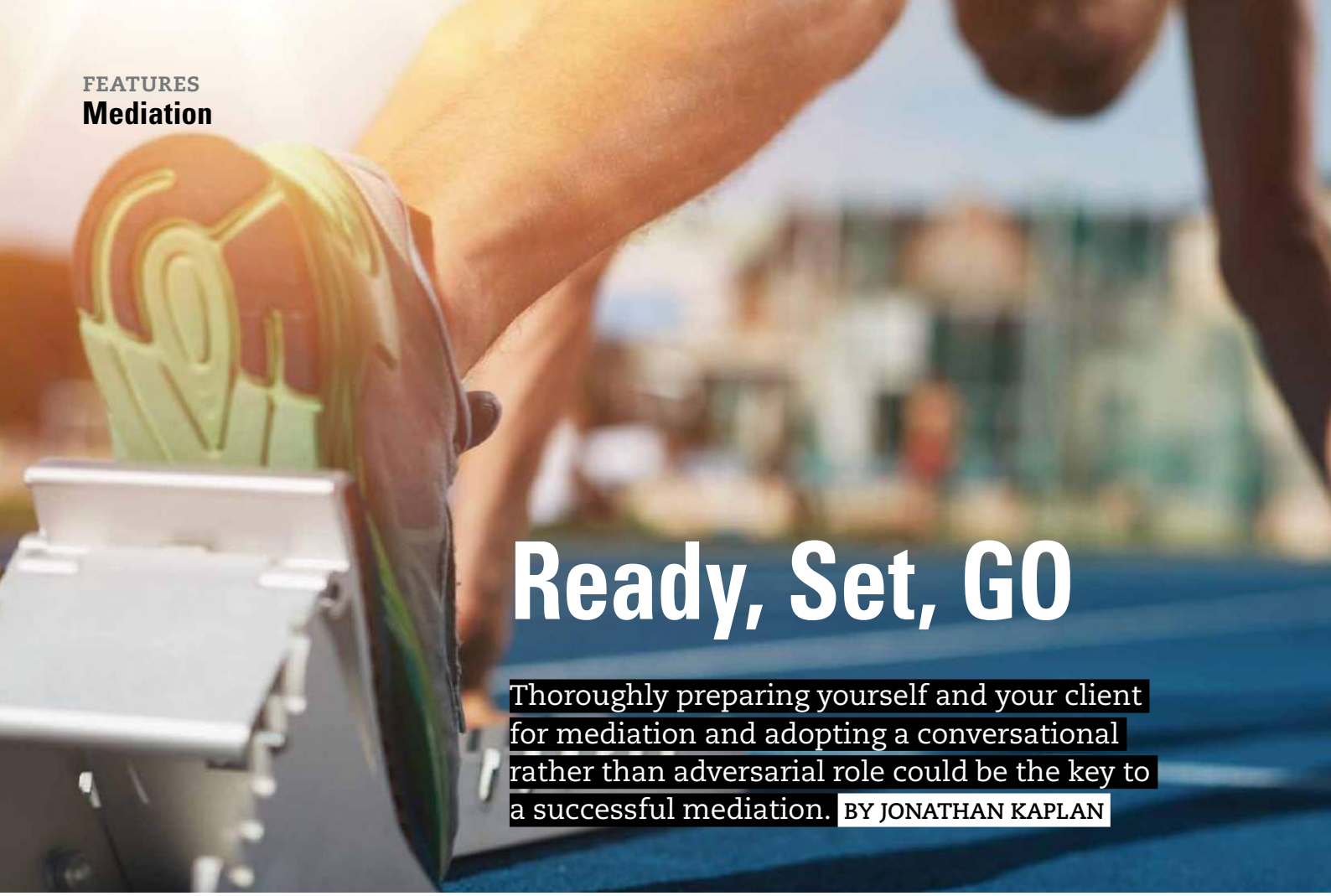

Ready, Set, GO

Thoroughly preparing yourself and your client for mediation and adopting a conversational rather than adversarial role could be the key to a successful mediation. BY JONATHAN KAPLAN

SNAPSHOT

- The solicitor will often be better placed than the barrister to assess whether a particular mediator will be suited to his/her client and to the nature of the dispute.
- To achieve the benefit of a well prepared mediator, provide your position paper well in advance of the mediation.
- Ensure that your client comes to the mediation with an open mind, and that he or she understands that mediation is the forum for achieving that commercial outcome.

Some time ago, a solicitor marched into a mediation and proclaimed that if his client didn't get what he wanted, court documents had been prepared and were ready to be issued. Not the way to start, I thought. He could have said that his client felt very strongly about his position but was nevertheless ready to bargain in good faith. Needless to say, the tone had been set, attitudes hardened, and I had an early lunch.

In litigation, to totally succeed one needs to prove every fact asserted and have every legal argument accepted by the court.

In mediation, the parties are usually unlikely to find much agreement on the law (although it is important that the legal positions are put) and inevitably they will probably not agree on all of the facts.

The aim is to work towards achieving that commercial outcome that you hear so many mediators spruik and have the luxury of crafting your own outcome, unless your client is prepared to roll the dice and have the uncertainty of a third party deciding a winner and a loser (with the associated cost implications).

The following are some of the major considerations for a legal representative when engaged to prepare for and represent a client at mediation.

When to mediate

Except for court ordered mediations where there is no choice, deciding when to mediate must be evaluated on its merits. In some cases it is preferable to mediate early, especially where there is an ongoing relationship between the parties such as landlord/tenant or franchisor/franchisee. In others, it can be more useful to go through pleading stages and discovery to enable the representatives to conduct a more scientific evaluation of the case. However, waiting too long can be costly for your client – both emotionally and financially.

Choosing the mediator

This is often a major obstacle. Usually a solicitor provides two or three names to the other solicitor, often supplied by their barrister. Frequently those names are rejected, and three more suggested by the opposing lawyer (or barrister).

It is important for solicitors to be involved in this process. Given that they have the carriage of the matter and a closer relationship with their client, they will inevitably understand their client's needs and mindset better than anyone else involved.

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Further, and of no less importance, the solicitor will often be better placed than the barrister to assess whether a particular mediator would be suited to his/her client and to the nature of the dispute.

Selecting or approving a mediator often involves some due diligence such as enquiring, Googling, searching LinkedIn or viewing the mediator's website to determine whether the mediator has the essential experience and skills to understand the specific dispute, manage the parties, deal with the lawyers and appreciate the character of the dispute.

One approach is for a lawyer to ask the opposing lawyer to suggest three mediators including at least one barrister/mediator and one solicitor/mediator. By putting the ball in the court of the other solicitor, it can engender a spirit of cooperation and generate goodwill. Try to avoid rejecting a mediator merely because you feel that he or she may favour the other party as that is highly unlikely. A mediator has an obligation to be fair and impartial and will not want to risk being accused of bias. Clearly your client can't be forced to accept an unfavourable offer at the mediation, so there's little danger in accepting a mediator proposed by the other side.

There is often reluctance by a solicitor to appoint another solicitor as a mediator due to concerns that the solicitor mediator might subsequently be requested to act for that solicitor's client in other matters after the mediation. Apart from the ethical considerations, that concern can always be specifically dealt with in any mediation agreement.

Half day or full day

Engage with your opponent to make a fair and considered assessment as to whether the mediator is to be engaged for a full day or half day. If the parties are certain that the matter will be disposed of in three and a half hours or so, or are only available for that time period, there's no issue. But bear in mind that the mediator may have commitments for the other half of the day and might not be available if the allocated time is exceeded. This often also presents a problem for a mediator if they are available to continue as fees would only have been calculated and paid for a half day. This would then necessitate the mediator having an uncomfortable fee discussion and making payment arrangements for the additional time.

Engaging the mediator

Once engaged, mediators on panels will notify their panels of non-availability for that day. As with barristers, when a mediator accepts an appointment they will reserve that day and will not be able to accept other offers to mediate. Therefore, mediators usually require that the agreement to mediate be signed and returned and the mediator's fee paid around ten days before the mediation.

Contrary to a barrister's position, which is secured when instructed by a solicitor, solicitors do not usually accept responsibility for the mediator's fee. Accordingly, unless an agreement to mediate is executed in advance, a mediator could potentially be unable to recover his or her fees if the mediation was, for example, to be cancelled the day before.

The brief

Solicitors should give the mediator their position papers or outline of the dispute at least two days before the mediation to allow the mediator time to become acquainted with the issues. Some time ago I received a very brief outline from one of the solicitors acting in the mediation. After 5pm on the day before the mediation I received a full lever arch file from the opposing solicitor containing only the pleadings (and amended pleadings) and no background, necessitating me having to burn the midnight oil in order to grasp all of the issues. On another occasion, having not received any documentation from the representatives, a solicitor handed me a five page outline of the dispute as the mediation was about to begin. This does a disservice to the clients as it diminishes the benefit that could be gained by the mediator having a good background to the dispute – and being able to digest the issues – and could save a significant amount of time in mediation. A two or three page confidential outline of the main issues dealing with the past, the current position and the desired outcome (if the party is willing to share this with the mediator) is extremely beneficial.

Preparation

One of the most frequent complaints from mediators is that the parties are often not adequately prepared for mediation, and consequently mediations fail where they could otherwise have had a chance of settling, or a worse outcome results where a better outcome could have resulted if parties had been better prepared.

When preparing for mediation, it is important to:

- Carefully assess the worst case and best case scenarios for your client if the matter is not able to be settled

and goes to a hearing. Ensure that your client understands that if the matter goes to court there will be a winner and a loser with associated cost implications for all. Explain in dollar, emotional and relationship terms the likely cost of winning and losing. Try to assess whether your client has the fortitude to endure the stress, time and expense of a court or tribunal hearing. This might determine your strategy in mediation.

- Prepare a draft of the possible terms of settlement in advance and copy it to a USB to save time if the matter settles. Some mediation venues won't permit you to insert a foreign USB in their PCs so it's a good idea to bring along a laptop. This can save significant time in recording and executing terms.
- Try to ensure that your client comes to the mediation with an open mind, and that he or she understands that mediation is the forum for achieving that commercial outcome, but be very judicious when you tell the other party – or ask the mediator to tell the other party – "This is my client's final offer", unless it really is. Your client's credibility might be torn to shreds if you then continue to negotiate.
- As a solicitor it's always useful to know who will be attending with the other party to avoid any potential conflict of interest or confidentiality issues, particularly where companies are the disputants. I was the mediator in a dispute involving two companies where the director in attendance of one of the companies happened to also be a barrister, who had been briefed in another unrelated matter that morning by the solicitor acting for the other company in the mediation. Neither knew the other was involved in the mediation. I felt for the solicitor who had to explain this embarrassing situation to his client.
- Confirm that your client comes to the mediation with full authority to settle. There's nothing more disconcerting than having agreed terms after four hours of negotiating and a party then says: "I need to call my wife/partner/boss to confirm it's OK". Bear in mind that none of those people were present at the mediation and they will only focus on the final offer, be it a dollar value or otherwise, and would not have experienced the subtleties or dynamics of the process during the mediation. This is frequently an issue with insurance companies or public companies.
- Be careful not to discourage a client who is keen to settle from settling unless you can confidently assure your client of a better result if the matter is litigated. I was the mediator in a dispute where a party was willing to accept the offer from the other party but was talked out of accepting the offer by her legal representative who encouraged her to litigate. From information available during the mediation it was apparent to me that she did not have the resources to litigate and I know that at least a year later no proceedings had been commenced. I often wonder whether or not she regretted her decision.
- Don't hesitate to contact the mediator before the mediation if you would like to discuss any issues of concern. There may be some special aspects that you want to confidentially draw to the mediator's attention.

Although many of the issues discussed in this article may seem trite to the experienced litigator, it is often the simple considerations that can make the mediation process for both practitioners and mediators a far more collaborative experience. This broad checklist should assist in the process. ■

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