Kluwer Mediation Blog

Effective Paperwork in Mediation

Geoff Sharp (Brick Court Chambers / Clifton Chambers) · Monday, April 2nd, 2018

As mediators, we spend much of our time contrasting mediation with, and distancing ourselves from, litigation.

Before your eyes glaze over, that is not for this post. Instead, this post draws out one of the many similarities between mediation and litigation, especially when mediating a litigated case.

Mediation has, some would say unfortunately, become a more paper intensive process over the years. Multiple ring binders are delivered to the commercial mediator's door in the lead up to the mediation, shortly followed by sometimes lengthy position papers emailed in the days or hours before mediation day.

Preceding all of this is often a lengthy exchange of correspondence between the parties, going back some years in major litigation, debating procedural and substantive matters. In addition there are the mandatory court papers framing the legal argument in the time-honoured way (pleadings, as they are known in the trade) usually in Times Roman and often in archaic language.

So, while the papers produced for mediation are not usually the first opportunity each party has to see how the dispute is approached by others, those papers, and in particular the position papers, are hugely important and becoming more so – especially given the trend for commercial parties to have less contact time as they spend little time together in joint and more time apart in caucus on mediation day. Paper can therefore sometimes be the primary way in which parties communicate the entirety of their legal, factual, and commercial argument.

Justice Susan Glazebrook of the Supreme Court of New Zealand (New Zealand's highest court) has produced a no-nonsense guide to *Effective Written Submissions* in keeping with her style of judging.

While aimed at appellate lawyers involved in the litigation process, much can be taken from the Judge' s paper by those preparing litigated cases for mediation, especially position papers to be provided to the mediator and other parties.

The obvious rider is that the Judge' s paper is all about how best to persuade the decision-maker before any oral argument takes place and we all know the mediator is not a decision-maker and does not need to be persuaded of anything – in that sense quite agnostic – but nevertheless my experience is that documents received prior to mediation day are very influential in determining how I approach each mediation, especially how I order my thoughts and work out the architecture

of the approaching discussion.

My post a year or two ago on Killer Position Papers was very much encouraging lawyers to adopt a mediation orientation when writing position papers rather than simply produce something akin to an opening submission at trial. These usually start with “This case involves… ” and end with an overly confident expression of success qualified with a commitment to discuss the dispute in good faith.

Taking nothing away from that approach, some highlights from the Judge’ s paper are;

> Capture the essence of the case at the beginning of the written submissions. The first paragraph should outline the essential facts and issues of the case. As you would explain it to an interested, but slightly distracted friend over coffee.

Comment; you have lived with the case, sometimes for years. A mediator probably has a maximum of 4 or 5 hours to read themselves in from scratch – please be kind.

> Your description of the essence of the case, if skilfully done, will set the scene for a decision in favour of your client. But subtlety rather than overt partisanship will be more persuasive. Try for an arresting first sentence.
>
> Your clients have names. Use them.

Comment: Once there are more than two parties, names are essential as labels like ‘sixth defendant’ or ‘fourth third party’ are meaningless to a new pair of eyes.

> Meet the usual rules of good writing. Use short sentences. One idea per paragraph. Keep adjectives and literary flourishes to a minimum. An argument can ironically appear weaker if it is adorned with hyperbole and adjectives.
>
> Make sure your submissions are logically structured, pleasingly arranged, with plenty of road signs. Charts and diagrams may help but make sure they are big enough to read and, if colour coded, that the judges are not given black and white photocopies.
>
> Chunkification: A term coined by my very dear friend and colleague, the late Sir Robert Chambers. By chunkification, he meant that you should split the argument into organised bite sized chunks with headings and subheadings. And a table of contents helps.
>
> Even if your submissions are of necessity long, they will be more easily digested in chunks. Further, by dividing up the submissions, this helps you to identify the issues arising in the case and to set up a logical structure for your submissions, which leads inexorably to the conclusion you want the judges to arrive at. Your task of persuasion will be much easier if the judges can easily see where the argument is

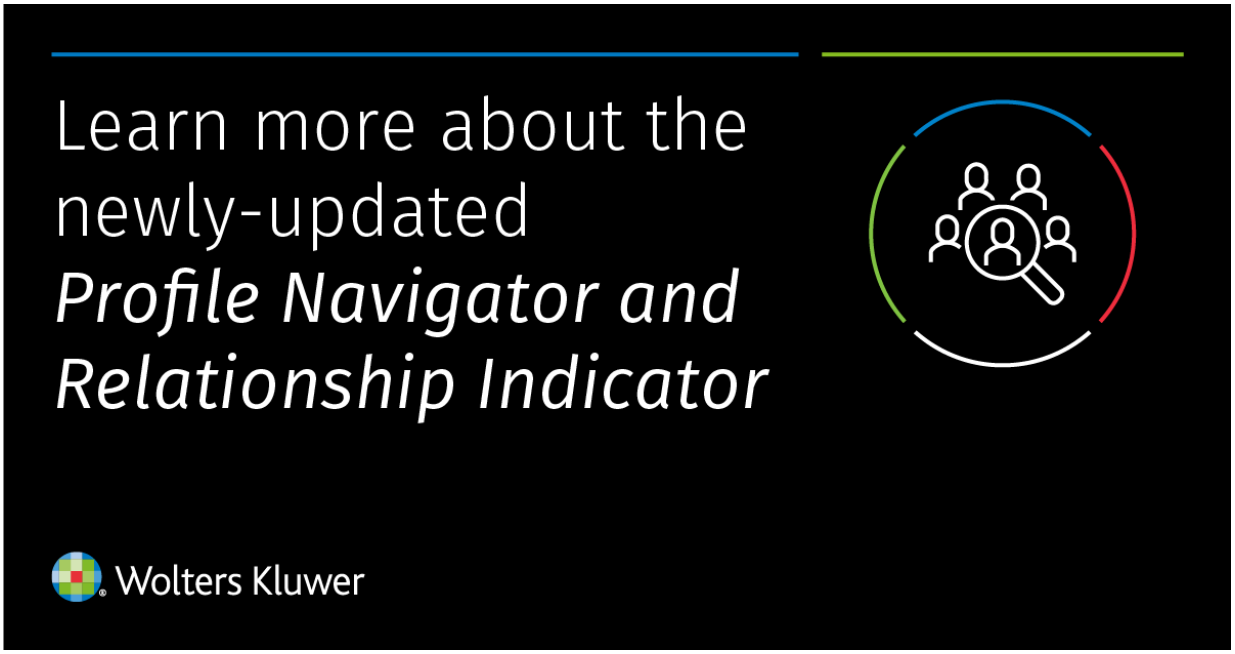
> going.

Comment: chunking is a wonderful tool of persuasion, and although the mediator has no decision making role, there are some real advantages to having the mediator really understand how you layout your case – factually, legally and commercially. Your aim should be to have the mediator adopt your structure of the issues – what I call the architecture of the discussion. Take a look at Chunking Up and Down – advice for those preparing for the ICC Mediation Competition in Paris

> I thought I would leave you with a quote from Justice Robert Jackson. He apparently once said that, when he was Solicitor General of the United States, he made three arguments in every case:
>
> > "First came the one that I planned – as I thought, logical, coherent, complete. Second was the one actually presented – interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night."

Comment: be ready to recalibrate on the day. So often the mediation takes on a life of its own and issues you highlight in your written material before meeting fall away and others assume an importance you might never have expected. Despite the trend to paper, mediation remains an oral sport.

The entire paper repays reading, whether you are mediation or litigation counsel.



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