FEATURES

The Role of Lawyers in Mediation — A Singapore Perspective

George Lim Teong Jin provides us with a clear understanding of the benefits and procedures involved in mediation conducted at the Singapore Mediation Centre. He explains the role of lawyers in mediation and how they can ensure that their clients obtain the most out of the mediation process.

Introduction

When the Singapore Mediation Centre conducted its first mediations in 1997, one of my friends, who practises as a court lawyer, recounted his experience at a mediation session to me.

He told me:

> It was an interesting and complex case, which had been scheduled to take seven hearing days in court. I was acting for the plaintiff, and eager to proceed. Then came this mediation thing. It was awful.
>
> My client decided to settle at 70% of his claim. I wasn't happy because I thought we had let the defendant off too easily.
>
> But do you know what?
>
> My client loved it. And when I saw him shaking hands with the defendant at the end of the mediation session, I thought to myself: 'Maybe we have done the right thing after all.'

Duty to Client

Doing the right thing for a client. Acting in his best interests. This is what my friend felt was his duty. It is every lawyer's primary duty. My friend was able to overcome his initial uneasiness with the mediation process, as well as his own preferences and interests, to help carve out a solution which his client was prepared to accept.

To me, this is a pre-requisite of being a good mediation advocate. To understand that at the end of the day, a lawyer's duty is to do what is in best interests of his client. We may 'lose' some fees in the process, but there are 'pluses', too. The disputants are happy (at least relatively so), and both counsel get to keep a client for life.

Role of a Lawyer in Mediation

What is a lawyer's role in the mediation process? What does it take to become a good mediation advocate?

I would like to touch on eight areas:

1. familiarising yourself with the mediation process;
2. considering the possible objectives of the mediation;
3. deciding whether to mediate;
4. deciding when to mediate;
5. choosing an appropriate mediator;

6. preparing your case;
7. preparing your client for mediation; and
8. representing your client at the mediation.

The observations and comments made in this paper relate to the mediation sessions conducted at the Singapore Mediation Centre (SMC). I will direct my address to the lawyers amongst the readership, but if you are a potential party or participant in a mediation session, I hope that you will find these remarks useful as well.

Familiarisation with the Mediation Process

All mediators accredited to the SMC are trained to practise interest-based, facilitative mediation. This means that the focus of the mediation is on ascertaining the underlying interests or concerns of the parties (as opposed to their claims or rights), and searching for an appropriate solution which can reasonably satisfy the interests of both parties.

For example, take a dispute between two neighbours where one neighbour has sued the other for damages for hitting him in the course of an argument. The claim may be monetary in nature, but the real interests or concerns of the parties would be to find a solution which would allow them to live in harmony.

Furthermore, as a general rule, mediators at the SMC practise facilitative mediation. In other words, the mediators are not there to tell the parties who is right or who is wrong. The focus is on problem solving, not on who has a better case.

Mediation advocates should be familiar with the process practised at the Centre, so that they can adequately prepare their clients for the sessions beforehand. Whilst there are no fixed rules or procedures in mediations, and mediators may need to be more flexible and creative in some cases, a typical mediation at the SMC will consist of a combination of the following components:

1. introduction by mediator;
2. opening statements by parties;
3. joint sessions:
   - identifying issues;
   - identifying interests and concerns;
   - generation of options;
4. separate meetings;
5. negotiations;
6. agreement.

Considering the Possible Objectives of Mediation

Of course, the ultimate reason for using mediation is to resolve the entire dispute between the parties.

However, as a mediation advocate, you should be aware that in the event that the entire dispute cannot be resolved, you can consider other possible objectives, which may still prove to be useful or helpful to your client:

1. resolving part, if not all, of the case: eg in an accident case, by agreeing to apportion liability (50:50) but leaving the quantum of damages to be adjudicated.
2. narrowing the issues in the case: eg if there are three issues in a case, by agreeing that Issues A & B will depend on the outcome of Issue C.

So, in preparing for a mediation, it would be useful to bear in mind these other possible objectives. Solving part of the problem for your client is still better than not solving anything at all.

Deciding Whether to Mediate

As a mediation advocate, you can assist your client by helping him to assess whether the case is

suitable for mediation. For example, a case is suitable for mediation when:

1. neither party has a clear case
2. the law is unclear;
3. there are evidential problems;
4. the value of the claims do not justify the costs or time involved;
5. one or both parties want the matter settled confidentially;
6. the parties wish to continue doing business together; or
7. the parties are prepared to give and take.

Help your client to assess his chances in court, eg by obtaining an expert's report or an independent valuation. What would the probable outcome in court be? Would a mediated settlement be a better alternative?

Deciding When to Mediate

In the movie, 'Disclosure', which was recently telecast on TCS 5, Tom Sanders (played by Michael Douglas) charged his immediate boss, Meredith Johnson (played by Demi Moore), with sexually harassing him. Tom's attorney opts to mediate the dispute three days before Johnson's company, Digicom, is due to enter into a merger with another company. The timing is perfect as the company does not want to attract any adverse publicity before the merger.

To give another example, a party that feels it has a good case may nevertheless be prepared to settle because it is preparing for a listing.

In life, timing is everything. Generally speaking, a dispute which has been referred to mediation at an early stage stands a better chance of being resolved. If you decide to mediate at too late a stage, the parties may not be able to settle because of the amount of acrimony which has been generated, and the costs which have been incurred. Sometimes, however, opting for mediation at too early a stage may have its drawbacks. The parties may need a cooling-off period before they are ready to mediate.

Choice of Mediator

The mediator is proposed by the SMC. In almost all cases, the proposal is accepted unless there is, say, a conflict of interest. You can help ensure that the mediator who is selected is an appropriate choice for your case by:

1. informing the SMC of the nature of your case when you first register your case; and
2. making specific requests viz-a-viz the choice of mediator. eg ask for a Hokkien speaking mediator if your client is only conversant in Hokkien, or for a more senior mediator if the parties are elderly.

As the SMC's practice is to appoint two co-mediators, you can request for an industry specialist, say, an architect or a quantity surveyor, to be appointed as a co-mediator where you think that their expertise will assist in the resolution of the case.

Preparing Your Case for Mediation

Just as a litigation lawyer needs to develop his case theory before trial, a mediation advocate needs to know his case well, and strategise for the mediation.

The first step is to review the pleadings (if any), the relevant documents and the correspondence between the parties. If without prejudice negotiations have been conducted, note the last offers made by the parties.

As the type of mediation practised by SMC mediators is interest-based mediation, the next step is to identify the interests and concerns of both parties. Once you are aware of the available evidence, the legal positions and the underlying interests of the parties, you will have an understanding of what is actually negotiable.

How does one identify the opposing party's true needs and interests, and deal with them?

Roger Fisher and William Ury in their book, Getting to Yes, offer these suggestions:

1. Ask why. Put yourself in your opposing advocate's shoes and ask why he or she would be taking a particular negotiating position. What could be the desires, concerns, fears, hopes behind it?
2. Ask why not. Again, put yourself in the opposing advocate's shoes and ask why he or she has not embraced your negotiating position. What desires, concerns, fears, hopes are precluding it? Are they legitimate? If not, what can you do or say to help the opposing side see that they are not legitimate? If they are legitimate, what can you do to modify your negotiating position so that the opposing party's needs and interests can be better satisfied?

Once you understand the interests and concerns of the parties, you are then in a position to make a list of possible options or solutions.

Example: Restraint of Trade Clause — 3 Years

	Plaintiff	Defendant
1 Claim/Counterclaim Injunction to	Restraint defendant from working in Company X. Account of profits or damages.	Unpaid salary, CPF, expenses incurred on behalf of the plaintiff company.
2 Interests/Concerns	Loss of clientele/business. Afraid it would set bad precedent for other employees	Livelihood at stake. Money.

3 Possible options:

- Defendant undertakes not to deal which would with specific customers of Plaintiffs satisfy interests for a period of time, say, 12 months. of both parties
- Plaintiff allows defendant to continue working in Company X.
- Parties sign joint statement to clarify position to plaintiff's employees.
- Plaintiff pays defendant $Y, or defendant drops claims.
- Claim and counterclaim discontinued, with each party to bear its own costs.
- Plaintiff and defendant consider pooling expertise and working together on certain business projects.

Discuss these options with your client, and work out a strategy in terms of:

1. Your goal for the mediation, ie, what your client would like to achieve, bearing in mind the interests and concerns of the other party.
2. The facts which you wish to present to the mediator to achieve your goal.
3. The documents which you are prepared to disclose to support your client's case.
4. The witnesses who should attend the mediation to corroborate your client's case.
5. The roles to be played in the mediation by you, your client and the witnesses.
6. A common theme which will capsulise your client's position, eg the restraint of trade clause is unfair and oppressive and your client is the sole breadwinner in the family, with four young children to feed.

Once this is done, you are in a position to prepare your client's Case Summary, which should be presented to the mediator several days before the mediation. The Case Summary should not be longer than two to three pages, and should state your client's claim, his interests and concerns, and the status of the latest negotiations. Important documents supporting your client's claim ought to be disclosed to the mediator. Preparing Your Client for Mediation

In a trial, the client's role is limited to the giving of evidence. The lawyer plays a greater role; making the opening statement, examining and cross-examining the witnesses, and making the closing

submission.

In a mediation, the client plays a greater role and the lawyer's role is more advisory in nature.

Plan a session with your client before the mediation, where you can:

1. Explain the nature of the mediation process to him.
2. Explain the procedures, the roles of the mediator, the lawyers and the parties.
3. Go through the case with him, identify his interests and concerns, and discuss possible options for settlement or solutions.
4. Discuss goals, strategies and themes.
5. Agree on a reasonable settlement range, opening positions, and bottomlines. If your client is representing a company or organisation, make sure he works out the limits of his settlement authority.
6. Help your client with his presentation of the Case Summary.
7. Discuss his BATNA (Best alternative to a negotiated settlement), WATNA (Worst alternative to a negotiated settlement) and MLATNA (Worst alternative to a negotiated settlement).
8. Tell him to be open.

Representing Your Client at the Mediation

This is the time for you to put the strategy which you have discussed with your client into action.

Opening statement

Assist your client in his opening statement. If he has missed out any important point, chip in at the end of your client's presentation. You may ask the mediator for permission to clarify aspects of the opening statement or obtain further information.

Joint session

Help explain your client's true interests and concerns. You may ask questions to 'test' the interests and concerns raised by the other party. Assist the process by helping to generate options and possible solutions, bearing in mind the goals, strategies and bottomlines of your client.

Private meetings

Be helpful, but ensure that your client does not disclose more than what he set out to do or exceed his bottomline. At the end of each private meeting with the mediator, state clearly what can or cannot be disclosed by him to the other party.

Advising your client/Negotiations

Take the time necessary to caucus with your client privately. Remember: you are there to protect your client's interests and to help him negotiate.

Working with the mediator

Work with the mediator. He is a neutral, and is there to assist the parties. If he is convinced of your client's sincerity and the reasonableness of his position, he can help to relay your client's proposals to the other party and explain the rationale in a more objective manner. A proposal made through the mediator usually comes across better.

Joint problem solving

In litigation, the aim is to win the case for your client, regardless of the outcome for the opposite party. In mediation, whilst the aim is still to obtain a good settlement for your client, the focus is on joint problem solving, not demolishing your opponent. It takes two to settle a case, and the challenge is to find a solution which reasonably satisfies the interests of both parties.

Settlement

Before your client makes an offer or accepts a settlement, ensure that you discuss the details with him so that he understands what he is doing. Check that the terms of settlement are viable and can be performed. You ought to be aware that the terms of the Mediation Agreement signed with the SMC specify that there is no binding agreement unless it is reduced into writing and signed by the parties. A party cannot, therefore, be held to an offer made verbally in the course of the mediation session. If the parties arrive at a settlement, draft a simple agreement which covers the vital points.

If, at the end of the mediation session, your client decides to shake his opponent's hands, remember the experience of my lawyer friend and tell yourself, 'Yes, I did the right thing for my client!'

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