

2025

WILLS & ESTATES CPD SUPER DAY

SESSION 5:

'BEFORE MEDIATION BEGINS - PREPARING YOUR CLIENT FOR SUCCESS'



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Scope

- Preliminary matters
- Preparing the client
- Conduct
- Closing
- Aftercare
- Discussion

Preliminary matters

Understanding the client

- What is most important to the client?
 - For some it's money and percentages, for other's – principle
- Are the client's expectations achievable?
- Does the client have a good ability to conduct reality checks?
- Is the client commercially experienced or likely to approach as such?
- What are the client's emotional needs?
 - Building confidence and trust
- Is the client fearful of trial?
- How difficult is it for the client to make a decision?

Preliminary matters

Choice of mediator

- Type of dispute resolution
 - Private mediation
 - Settlement conference
 - Judicial mediation
- Matching to the client's needs / emotions
- Expertise in relevant law and practice
- Interventionist or 'hands offs'
 - Do I have a strong case or a weak one?
 - Have I been able to manage client's expectations Or not?
 - Assessment of the opposing client / decision maker
- Independence – connection with either side, including practitioners
- Small Estate
 - (< \$500k – County Court low-cost mediation, < \$1m for judicial mediation –Supreme Court)

Preliminary matters

Necessary information

- Detailed witness statements / instructions
- Clarity on current Estate financial position
- Parties' respective financial positions
- Valuations
- Any other necessary party?
- Position of any other beneficiary

Preliminary matters

Location

- City or regional
- Neutral
- Access for client
 - Mobility
 - Travel times
- Cost
 - New Vic Bar Mediation Centre
 - Level 11
 - Castan Chambers
 - 460 Lonsdale Street



Preliminary matters

Assessment of the Case

- Explaining the legal framework of factors that determine the outcome
 - Using straightforward language
 - Assist client to understand what is a relevant fact
 - Inviting questions
- Realistic assessment of range of likely outcomes
- Costs advice
 - Noting County Court expected range as conclusion of mediation in a TFM is between \$10k to \$35k
 - Will costs come out of the estate and if so, whose share?

Preliminary matters

Position Statements

- County Court Practice (VSC for estate < \$1m)
 - Filing of position statements rather than affidavits
 - Summary of key elements
 - 6 pages
 - No legal submissions or annexures
- Important tool in advocating client's case
- With prejudice
- Needs to be prepared as for trial

Preparing the client

Putting client at ease

- Why?
 - A client that feels fully briefed on the day and sees it unfold as advertised, can spend less energy worrying and concentrate on making good decisions
- Explain the day from beginning to end
- Confirm logistics, meeting time, parking, lunch, coffee, meeting rooms & layout
- Confirm who is attending
- Advice on the chosen mediator –
 - style, likely process
 - Role of mediator
 - Mediation agreement
- Explain confidentiality and trust as a necessary ingredient to mediation

Preparing the client

Emotionally preparing the client

- Advice on
 - Likely style of opposing advocate
 - Advocacy aimed at creating doubt and apprehension of risk in client's mind
 - Potential for theatrics
 - Aggression
 - “big team”
 - The walk out
 - Offers outside the range
- What to expect in joint session
 - “poker face”
 - May be invited to speak by mediator
 - Not obliged to respond to direct questioning from opposition

Preparing the client

Revisiting the legal assessment

- Confirm legal framework
- Update on assessment following exchange of Position Statements / Affidavit
- Identify own strengths and risks
- Identify other party's strengths and risks
 - Case concept to increase apprehension of risk by other party
- Confirm current and projected costs estimates
- Describe BATNA / WATNA
- Clear up doubtful points
- Derive negotiating strategy – at least opening position

Preparing the client

Clients like to feel there is a strategy

- Advice on potential negotiating strategy of other party
- Making offers that convey a message
 - Does the client really wish to settle
 - Offers designed to insult – not recommended
- Plan to deal with shuttle diplomacy / bargaining
 - Slow or get to the point

Conduct of mediation

Manage the client

- Intro to mediator and building rapport
- Confirm steps in process as it unfolds
- Manage need for breaks
- Re-group after joint session
- Initial offers
- Potential for impasse
 - Tactics for moving through
 - Use of mediator
 - Take a break
 - Look at the problem from a different point – identify alternate benefits, e.g. to a third party

Closing

Reality checking

- Preference to discuss in private
- Mediator will want to see client has good appreciation
- Should be no surprises