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What would a settlement look like?
Preparing for mediation

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'He hasn't prepared for the mediation.' This common complaint bedevils mediations, but few think seriously about where the failure lies.

Parties often accuse the mediator of not preparing. A party will react with irritation because a mediator simply does not appreciate the significance of a letter dated 18 June 1998 deep in the third of a half a dozen lever-arch files, or apparently cannot remember a conversation between the wife's brother-in-law and the second cousin's half sister that absolutely proves the strength of that party's case.

Said party has, of course, prepared to the utmost. He has drawn up an eight-page skeleton argument – no, a position statement is the correct term, isn't it? – explaining in close detail, legal as well as evidential, why success is certain; a position statement that inevitably ends, 'We come to this mediation with a view to compromise and hope the other side are approaching the mediation in the same spirit. We remain, however, convinced of the strength of our case.' And what is more, they tactfully refrain from saying, we can prove the thoroughness of our preparation by delivering umpteen bundles collated and copied at paralysing expense to the client.

Receiving those umpteen bundles, the mediator groans, inwardly or outwardly depending on who is within earshot. It is not so much the burden of reading the paper that dismays the mediator – though some highly successful mediators are rumoured to distribute yellow sticky tabs at random to create an illusion of engagement – but what the position statement and the avalanche of bundles betray: a complete failure to prepare for mediation.

A party who acts in this unproductive way is rehearsing his preparation for litigation. He is doing nothing whatever to make a successful mediation more likely.

The mediator could not care less what the wife's brother-in-law said to the second cousin's half sister five years ago. He has only a passing interest in the strength of each party's case. What he wants to know is what a settlement would look like – and at mediation that is what the parties should want to know too.

Time and again a mediation fails, or drags on endlessly, because neither party has given a moment's thought to that simple question: what would a settlement look like? One party to a family mediation has, for example, a right to receive an income for life. Of the three or four plausible settlements,

the mediator can see at once that all require this right to be extinguished in return for a capital payment of some sort. Has anyone even thought of calculating the current value of that future income stream? Or sought advice on the tax consequences? No and no: blank faces all round and a potential dead-end to what is, after all, a very expensive day's mediation.

Any number of examples point in the same direction. In another case any rational settlement is bound to involve the sale of a house: has anyone given a moment's thought to Capital Gains Tax? Of course not. Money is to be paid from an estate: does the payment count as a potentially exempt transfer for Inheritance Tax? No one has a clue. These are not trivial questions. A house bought for £100,000 but now notionally worth £550,000 could in the real world be worth no more than £425,000 or so if Capital Gains Tax is payable. Settlement is impossible while these questions remain unanswered.

None of these obstacles should take the parties by surprise. All stem from their failure even to start preparing for mediation by asking that simple question: what would a settlement look like?

And there lies the kernel of this problem. Failure to prepare for mediation is not just failure to foresee the questions that any plausible settlement will throw up: that failure to foresee is itself caused by a failure to think strategically. What is our strategy? What are we trying to achieve? You have to know where you want to be before you can decide how to get there! What are we trying to achieve? The answer is not 'a settlement', still less 'the best deal we can get away with'. Effective preparation for mediation starts by looking in very concrete terms at the set of plausible outcomes and continues by selecting the sub-set of outcomes that are acceptable, within reach and thus worth playing for. The strategy is to achieve a member of that sub-set, a sub-set which on hard-nosed analysis is in all probability really quite small.

In other words, the range of plausible outcomes is probably, if you are honest with yourself, really quite narrow. Accepting this uncomfortable truth is the first step in preparing for mediation. And admitting the truth, even to yourself, is probably the hardest step you will take in mediation.

What are the plausible outcomes? Each party should start by asking that question in purely neutral terms. There may well be – indeed in all but the most straightforward case probably will be – more than one answer, though several of the answers may overlap with common features. In all but the most complicated case, on the other hand, the number of plausible settlements will be smaller than you would like, particularly if payment of money is taken to be a single option regardless of the amount to be paid.

Indeed from the defendant's point of view that is probably the first question to ask in preparing for any mediation: 'Being realistic, do I think this case can

settle without my handing over money (never mind for the moment how much)?' *Settle*, note, not *end*. *End* is an entirely different question. If your case is as strong as you believe, you may well walk away from Court without giving a penny to the other side; but if the case is going to mediation, the relevant question is, 'Why on earth should the other side walk away empty-handed?' If the answer is 'They won't', then the case can still end without payment, but cannot possibly settle without payment.

A case (and they are surprisingly common) in which there is only one realistic settlement option – the payment by the defendant of money – offers a good paradigm for the whole process of preparation. At the pre-mediation meeting the defendant's lawyers will draw up a realistic forecast of the potential judgments at trial, ranging from the worst, where everything goes the claimant's way, to the best, where all the defendant's evidence and arguments turn to gold. Translating that range of potential judgments into a range of plausible outcomes at mediation is the starting-point of all preparation.

Paying less than what you have identified as your most favourable judgment is of course a possible outcome, but it is not a plausible outcome, because your opponent might as well take his chance at trial. Equally, of course, there is no point in paying more than your worst forecast, because you might as well take your chance at trial: that is not a plausible outcome either.

It goes without saying that these forecasts include both sides' costs as well as damages. Paying more in damages than your advisers believe likely even on the worst forecast can still be a good deal if the mediation takes place early enough, because the total of worst-case damages plus current costs may be a lot less now than the total of middle- (or even best-) case damages plus the costs of a full-blown trial.

In a case like this deciding the negotiating strategy could not be more straightforward. Your best forecast defines your cheapest plausible outcome and thus the bottom end of your settlement range. As for the top end of the range, how close are you prepared to go to your worst forecast to secure a settlement? Answering that question involves putting yourself in your opponent's shoes and asking what motive he has for accepting this sum rather than that, but answering the question will at the same time identify the point at which you will simply walk away on the premise that no deal is better than a bad deal.

Preparing strategically confers tactical benefits. You are the defendant and you are coming to the end of your pre-mediation meeting with your lawyers. Your lawyers forecast the worst possible outcome at trial to be (say) £200,000 in damages and costs. You still think there is a reasonable chance of seeing the claim off altogether if the case runs to trial, but paying nothing is not a plausible outcome of mediation, because the claimant is not simply

going to abandon the proceedings. At this end of the scale the lowest plausible outcome is £30,000, because that is the lowest value of the strongest head of claim with a reasonable allowance for the relatively modest costs incurred at this early stage.

The other end of the mediation scale is not of course £200,000. No deal is better than a bad deal, because (if your lawyers are right), things cannot be worse after a full trial. How far off £200,000 is the maximum sum it is worth paying to achieve a settlement?

Putting yourself now in your opponent's – the claimant's – shoes, you conclude that if he loses his most speculative head, the claim will still total £155,000 with costs included; short of an outright win, that is the most favourable judgment he is likely to achieve. You are not disposed to settle even at that figure, however, because doing so would mean throwing away your chances of winning outright. At this point you have to think like a professional gambler. Balancing your chance of winning outright against your chance of losing outright, you fix £100,000 as the point at which no deal is better than a bad deal. In betting terms this particular horse is worth backing at even money, but not at odds-on.

No analysis will reveal just why you have chosen £100,000. Analysis will tell you why you are reconciled to paying at least £30,000 and never going to pay more than £155,000, but your choice of sticking-point between those figures has to depend on your gut feeling for the relative strength of each case, your appetite for risk, the likely damage to your finances if you lose and so on.

Your strategy has now written your tactics for you. Of course you want to lengthen the odds as much as possible, but there is no point in opening the bidding at at £20,000, because your own analysis has shown that is not a plausible outcome; you will simply antagonise your opponent and make settlement less likely. Start where logic dictates: £30,000. If the answer is no, move forward in substantial, rational steps. There is no point in edging forward on tip-toe. After all you know you are not going beyond £100,000 and you also believe that £100,000 is still a good deal, so there is no convincing reason to delay too long in reaching that point. If your opponent does not accept, then the mediation was probably never going to be successful anyway.

A vital aspect of preparation lies in deciding when, and to what extent, to take the mediator into your confidence. Although I do come across them from time to time, it is a rare party who is prepared to give the mediator his bottom line at the outset. On the other hand, one of the mediator's greatest frustrations arises from watching parties inch towards each other in increments that represent two or three per cent of the claim while having no inkling of the figure at which they might meet.

Creeping blindly forward in this way is bad tactics and wastes the benefits of mediation. The tactic is bad because it eats up the time allocated to mediation and irritates the other party to the point where the will to compromise evaporates. It wastes the mediation because an unwillingness to trust the opponent is the main reason why mediation is needed; mediation works precisely because confiding in the mediator amounts to offering the opponent limited trust by proxy and so opens up channels of communication that may lead to an agreement. Outside mediation each negotiating party is driving golf-balls into fog, and neither party can see the green. Openness with the mediator, on the other hand, lifts the fog: the mediator cannot improve the player's swing, but he can at least point him in the direction of the green.

Without that overview the mediator's ability to help is trammelled. Armed with that overview, he can help the parties direct their efforts into the zone of likely settlement. Equally, of course, he can tell the parties there is no point in wasting further time and money on mediation because their strategies are too far apart to create a zone for settlement.

A mediation is not necessarily a failure just because there is no agreement. If your settlement strategy fails to produce a settlement, you have learnt something – that you will either have to pay more than you thought or accept there is not going to be a settlement and prepare for trial accordingly. This is valuable information that tells you a good deal about the other side's assessment of its own case and yours, but once again only if you have done the necessary preparation. Knowing that the other side will not accept £50,000 is not worth knowing if £50,000 is just a random figure; if £50,000 is a sum you thought the other side had good reason to accept, however, then finding out you were wrong will help you to formulate a more effective strategy for the remainder of the proceedings.

One final plea. As soldiers say, no plan survives contact with the enemy: be flexible. Draw up a Plan B. If the engagement refuses to follow either Plan A or Plan B, ask the mediator for half an hour, or more, to rethink your tactics, even your strategy. The other side does not need to know you are regrouping: suspecting a hidden advance, they may even be unnerved by your sudden decision to hold fire. But when you do finally break cover, please, please move forward on a plan to prepared positions.

And if anyone tells you that mediation is not war, reflect for a moment on what von Clausewitz thought about war. Like war, litigation is not an end in itself. Litigation, like war, must always be subordinate to policy and serve only as a means to an end. The aim of litigation is, like the aim of war, not to obliterate the enemy, but to achieve an end state different from, and hopefully better than, the beginning state. So ditch what the wife's brother-in-law said to the second cousin's half sister and concentrate on the better end state!