense of belonging, Status, Autonomy and Certainty.

The human motivation to avoid the risk of danger or uncertainty: takes precedence over the motivation to pursue the chance of a reward or financial gain.

To me, this serves to explain 2 things:

1. How the conflict came into being; and
2. How it may be resolved through mutual communication and negotiation at mediation.

"I've learned that people will forget what you said; people will forget what you did; but people will never forget how you made them feel."

Maya Angelou, author, poet and civil rights activist.

In preparing for Mediation, think about the position paper and joint opening and the importance of striking the right note. These are two important opportunities for a party to articulate their understanding of the dispute directly to the other and their motivation to resolve it.

A few more relevant quotes here:

> "An effective position paper creates a narrative of the dispute, identifying the risks if the dispute continues and assist the other party to see the dispute in a different way." Roberts SC and Carr (1)

Adrian Chiles in The Guardian recently made the point that "on all media, mainstream and social…nobody wants to know stuff; they just want to tell you what they already know, or how wrong you are about what you think you know. When is the last time you heard anyone on Question Time or a phone-in ask a genuine question along the lines of: 'There's something I don't quite get; please can you explain …'".

This may be counter-intuitive as legal professionals whose role is to have prepared their client's matter in a way that maximises the strength of their claim and minimises any unexpected or unknown issues of fact, evidence or law. You don't want to showcase that you don't understand or know something about your opponent's case, right?

But that's now what you are doing.

Use the mediation to ask questions of the other side, that you don't know the answer to. Even if it is just to test your assumption about the answer, or their answer. Asking questions demonstrates an interest and preparedness to consider the other side's point of view – powerful stuff in any successful negotiation.

Why is this relevant for a position paper or joint opening? Because, as the Dalai Lama says on the value of "active listening":

> "When you talk, you are only repeating what you already know. But if you listen, you may learn something new."

And when you respond, this is the other side's turn to listen to what you have to say.

But consider this:

Listen with a focus on ensuring that the other side is heard, rather than listening to reload or refuel an argument. This ensures full disclosure and the development of mutual

understanding. Think about this key question: What does your opponent need to hear to feel understood?

When you couple what you say with an acknowledgement of what your opponent has expressed to you, (using your "soft skills" and "emotional intelligence"), what you say will hopefully satisfy your opponent's need to feel heard and understood. This is a need that is innate to us all.

Importantly: acknowledging the validity of how the other side sees the issue does not mean that you are agreeing with them, nor that you are conceding that they are "right".

Remember that mediation is very different to trial and this represents a vital opportunity to negotiate a mutually agreeable settlement. After all, you are trying to connect with the other side. Persuasive arguments to a Judge in Court are an entirely different thing for an entirely different day.

Of course, this approach applies not only to the communications at joint opening but throughout the entire course of the mediation.

Former FBI hostage negotiator-turned negotiation coach, Christopher Voss, talks at length about this sort of stuff, referring to it as "tactical empathy" and even "Jedi mind tricks". (2)

Use the cloak of confidentiality that mediation affords – to achieve the breakthrough that you need towards a settlement.

That said, I have been fascinated to observe that when parties speak to me in depth about their view of the matter in private session, (noting that it is an integral role of the mediator to really listen), I have found that they often do not feel the need to then say all of this again to their opponent! It can be enough that they feel properly heard. They are then able to "move forward" with negotiations. Further, I have found this in a wide range of matters and with the parties on any side.

In closing, I'll get off my "Jedi mind trick" soap box and leave you with a very practical observation regarding Position Statements:

I think these are a "horses for courses" thing which should always be tailored to the matter, in terms of detail.

However it is always most constructive when the tone is conciliatory rather than adversarial and at the very least: it should include a statement to the effect that the party comes to the mediation in good faith and motivated to achieving a settlement. When a statement like that is absent – it is always noticed by the other side and by the mediator. So if you mean it, please don't overlook stating it.

Finally, one of the most helpful and persuasive position statements I have ever read had the following features:

- 4 pages long;
- set out briefly but with adequate detail, the facts of the dispute;

- set out the allegations of damage, indicating what the various opposing experts have supported;
- provided a brief account of attempts to resolve the initial dispute / avoid litigation, as well as more recent attempts to settle the litigation;
- compared the areas of agreement and divergence by the experts, with a critique of the divergence;
- concluded with a conciliatory statement expressing the party's desire to negotiate a settlement.

References:

1. "Mediation Strategies", by Ian Roberts SC and Adele Carr, Greenway Chambers Sydney, February 2019. See Greenway Chambers' website for an excellent range of CPD papers and videos and ask to be added to the mailing list for upcoming CPD talks that are delivered regularly.

2. Christopher Voss, "Never Split the Difference – Negotiating as if Your Life Depended on It", 2018. Note also The Black Swan Group electronic newsletter (free). Voss' book and newsletter subscriptions are interesting and invaluable reading for any negotiator, which means all of us in some way, shape or form – every day.

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