

PERSPECTIVES

# CREATING CLIENT VALUE BY GETTING THE EARLIEST POSSIBLE SETTLEMENTS

BY **LAURA A. KASTER / MICHAEL J. LEECH**

&gt; APPROPRIATE DISPUTE SOLUTIONS / TALK SENSE MEDIATION

Clients know that most commercial disputes will be settled and not tried. However, their legal and expert expense and internal distraction will increase in direct proportion to the time spent litigating prior to settlement. Clients are asking their lawyers “Why can’t the dispute be resolved earlier to reduce the process expense and business disruption?” and “What is the value of your legal services expended prior to settlement?”

These questions are reflected in requests for (and monitoring of) litigation budgets and demands for alternative fee arrangements that create incentives for outside counsel to minimise legal cost. But settlement takes the cooperation of all parties, and one party’s counsel has a limited ability to make it happen sooner, even when incentives are in place.

A client-oriented process for earliest dispute resolution can be best obtained by using a multi-

phase mediation process. Using the mediator's power to confidentially investigate and diagnose the causes of the resolution impasse before any negotiation occurs, a trained mediator can suggest the process best calculated to lead to an early settlement at a minimum of cost to the parties. Such a process will be customised to address the reasons the dispute has not been settled already. For example, the settlement process may recognise that the parties are not ready to negotiate until more information is exchanged.

This process is the 'Guided Choice' process, a form of mediation designed to achieve the earliest possible dispute resolution. It relies on substantial confidential pre-negotiation investigation and process design activity by a mediator trained for this endeavour. In this way, it differs from the type of mediation lawyers think of, which is typically a process in which mediation is an event and the mediator helps with negotiation activity on a single day. This misunderstanding is the primary reason why lawyers object to mediation as being 'too early' or a 'waste of time and money'. Guided Choice is completely different from the pre-trial settlement model familiar to so many mediators and lawyers.

How then does the process work?

### **Phase one – choosing a Guided Choice mediator**

Even if the parties have signed a pre-dispute agreement providing for early mediation or have been ordered by a judge to early mediation, this does not mean that the parties have committed to a full settlement process. Generally, the parties' assumption is that mediation will be a typical one-

---

**“Even if the parties have signed a pre-dispute agreement providing for early mediation or have been ordered by a judge to early mediation, this does not mean that the parties have committed to a full settlement process.”**

---

day process, which they may strategically view as an opportunity to assess the adversary's appetite for litigation, gather some information and otherwise simply 'check the box' on the way to the courthouse or arbitration service.

Because the parties think that the selected mediator's primary job will be to conduct a negotiation, they may have difficulty selecting a mediator. They worry that unless they have the 'right' mediator, they may 'lose' the mediation.

Instead, the parties should agree to talk to a potential mediator whose initial assignment is to convince any reluctant parties that it is in their best interest to start a process with a confidential investigation and to recommend a settlement process that begins negotiations only when the parties are actually ready. If there is resistance to this diagnostic phase because of cost and scepticism about the value of the Guided Choice process, first, it can be pointed out that one or more parties, especially insured parties, may be unwilling to make significant concessions until they have a better understanding of what the evidence and legal arguments will be. Second, the Guided Choice process ensures parties that they will advance their understanding of the merits of the dispute during the process, so that if it does not resolve immediately, meaningful progress toward resolution will still have been made. Third, the risk of a 'check the box' mediation experience will be greatly reduced. Finally, the whole point of Guided Choice is to reduce total cost by finding the cheapest and quickest way to bring the case to conclusion. The mediator and the parties may also set a budget and schedule for the diagnostic phase to allay these concerns.

### **Phase two – diagnostic**

Confidential interviews by the mediator of people who understand the settlement impediments – existing and future – are the starting point. It begins with phone interviews of lawyers and, if there are

insurance issues, phone interviews with claim reps. It should proceed to meetings, or at least telephone interviews with the corporate constituents affected by and charged with resolving the dispute. In-house counsel is usually central to this conversation. The diagnosis includes looking at the identified legal and factual issues identified by the lawyers, but also discovering and weighing much more beyond that, considering the corporate strategies and individual interests that will impact resolution. It seeks to understand the factors that might change positions on both sides. This requires the mediator to have an understanding of the science of personal and organisational decision making.

### **Phase three - process design**

The mediator diagnoses the impediments and develops suggestions for a settlement process that can get people (and their organisations) ready to evaluate the issues and assessments that would change their case valuations and settlement positions. There is often a need for further information exchange. At this stage of the process, the mediator encourages internal investigation and facilitates an efficient exchange of the information necessary for settlement. This is a different standard than one based on the Federal Rules of Civil Procedure, which are designed for trial. Only information important to making settlement decisions need be exchanged, which should dramatically reduce the 'discovery' cost. If there is

distrust, the information exchange can be conducted in a way that allows for accountability if parties are not forthcoming or candid. If the case really needs to be prepared for trial, then the full range of discovery can be employed later.

Process design should also include an exercise involving 'what-if scenario' planning. Early stage negotiations increase the probability that some impasse will be

encountered along the way. Therefore, the parties should be prepared for roadblocks and those roadblocks should not be considered an end to the process. It is much easier and more fruitful to discuss next process stages before a roadblock

or impasse appears. The objective

is to anticipate temporary

impasses and plan how

best to work past

them. Indeed,

a period of

impasse may

even be an

important

step toward

resolution.



### Phase four – negotiation

The negotiation is conducted based on the agreed process design. It may or may not include plenary or joint sessions, video/telephone discussions, separate or caucus sessions with insurers and other third parties who are important to a settlement. A quick impasse-breaking binding arbitration of specific issues, for example, can be an element built into the process.

### Phase five – overcoming the impasse

What happens when an impasse, anticipated or not, occurs? Negotiating an impasse should never be a reason to terminate the settlement process or terminate a mediator who is not part of the problem. Rather, the negotiation should be adjourned while impasse-breaking strategies are pursued. These strategies include seeking outside opinions from judges, arbitrators and experts; often in commercial disputes, evaluative opinions by the mediator do not cause settlements and impair the trust of the party in the mediator. This stage may also lead to bringing in new negotiators or stimulate an internal re-evaluation of the negotiation on one or both sides. The problem may simply be time, or some impending event, or a decision by a party that is not part of the process. The point is to view a moment of impasse

as only a moment, exploring the underlying causes and trying to address them, rather than giving up on the process. This matter will settle because the vast majority of cases are resolved before trial. Between 1962 and 2002, the percentage of federal cases filed that were tried dropped from 11.5 percent to a scant 1.8 percent.

If litigation ensues, it's likely that settlement will be explored again at some point before trial and appeals are completed. The point is to continue seeking resolution and be ready to resume negotiation at the first moment when there is reason to believe it would be productive. **CD**



**Laura A. Kaster**

Arbitrator/Mediator

Appropriate Dispute Solutions

T: +1 (609) 921 0095

E: lkaster@appropriatedisputesolutions.com



**Michael J. Leech**

Mediator

Talk Sense Mediation

T: +1 (312) 283 3310

mleech@talk-sense.com