



Advanced Dispute Resolution[®]

Seminar Series 2019

www.smlake.com



Sarah M Blake

Advanced Dispute Resolution Series 2019

The Advanced Seminar Series has been designed to provide the space for frank, gritty and real conversations about the things that impact us as professionals in the Dispute Resolution Industry. It has been designed to be multidisciplinary and interactive so that you can integrate your learnings and maximise the benefits.

Our first event gathered three incredible professionals who shared their insights into a challenging topic. Thank you to Registrar Natalie Whitby, Ms Charmaine Tsang Partner at LAVAN and Dr Sam Hardy, Principal Conflict Coaching International for enhancing our knowledge and skills in this space.

What happens when the mediator is the block to resolution?

Have you ever been part of a mediation when the mediator seems to get in the way of a good outcome? It can be incredibly frustrating for all involved and sometimes results in parties agreeing to outcomes that are limited, unsustainable or even no agreement at all. Our panel members explored a case and engaged with participants in a collaborative and enriching discussion about the problems and potential opportunities.

Special thanks to Charmaine Tsang and LAVAN for hosting this event with us.

This report was gathered from the Advance Dispute Resolution Series hosted by Sarah M Blake. Whilst you are able to use this information for your own personal reflection, please don't use it for business or commercial purposes. Should you have any questions please contact info@sdblake.com

What happens when the mediator is the block to resolution?

"Picture this, you have travelled from interstate with your client to attend a mediation and one of the first things the mediator says as you begin is "I don't think this matter will settle". Probably not what you expected to hear if you were familiar with National Mediation Standards. Their concerns were further fuelled by the mediator going on to assess the validity of the case during their opening statement.

This is exactly what happened for a lawyer and their party during a past mediation. They had invested significant time and money on preparing for the mediation, clearing their diary to travel interstate and allocating a least a day to engage in a process, all in good faith and a hope that the matter might be resolved.

What goes through your mind in that moment? In this particular case, it was a multitude of questions, shock and confusion. Overall though, it was the questions that stood out. Is it safe to engage in this process? Do we have confidence in the mediator to manage this process? What are we even here for? Have we just wasted our time? All of these questions represented a potential barrier to resolution and emerged due to the approach adopted by the mediator. In this particular case, the way parties experienced the mediator became a barrier to moving this matter forward."

Case study provided by Charmaine Tsang

This case study became the backdrop to a conversation about what happens when the mediator is the barrier to resolution. Is this even possible and what do we do if we think this might be occurring? Our panel members and audience explored these questions, and many others, as

they unpacked problems and explored opportunities. The problems real, and imagined, all stimulated a rich conversation. What follows are the key problems identified, the areas for further exploration and some take home messages from the panel themselves.

THE PROBLEMS

The case study provided a great way to explore some of the problems or barriers that did, may or were possibly influencing the potential for resolution. Here are some of the responses which were explored by the group.

The potential to undermine the authority of the representing lawyer

When there is a discrepancy between information provided by lawyers and the approach adopted by mediator it can cause confusion and potentially mistrust.

Potentially entrenching the position of parties

Hearing from the mediator that your case is unlikely to settle does very little to foster an environment of good faith negotiations and is likely to reinforce their commitment to their position.

Creating an adversarial approach from the start

If the process looks and feels like an adversarial battle, it probably is. Parties are less likely to engage effectively if they feel vulnerable, so the mediator's inability to address the potential clash of expectations becomes a barrier.

Too much focus on the legal consideration and not enough on interests

A focus on legal issues only poses the risk of embedding the fight rather than expanding the opportunities for resolution.

Inhibiting the potential for dialogue

An assessment on validity of case at the beginning by the mediator is unlikely to encourage parties to talk, what would be the point?

How much preparation is too much

Part of the pre-mediation process is to gather information and prepare parties and mediator to engage in negotiations. In this case it resulted in the exploration being done by the mediator via the written word.

Lack of understanding of the system within which the mediation is occurring

Court-based mediations occur within the context of a different system to those of private mediations. By not addressing the differences and assuming that there is shared understanding, the mediator is likely to inadvertently create barriers.

Lack of clarity regarding the rules, process and variances

The lack of clarity regarding the role of the mediator and how they conduct their process creates further confusion and barriers to potential resolution.

Ultimately, as identified by one of the panel members a critical question here is "what is the cultural framework influencing our understanding of resolution?" As lawyers, mediators or parties we come to this process with our own understanding of how resolution decisions are made. Is your framework based on a facilitative or determinative model? In asking the question we at least reduce the potential barriers which may emerge through confusion and assumptions about process.

AREAS FOR EXPLORATION

As well as identifying a number of barriers and challenges which may emerge from the case study, the group also identified a number of areas for exploration. These questions present an opportunity for further exploration and discovery, to help us as a profession sharpen our services.

What does effective preparation look like to mediators and others?

What perceptions are influencing power dynamics and choices?

How do we reduce the barriers to resolution and what role do lawyers, parties and mediators play in this process?

Do pleadings restrict or narrow the focus for resolution options?

What is the impact when the mediator doesn't control the process with legitimacy?

What is the role of the lawyer in preparing parties and how can we best influence good outcomes?

Suggested Questions for Lawyers to consider asking:

- What would be a normal mediation process and how is the session usually conducted?
- If mediation is occurring in Courts – Do you have best practice guides and how can I best support my party through this process?
- What does it mean to engage with a resolution focus?
- To what extent does the pre-mediation preparation material influence the mediation process?

Part of the challenge lies in the professional and wider public understanding of the mediation process and its benefits. It might be useful for people to consider how we measure success and then share these stories. For instance:

- Why seek early resolutions?
- What are the benefits of mediation and the different experiences of it?

The group also explored deeper challenges to the profession as a whole that may influence where we focus our next developmental leaps.

- Has mediation become a tick box process on the way to court?
- Has the legal professional missed an opportunity with mediation as a real value adder?
- What does it mean to start with an interest-based approach rather than from a position?

MESSAGES FROM THE PANEL

Ultimately, the general consensus was that mediation is most effective when parties and legal representatives seek mediation early and before hitting the courts. Why? Because in doing so you are actually empowered to have more choice – choice about the mediator, choice about what the process looks like, choice about time and cost factors.

This isn't always possible, but at the least these questions provide some focus for the profession to help them engage and promote mediation as a viable and useful option.

Some fundamental question for the legal profession to consider when mediation is an option include:

- How can we find a mediator who has a shared values approach to mediation?
- How can I best prepare and represent my client through this process?
- It is ok to ask to meet with the mediator prior to mediation – event within the court system?



Natalie Whitby
Registrar Supreme Court WA



Ms Charmaine Tsang
Partner at LAVAN



Dr Samantha Hardy,
Principal of Conflict
Coaching International

Here are some final messages that our panel shared with participants

- Seek early mediation before courts!!!!
- DISRUPTION - lawyers doing interests-based work
- If you see a barrier – say it!!!!
- Empowering you to ask questions – can I challenge the mediator about process...?? YES!
- We need to be better at acknowledging the impact of grief

If you experience a barrier, ask the question. It might a real barrier that can be addressed, a perception barrier that can be clarified through information or a deliberate barrier which can be called out to ensure a fair and accountable process. Ultimately, we are all only human and each of bring our own ideas, experiences and expertise to the room. Sometimes this means that a mediator can become a barrier to resolution. Our panel and participants agreed that even if this does happen, there are still options open to you. Ask the questions, call out your experience and stay focused on resolution.

Thank you,
Sarah Blake



About Sarah M Blake

With more than 20 years' practice experience, Sarah understands the complexities of conflict and recognizes the high cost impact on business, community and individuals when resolution isn't achieved.

Pioneering a strategic, comprehensive model for conflict management, Sarah's expertise in the field of multi-party mediation and cross-cultural decision-making allows her to customize services that bridge cultural, commercial and legal divides. Her realistic approach to the challenges of working in the cross-cultural space have resulted in her training gaining international recognition in the Pacific and Europe. Her work with Executive teams and Boards have resulted in cultural and systemic change and she continues to provide comprehensive conflict advice to state and federal government.

© Sarah M Blake 2019

Except as permitted by the copyright law applicable to you, you may not reproduce or communicate any of the content on this document, including files downloadable from www.smlake.com website, without the permission of the copyright owner.



Sarah M Blake

Phone: +61 (0) 419 841 184
info@smlake.com | smlake.com