

Mediation advocacy – How to keep on track for results?

Avi Schneebalg: ...from Brussels, I acquired this expensive mistress called mediation back in 1995, that's what my wife calls it and she's absolutely right, I hope it will change and that bigamy would be allowed. I have created Brussels Business Mediation Centre in '98 as a joint venture between the French speaking and Flemish speaking lawyers of Brussels, one year of work. These guys work together on anything, and the Brussels Chamber of Commerce, and I wrote last year I guess the first book not in English on mediation advocacy.

Tony Willis (PIM): I'm at nearly thirty years, fantastic career with clever chance and now even more and difficult to believe, fantastic five years as an independent mediator, and I spend all my time as independent mediator apart from presenting to you today.

Colin Russ: Thank you Tony. And although I'm tagged as CEDR I'm not actually a CEDR employee, except I'm an independent mediator as well. My background is DLA and this includes, out of Birmingham not London, DLA in Birmingham, and I also do consultative work for CEDR and I also do some teaching for CEDR as well as part of the CEDR faculty. I think without further ado what I would like to do is, we've kind of structured this to give it some shape, that is to say Miryana has given it some shape, thank you Miryana. And these are the issues we wanted to look at, we're looking at mediation advocacy really in the broader sense and, as I say, what we would like is for you to chip in very much. If you hear things you don't agree with, please intervene and say you don't agree with them, but we would very much like some participation from you. But just looking at examples of bad lawyering to kick-off with, I'm going to pick on somebody and just ask them to talk on the subject of poor preparation, and Miryana, perhaps I can pick on you first of all.

Tony: Well, I'm going to be interactive and interrupt. This session is headed Examples of Bad Lawyering and there is a risk that this gives the wrong impression. I have seen, and I'm sure all of us have seen, some of the most brilliant examples of advocacy, and there are some people in this room who have done fantastic jobs as advocates for clients in mediation. So, I would n't want you to think that this end of the panel is assuming that all the lawyering that goes on in front of them or around them or under them or on top of them is bad. In quite the contrary, there are some brilliant examples of it around, people really do get the best out of it regularly. I'm sure though, like all mediators, we can all do better at it, now I'll hand over to where it was intended.

Miryana Nesic: Can we also get a sense from the audience how many are actually mediators and how many are on the other side of the fence as mediation advocates and representatives in mediation? So mediators? And lawyers? So, fifty – fifty. It would be really helpful also to get input from...

Avi: Bisexuals?

Miriana: The sex topic is going to come up very frequently, I know I'll be quite well, that's why I'm sitting on this side of him. We'd like the input also from the audience of those who are mediators of experiences that they've come across of also good lawyering as well, I mean we

didn't want it to be skewed. My favourite point on this light actually is number 4, the wrong attitude and inappropriate lawyering, because what I tried to do in that section was just to pull out as many examples that I've come across just over the last year of inappropriate lawyering, rather than bad lawyering, inappropriate lawyering. And in particular, and I think if I could pick on one point out of that whole long list is the feeling I get occasionally that lawyers approach a mediation as a mouthpiece rather than as a supporter for the client. And I think this comes from the philosophy of representing clients in trials and really not being able to lose a bit of control, I guess, and hand over to the client. And I didn't include it in the notes but there was a very interesting study of the Ohio courts in America. The stats showing that actually if the lawyers are quiet in the private sessions in a mediation, they've actually found that the settlement rates go up because clients find themselves under considerable commercial pressure then to do a deal. So I just thought that was an interesting perspective and it sort of brings me back to tie the loop on how important, from my perspective and mediations that I've been involved in at least over the last year, for the lawyer just to take that backseat occasionally, particularly in those private sessions. Sorry?

Audience: Have they tried it in personal injury cases?

Miryana: And even more so because...

Audience: I found the client tends to lean on the court.

Miryana: Yes, and that's why I come back to the lawyer as a supporter rather than solely as a mouthpiece. And when I'm talking about as a supporter, and they're further in the notes, and mean as a person who's a conduit to open communication, to constructive negotiation and also an agent of reality. Because sometimes you find that the lawyer is sometimes too emotionally attached to the case himself, it creates a stumbling block for settlement.

Tony: I think it's also got to be said that it's all very well for us to talk about the wrong attitude to the mediation, we don't know what we don't know as mediators. Regularly you only know, you will never know all of what the parties know. There's not time in the universe to know everything that they know that's in their heads which is driving, and therefore someone may appear to do something which appears to you as a mediator to be odd and even worse. There may be a very good reason for it, even there may not but there may well be, so there are no absolutes in here. And I have seen people do things which make you smart, but there is a reason, they've worked out a strategy and sometimes it can work.

Avi: And often it's a very good bad reason. A very good reason for the lawyer, now if I could send up with I think even one line, the bad attitude is for the lawyer to represent his client instead of assisting him. Would you agree that would be, if you had to send up in one line? The client is there, if you don't represent somebody who is there, you assist him or her, it's a very different attitude.

Colin: That's very interesting because CEDR of course has a course covering all of this sort of thing called Representing Clients in Mediation. And certainly ought to be renamed and I mean that course exists and to my knowledge is very well received. But a lot of it is about just trying to

look at the mediation process in a particular way and look at it in a very constructive way, and try and help lawyers in terms of the way that they do assist/represent their clients in mediation. And it is not an easy task, it is not an easy task and I think that the, and I'm looking back at one of my facts, I spent ten years representing clients in mediation and I think looking back at that now from the perspective of a mediator, I can have a very strong sense of just how badly in most cases I actually did it, without realising it. But I can now look back and think that I did not actually do it, in certainly in all cases, particularly well because I was approaching it very much from the standpoint of a litigation solicitor and not appreciating some of the subtleties of the mediation process. I'm going to pick on someone in this audience now and I can see Angela, she's never going to forgive me for this, but Angela Taylor sitting there. Angela, you have a lot of experience now of representing clients in mediation, active clients in the mediation context. Can you tell us how does that feel and how different do you think that is from representing clients in the litigation process?

Angela Taylor: Well I suppose it is relative because I suppose the first hurdle you have to get over is to persuade your client that it is in their best interest to achieve settlement and sometimes that was the biggest obstacle. And if you can sell the process to the client and some of the assistance the mediator can provide a good prospect on the day, so yes. I find that the kind of things that came out this morning was that I think there should be perhaps a little bit more tactics and more bare-chesting on the part of the mediators. My experience of mediators up until now has been they tend to be very, they're very anxious to be seen to have been absolutely neutral and something holding balance, and I think that perhaps a more moderate approach might be a good thing.

Colin: Yes. I think that's very interesting and I think what we are seeing is the way in which mediation practice is evolving and has certainly evolved over the last few years and has changed quite dramatically. I mean Tony, I don't know whether you want to comment on that further. I mean one of the issues I do think as well is on preparation, just preparation and what sort of preparation is perceived.

Tony: You've been reading my mind, clearly the emphasis is working here. I was about to say it goes back to preparation, we've all heard about the wrong sort of snow and the wrong sort of leaves, well there's a wrong sort of preparation as well I think. Preparation, you expect the lawyers to come in, you expect their clients to come in, encyclopaedic about the legal issues, about the process that's gone on about the right way of doing things. But regularly lawyers don't come in having worked out the answer to the question I tend to put to people which is what's your negotiation strategy? And although it's an awkward question for me to raise, it's deliberately designed to provoke people into thinking what the hell is my strategy, do I have a strategy for negotiation? Not just about how I win the legal point or how my client can win the issue in front of a tribunal at some stage. So preparation and preparation and preparation on a negotiation strategy seems to me to be terribly important. You expect the lawyers to be good at all the things that they're good at, but they've got to go that step further.

Miryana: But also there's over preparation of certain aspects of the case which is not helpful in a mediation context. So for example, I had a construction mediation where I turned up and the parties had plastered this mediation room with about a hundred sheets of intensive drawings and

tables, no one ever referred to it. And then I asked the parties in the private sessions, I said can you sum up the case in two lines? And no one could do it, you know, they couldn't see the wood for the trees. And I think in that case, that was sort of the other extreme where there was so much detailed preparation which, and that sort of preparation I don't think is essential for a mediation. And on the other side of the coin, what I think is extremely important is for example preparation on the costs, you know, what are your costs to date, what are your costs going to be to the end of the trial, what are the costs consequences going to be, what's going to happen on an assessment, are there insurance implications, all that sort of thing. Which still today we find that lawyers aren't tackling and don't feel comfortable tackling, it's maybe the uncertainties. And with reality testing as well, I mean I've included in the papers some interesting perspectives I've gleaned recently where in response to reality testing, you get the lawyer saying things like well, of course litigation is uncertain, there are no guarantees, we don't know what's going to happen. They're not specific about the risks involved in litigation which I don't think is very helpful in a mediation context and particularly not helpful for a client. And then you get the comment that we got this morning I think about well, some lawyers don't feel comfortable with the mediator reality testing to that extent in front of the client. And I'm not surprised given my recent experience with lawyers being very wary about confronting the risks in some detail.

Anthony Monaghan (Herbert Smith,Audience): Can I just ask for a comment on, in terms of the opening session, the plenary session, and good lawyering, from your perspective what is it that you like to see? Because it seems to me that, from experienced that I've had, is that some lawyers very much take control, some people just worry about from what case division. But for the really good ones that you've seen, what's the different thing, what sort of things are they doing in that opening session to make it more than just a pedestrian mediator introducing system rules and then getting in.

Avi: I'd like to say a human being I would wish to have a drink with after the session.

Colin: Just on that Anthony, I mean a particular anecdote was a mediation I did within the last four weeks where the bulk of the opening presentation, the bulk of that opening meeting was dealt with by the client themselves, the chief executive who had come to that meeting. He was phenomenally well informed, it was a complicated IT case, he was phenomenally well informed in terms of the whole history of the matter. He spoke for probably fifteen minutes, perhaps a little bit longer than entirely desirable, but he spoke for about fifteen minutes. He knew it absolutely inside-out, his lawyer did a shorter session for about five minutes dealing with some legal issues in a fairly neutral and uncontentious way. But the bulk of it was done by the client themselves who knew the case inside-out, expressed it very clearly, very well, had clearly done an enormous amount of preparation, and there had clearly been great preparation between lawyer and client as to how they were going to run it, and it absolutely blew the other side away, and they never recovered from it for the rest of the mediation which went on for another ten hours, ten – eleven hours. But they never in my view, in my perspective as the mediator, the other party never actually recovered from that. And indeed later on in the mediation, there was a time when I wanted to get them together to have another joint meeting and the other party wouldn't have any of it, they just didn't want to repeat the experience, they'd had enough thanks very much. And I think the settlement that was ultimately achieved was coloured by that initial opening meeting where they put forward their position extremely well and extremely clearly.

Tony: They had a strategy, they had a strategy and they put it in that.

Host: And had prepared, had clearly prepared for it well in advance. And I think as lawyers, and I say it again from my own personal history really, I think I missed a trick regularly in mediations in not preparing as thoroughly with my client as I should have done. And if you think of the settlement rate of mediations, it's a phenomenally high settlement rate, and so that mediation is very likely to be determinative of that particular dispute. And therefore there is every reason, every reason and every justification for spending a lot of time preparing with the client prior the mediation. And if we don't do that A, we let the client down I think to an extent, but B, we also miss a commercial opportunity. Because there is every justification for spending at least several hours preparing yourself, preparing the client, selecting the right team, dealing with issues of authority, making sure you've got the right people at the mediation, all these various factors which are covered in the notes, there is every justification for doing that and doing it very thoroughly. Making sure the client understand the mediation agreement, what it says, what its implications are, going through it with the client. And these are all commercial opportunities and I think we have been missing them.

Audience: Isn't there a danger of you going to mediation and having a negotiator strategy that you're only new with, that you're actually missing the opportunity of going in there with a much more open mind and seeing what actually comes out of it?

Host: Yes, and I think there is that risk, and I think that as part of your part of your preparation should also be the recognition that things may happen during the mediation and things may come out of the mediation, information maybe conveyed through the mediator or indeed direct across the table, which causes you to reassess the position. So, part of your preparation is saying well, we must remain flexible, this is our strategy and we will go forward with this strategy. But part of that strategy is remaining flexible, is being aware that things may come out of the mediation that you need to take note of, that you need to listen to and you need to take onboard. And it comes back to a comment that was made this morning by Professor Mulcahy, however you pronounce her name, who said as lawyers we are trained often to speak but not necessarily to listen. And that is one of the essential things in the mediation process is to listen, listen and to actually observe. I think one of the great values of the opening meeting is observing the other party, observing the other party's lawyer, observing the other party's clients, what's their body language, how comfortable are they, how good are they going to be as witnesses if it comes to an actual trial? There's fantastic value to be had just from things like that.

Tony: Certainly a strategy that doesn't accommodate the fact that you'll get blown off course in the first five minutes is not a strategy worth having. So I, in direct answer to your question, I don't think you should be blinkered if you've worked through your strategy properly, because it will, as in war, all plans are blown out of the window very quickly but your strategy has to cope with that. And having done some 'what if' preparation, what if they do the following, what if they walk out, what if they put at the high figure on the table, what if they put no figure on the table, what if they start criticising this particular aspect of the case? And these are the things that I urge people to do, to prepare for.

Miryana: It's also a case of continuing preparation, I mean preparation doesn't stop at the door of the mediation. And what we find as mediators is this sort of seems to be, maybe it's not an appropriate word, but laziness when it comes to those sessions when you're not with the mediator. Because everyone's geared up for the private sessions with the mediator, they know they're going to be asked a lot of probing questions, and then afterwards there seems to be a lull. And that's the time when actually that intensive ongoing preparation needs to happen with the client. So what do we find out in that private session, what is actually the mediator trying to tell us? How do we need to re-evaluate and take stock? Is our background looking at good as we thought it was, and so forth? Taking responsibility for that part of the process that comes back to the lawyers.

Avi: And when the lawyer does listen because occasionally a lawyer does listen, I know I'm one myself. We are trained to listen just where we listen we are already preparing a response or a reaction. Let's learn to listen just for the sake of listening, like listening to a concert, for the pleasure of hearing the music and the pleasure or the pain of listening to the music from the other party and acquiring information and acquiring a new look at the case from the information one almost always gets from listening to the other party first hand, looking the other party in the eyes and not just reading the documents the lawyer for the other party has prepared one or two or three years before. And the same thing maybe, one of my mentors in mediation, Eric Galton from Austin Texas, when he enters a caucus typically he asks the party there, Mr Smith, Mrs Jones, how do you feel about this case? Let's lawyers ask first the question to our own client, Mr X, Mrs Y, how do you feel about this case? OK, you want a million dollars, you want this and this, where removed you want child custody whatever it is you want, why do you want it? And we never do that, before mediation a lot of us never try to do ask why. The client wants this, OK, it's not illegal, not too immoral, OK, I'll go for it. Well, let's learn to ask why does the client, good or bad reason, why does the client want the particular thing he or she wants?

Colin: I've got a mediator friend in California who says, with a strong degree of truth, that the mediators mediate the people. It's the lawyers who worry about legal issues, they worry about the best case and the worse case, of course the mediator has got to be conscious of that. But the mediators job is to work with the people and that means asking those kinds of questions, I absolutely agree, how did that strike you, was it surprising, why was it surprising, have you thought about it from this point of view? That's all working with the individuals involved, the individuals can be anyone from a CEO of the biggest multinational in the world down to a personal injury claimant who's an individual and has only his or her issues to think about, so I agree with you.

Miryana: The point about the opening just done with the audience, it just strikes me that it could be a useful question about how does the audience feel about not having an opening at all? I mean we've heard examples of that in the US, I mean I come from the Australian system where we don't necessarily have the opening sessions.

Audience: I think that it's true, it is an opportunity.

Colin: I agree with that entirely and the views do differ on this and there may be views in the audience that...

Audience: At the end of the day if the parties both say listen, get used to the process and just want to go straight into the debate, I say that's your choice but think very hard about it.

Tony: My heart sinks when people ask that.

Host: We're talking about whether or not you dispense with the opening meetings and we've heard the view today expressed sort of slightly tangentially from the platform about dispensing with the opening meeting. It was in the context of being flexible and I think that that's certainly right that as mediators one has to be flexible and not least in relation to the process itself and the shape of the process. But it's just interesting to hear any views people might have on the value of the opening meeting. Yes, someone here.

Audience: For me the opening meeting is actually about setting the communication style and actually opening up the communication between parties and lawyers and anyone else that happens to be there. And not to have that opening, you will always have little boxes that you have to join together, whereas in my practice I will try and keep the opening meeting going for as long as possible. And because I want these people to be talking together and thinking together and the only way they can think together is to be together.

Colin: And that's from the sort of mediator's perspective, and I think there's a lot of mediators who share those views. Have we got a practitioner who would like to...?

Audience: ...and I really strongly feel that the opening session is very important because it's a unique opportunity of the lawyer representing the client. The lawyer representing the client is a unique opportunity for me to see the other side, if you are the person who's going to make the decision and you talk to that person which is a great channelling of American lawyers in particular. They get into a mediation, and because many mediators in America have ??? from judges, they start trying to convince the meeting that they're not going to end it. Instead of looking at the other side and using and embracing this wonderful opportunity to present the case to other side and convince the other side, and also to assess the other side. But the mediation guys nothing in America and Europe and in the cases in which I represent the parties in mediation, I really think it's a very unusual case when you pick up heels in the session, it would be the case in which you were afraid your client would pull a gun basically.

Colin: Yes, thank you. Have we got a solicitor who could, yes Mark.

Mark: I totally agree with that and how many times can you speak directly in the eyes of the managing director of your opponents? How many times can you ask him awkward questions that he's got to face straight eyeball-to-eyeball and see how he reacts, see if he thinks he's got a good case. See if he's nervous, see how the person to his side is making a statement is reacting, you get so much from that opening meeting just by asking questions and looking.

Tony: Possibly even getting the managing director of your opponent to start liking you and respecting you, because part of the strategy of preparation is to come out of our shoes as a litigation lawyer, trying to convince the judge that the other guy's a complete blaggard. If you say to me or you or you that you're a blaggard, the instant human response is a fight or flee response,

and inevitably means that they will think that either you're a shit, you're wrong or something else, they won't be persuaded. And so one of the things the preparation is to have in your strategy a means to get through that kind of fight or flee reaction and get them to understand that you're a real human being, as someone said earlier on. Actually there are points to be discussed here and the other side's looking at it reasonably, they may disagree with you but they're looking at it reasonably. And that critical opportunity, which can be a golden moment, can be lost if you don't get people together and make use of the plenary session.

Colin: Just another very quick anecdote, I was involved in mediation where one of the parties actually ended up being almost cross-examined effectively by two lawyers and the client on the other side of the table. I was very tempted to stop it but the client who was on the receiving end of this cross-examination said no, I'm fine with this, and his lawyer was fine with it, and he dealt with it superbly, absolutely superbly. It went on for about fifteen minutes, he batted it back absolutely for fifteen minutes. And I gather, because I was told afterwards when the matter had settled, that following that meeting the other party went into the room and said we've got to settle this because this guy is going to be brilliant, he's going to be absolutely superb in court and we have got to settle. And they said that to their counsel and lo and behold, some admittedly fifteen hours later, we did settle.

Tony: How many of you have been in mediations when there's been only a plenary session, no private caucus sessions at all? None at all.

Colin: A hand up the back, yes.

Avi: At the Belgium school of mediation there's no caucus there, they oppose philosophically the idea.

Colin: Gentleman at the back, could you tell us about...?

Audience: It was confirmed, it was one of my partners, a construction dispute, went into the dispute, got the CEDR arbitrator and they failed. The reason it failed is because it was kept completely in the open together with no break, no nothing, and I think that was the failing of the mediator. I think the mediation process is very good, if you get it that wrong then I think you should pick something else. Because there was some, you know OK, there was a lot of tension going on there, being restrictive, but they were there to do a deal if they'd been given the space to do it, in their service through the private session.

Tony: Well I ask the question because lots of mediators try and extend the plenary session if they think it's making serious progress, this is the logical extension of the value of the first meeting. And there are occasions in which these meetings can go on for some hours and sometimes can be very remarkably effective, but there are risks and you've just pointed out to one major one.

Audience: It's one thing to extend it, it's another thing to have it as the exclusive option.

Miryana: What does it add to direct negotiations then in a sense?

Audience: That is an evasive question, as a solicitor and a representative, is there any value at all in handling it all as advocates? When I tend to approach mediations, again I like my clients to speak up and I ask them for five or ten minutes of their own thoughts in the case. And if there are any medium points I will try and deal with them in a pre-meeting with the mediator, or in written submissions and we can take them up again in private session. So my general view is it will always be the exception to the rule that I would want to say something.

French Man: I just did start a conference in France a year or two ago by saying lawyers are not per se, and in all cases trouble makers. Those can help sometimes, but has been seen that at every point. But seriously, lawyers can do much harm, they can do more good by indeed not representing, sorry for repeating myself, assisting the clients in private, in caucus between and clients, reacting I think to strategy, the client is alone, doesn't know what to do but to ask from his client, is there to hold his or her hand, to reassess a strategy, to again at every stage what can happen, what is the worst, what is the best. The lawyer is his or her best friend at that moment, or at lodger of whatever it is, assistant, to help him or her in sort of confidence and to again reassess the BATNA at every moment and also well, to try and see what are his or her options at every moment of the mediation. And if I can make a comment just a second, on the opening session a good, good opening presentation by the lawyer is when the client of the other party thinks of course, I'm still one hundred percent right but it doesn't mean that this other guy's one hundred percent wrong, then the lawyer did a good job.

Colin: There's a lady here...

Audience: I have a question to the panel with regard to this point. What do you do from the mediator's perspective if you have attorneys sitting on both sides attacking every practical solution, every idea we try to submit or we try to bring to the parties, and really go against everything by almost saying you don't have to do this, stop it. And that's maybe half of five minutes, and then you come back and whatever. I find it very difficult from the mediator's side then to deal with these attorneys, so do you have any ideas...?

Tony: Do you want us to answer the question before we beat them up in the cupboard or after? I'm taking them lawyers on their own to one side, not in any sense seeking to humiliate them or to undermine their position because it's critical, it's a very important ingredient. And speaking if you're a lawyer mediator, as most mediators are, not all, but most and even if they're not lawyers then they're professionals and they can have an eyeball-to-eyeball discussion about why are you doing this? If you've got a strategy you can explain to me, then I can understand it and of course you have the right to do what you, in the end, decide to do. But it seems to me that if you carry on doing what you're currently doing this will be the result, that will be the result and this may not be in your client's interest. Now, that conversation can be very powerful even at the very early stages of a mediation.

Audience: Tony, do you do this in front of the parties?

Tony: No, I would take the lawyer one-to-one, and I would talk to him or her and say why are you trying to do this, and explain what your strategy is. Now, they will most of all tell you, most of the times when you say oh, I hadn't quite realised I was giving that impression. Because

impressions are ephemeral and they are constructed of all kinds of things we don't fully appreciate. There's these awful statistics about when you give public presentations, and what people remember and carry away with them is something like five percent of what you've prepared and it's made up of the first ten seconds of your stance, your appearance, the first few words, the smile on your face, that's what they remember and that kind of thing works in mediations too. So lawyers who are constantly paper and detail driven will regularly miss that point, so often times they'll say goodness, is that the impression I'm giving, I didn't mean to do that. Whereupon it can change the dynamics.

Host: It seems to me that, picking up you were saying to the gentleman at the front here, it's a team game, a version of a team game. You leave the mediator to do what he needs to do, and particularly not screw it up, because no doubt there are mediations where you could put a cardboard cut-out at the end of the table and you'd still settle. And there are other mediations which for some reason or another will not settle whoever is the mediator given that role. In between that there are mediations where the mediator could have some influence, but the mediator needs to do his bit, but the lawyers need to do their bit as well, it's a team game, and the clients need to do their bit. And the role of the lawyer in the mediation is very important, but it's a different role, and it maybe a role that changes from mediation to mediation and client to client, but it is a very important role and it needs to be played correctly.

Miryana: Can we just get a sense from the lawyers in the room how many actually, ahead of a mediation? will run a mock mediation for example with their clients. Is that happening commonly? How many of you actually involve your client in writing up the case summary? Yes, it's common, yes.

Tony: One of the best mediation presentations I've ever seen was a lawyer, I don't think he is in the room, but a lawyer who gave an absolutely brilliant thirty-minute, with a flipchart but pre-prepared, went through all of the issues, both fact and law, and it was an absolutely first rate presentation. Sat down, his client then got up and said he agreed with everything that had been said, he just wanted the other side to know that he was sorry, and it changed the entire matter instantly.

Miryana: In fact that's one of the...

Audience: That is the case of doing a straight forward summary... I've had the opposition's appearance and that is giving a straightforward summary to the mediator, and the client then said and I just want to add that they're a bunch of shits.

Miryana: Same effect.

Audience: ???

Tony: Well, it's not wrong, that may make that individual feel better. It may reinforce or change the perception of the people on the other side of the table, you don't know. And the flipside of requiring or encouraging people to prepare is they prepare the way they think is right and they take

the risks. And even if it has the wrong effect, you can bring the matter back later on, however it may be, the absolute best thing in life for that guy to say exactly what he did to him to him.

Avi: And also about a counter productive, apparently counterproductive lawyer, the sabotaging lawyer, they don't dare writing it in Europe, maybe in England, but certainly in the US they do there writing it, that dear friends the lawyer and his client do not at every moment exactly the same interests. So there are mediations taking place, different mediations within the mediation. Party and his client, the lawyer present with a single partner, with his wife, his girlfriend, da-da-da, and person from the party with his or her board of directors and all this must be managed at the same time. Sometimes it happens that the lawyer advised against the mediation, the clients insisted with let's try it, and the client, consciously I hope, and consciously wants to prove he was right, see, the mediation will not succeed. And then he does everything necessary to have it blow up, and well, then the mediator is in trouble of course, but what are they to do, never commit the capital sin or putting a fuming dispute between lawyer and client by taking the lawyer apart and trying to understand what's going on and you're managing it as well as possible, but it is a difficult situation indeed.

Tony: And you're taking the lawyer to one side and taking the lawyer apart on this side.

Colin: Can I move this on a bit, we've got until ten past I've been told, so slightly longer but not that much left. I want to just move us on to the next section and perhaps ask you, Miriana, just to kick us off on that, just looking at where the training might go and what the focus of that might be. And again, any contributions from the floor would be gratefully received. Now, would you like to say a few words?

Miryana: Well, given that you and I have worked, it took us two years to put, almost, the CEDR course together, and Tracey's in the front row as well in Representing Clients in Mediation. We started off with what was I think a one-lever arch and we've ended up with three lever arch files of material.

Tony: Concentrating too much on the details, Miryana.

Miryana: Too much on the details, that's right. But first and foremost, and we'd almost forgotten about it, was whether we had to train boys? in how to persuade the client and also the opposing party to mediate. And I don't know what the views are around the room, I mean given CPR and what the judges are doing these days with cost sanctions, you know, can we use the CPR as a carrot and stick? Is it as easy as that? And my experience being on the lawyer's side of the dividing line, I don't think it's as straightforward as that. I actually find it's still very difficult to persuade, not so much clients, but opposing solicitors to mediate.

Audience: There is a right time to talk about what might happen in mediation. I think sometimes if your client comes in through the door and someone's just relayed on a contract and he's spitting and he's really cross, and the first and the last thing you wanted to talk about is well, it's alright now to settle this, we'll mediate. And I think there's a right time for the dealing with the issues with the client and having the bills making. But I think there's also a right time in the litigation and I think the courts are going to start trying to force people to go into mediation too quickly, and

the process won't be allowed to do its job because until both parties are in the right mind to mediate, I don't think you'll necessarily be able to do that.

Colin: The gentleman behind... yes.

Audience: A couple of points, I've had an experience recently with a solicitor who was quite reluctant to mediate and they're very reluctant to choose the mediators. And then we had a situation when I suggested that we put the mediators, stress? the mediators into a hat and pull one of them out. An incredible situation where he was, it wasn't the real names of the mediators, and he seemed to be serious. So very reluctant work, and I think due to inexperience of the court process. I've also been in a situation where I've been criticised by CEDR and by our opponents for refusing to mediate, and in a case last year told CEDR on what's and whys.?

Miryana: We know it well.

Audience: Where we refused to mediate for what we thought was a very good reason, on communications and I was staggered at the amount of adverse comments there had been about that decision. I am very much in favour for mediation, and particularly in those I do all the mediations?. There's certain cases where it doesn't seem to support and where now we are now being pretty much to meetings ?because what the case court. Now, that means the mediations have no prospect of success because you go because you have to go, when you will advise your client that you have bad payment unless the other party is prepared to walk away, there is no progress made, and you have mediators say to me Michael, why is this not better?

Miryana: Out of interest, would you prepare differently if it was a court-forced mediation or a voluntary one? I mean in your experience, have you prepared different?

Audience: No, I think that it's absolutely key to prepare very, very thorough with the mediation. A comment was made about if I'm weaker by preparing your foundation without it, I can't disagree more with that, I think you have to prepare for any mediation. It could be it was a court ordered one where you don't want to go, it could be it and the other side will collapse, I don't like it but the offer is there and you won't get rid of it.

Tony: And in the case where the mediators were pulled out of the hat, did it work anyway?

Audience: Well, actually it was a good sign there. We had a mediation with Patrick Sherrington, and it ended up in one of those late night situations where we couldn't get out of the building, it had finished ???

Miryana: That was a collective chance wasn't it?

Audience: And what happened than, it didn't succeed at that very long and quite hard force, an uncomfortable mediation, but we did agree that we all weren't quite ?what we were about to start to the other parties. And we had a claimant company which was driven by it, its very forceful managing director who had been very successful by early life, and he was the person we had to get to. So we had our chance in mediation to really see what he was like, and he was more like

probably a more realist and a more stable position than we could have possibly. So they came to the end of it where we all said well, we're not going anywhere with this, we're not going to make any more progress today, ??? we were a long, long way apart. But we'd like to go away and think about what you said and if we can't all agree to do that and maybe come back, and they said yes. And we went back about six weeks later, sort of two months later, without the mediator and we settled it, we had a sort of part 2. Now, we went without a mediator because he was abroad and unavailable, unavailable over quite a long period and we felt it was important to make progress. For that reason is one of the points that I am at present, and I'm sure that many others will be doing the same, I'm having what I'm calling mediation now without a mediator. For settled meeting in the old style, they are a formal process needing their own rooms, they're doing that without a mediator.

Tony: I'm very please to hear that because lots of us for a long time have said if we all do our job properly we'll do ourselves out of a job. Because if the culture changes so people recognise that these techniques are of universal application and there is, as you've rightly said, there are occupations, there are not many of the cases that you and others do, but there are cases where you could be a cardboard cut-out. You take the cut-out away, well you'd be taking a chunk of cardboard away, it should work, so I'm delighted to hear it, I really am.

Host: Yes, I'm sure there are cases like that and it can be done. Just, we've put a few things up here in terms of where the training that is available is focused at the moment. Just speaking up on one of those areas, dealing with authority issues, it has cropped up a few times in recent mediations, to my knowledge. Tony, I think it's one of your concerns as well isn't it, in relation to authority, the authority that parties have or lawyers have at mediations?

Tony: There are three rules to do with authority, the first is that you always remind people that they need to have authority. The second rule is that they will always tell you they have and the third rule is that they will always lie, in the nicest possible way. You'll never know what the ultimate level of authority is and it doesn't matter who it is, George Bush doesn't have the ultimate authority to do anything. The Almighty may have some limit too if he or she ever came in front of us as a mediator. The reality is that people will tell you porkies about their authority limits because they're negotiating with you, and mediators who get upset about this should get real because this is what life's all about. I had a very, very thought? pugnacious, a very competent woman lawyer from Ohio in front of me who flew in the day before the mediation, and at the outset lied to me that she had authority. About half past eleven that morning lied to me that she didn't have authority, at about half past two lied to me that she had some limited authority, at about five o'clock lied to me that in fact the authority had been withdrawn, and settled at about midnight lying to me about something else. A sweet, lovely lady who did an absolutely great job for a client, I knew the game she was playing, at least I knew some of the tricks that she was pulling but that's life. And so people who go in thinking that it's a gross sin to not come in with authority, I think, are missing the point that no one has authority to do everything. But it can be an issue if the right insurer is not there, if people misunderstand the level of authority, if perhaps they assure you in the day yes, yes, the people on the phone, don't worry, if I have to go beyond that limit I can always find them. Then of course whoopee, at half past five they've gone on the train and they can't reach them. So those sorts of issues arise but people get too hung-up about authority in my view.

Audience: Is it the case that actually mediation bodies almost cause solicitors to lie because when you look at the various, and not looking at one body, but all the various bodies within the mediation agreements. They all try desperately now to define what full authority is, which is usually something on the lines of you know, they either meet the full claim the other side of house, which you're just never going to get frankly. And that often, I think the way it is set up often makes is very difficult I think to do that.

Avi: And the risk is being at an important decision in principle to be made by one party over not much money. You cannot disturb a person of high authority but it's a political decision, so in this case they'd probably not settle.

Colin: Can I just throw a question obviously to the solicitor practitioners, who feels there is a need for some sort of whatever you call it, whether you call in advocacy training or whatever you call it, but some sort of training for mediation to learn new skills? Who feels that there is that need, can we have a show of hands? So, a number, and conversely, there must be people even in the audience that don't feel that need. Yes, there are a few. And that's interesting because this is an audience of people who are effectively interested in mediation and sufficiently motivated to be here today. But I do think there are a lot of people, a lot of practitioners, a lot of listed practitioners out there who actually don't feel there is a need for any sort of training at all. And that maybe in their particular case true because there are probably a number of lawyers out there who believe there isn't a need for training but whom would probably benefit from some, and promising in the mediation context. We've got about three or four minutes left, and I just wanted to move on to the last bit of this, which is just looking at whether there is anything that the ADR providers or individual mediators can actually do to help in terms of essentially documentation. And I think Miryana, again, I'll come back to you because you are the author of this documentation, and certain things of mine.

Miryana: But we also, I mean as part of the CEDR exercise, we've also developed all of these and I guess we were also wanting to use this session as a feedback to get from you, the users, what you think would be very useful documentation to have when you're preparing for a mediation. So for example, we've now got checklists for early case assessment. You know, every lawyer does it, early case assessment, risk analysis, identifying the ??? in their own way. And the question they'll throw back to the floor is how useful would it be to have something quite structured to get to the point that Tony Willis is talking about, about a negotiation strategy. Would lawyers find that helpful?

Tony: Do you get it now? Who feels they get guidance either from individual mediators or from the mediation providers?

Tony: ...that gives help to the as opposed to just flannel? Any of you?

Miryana: Well, that's disappointing.

Audience: Never had guidance but internally, in the internal training I think most players are actually doing that now.

Tony: I was talking about before an actual mediation where the...

Audience: Before the mediation is actually, in terms of internally, most parents are prepared and looking lists like that and that's how we are preparing for mediation...

Miryana: Without the help of ADR organisations or the mediator.

Tony: But you haven't had it from the mediator or from the organisation?

Audience: Yes, right.

Miryana: So has anyone, for example had...?

Tony: It's interesting.

Colin: The gentleman at the back?

Audience: We had in the firm certain performance from mediators suggesting questions and preparation on the subject what are your three best points, what are your three worst ones, what is your bottom line, what is your best option? But certainly for those of us in the firm where the firm is not personal a relation, they seem to have been very helpful.

Tony: I certainly find guidance in people, but clearly it's being ignored or it's not worth the guidance that I'm giving.

Miryana: Or they know it already, they've memorised it.

Audience: I wish to make a different point which was that I think part of the most valuable big surprises that I've seen first time round is please do not put the pleadings wholesale into, and think of that as your statement of case. And certainly I've been in mediations where we've done a case summary and those would always be slightly different, and depending on mediation, but the other side has been thinking about here's our statement of case. And in one set of proceedings we had ten different statements of case, well that was hopeless and...

Miryana: That's useless.

Colin: Yes, I mean how many mediations are there where actually the documentation that's being prepared in advance, whether it be pleadings or whatever it is, are actually never referred to, never specifically referred to. I remember going through mediation, I'm glad to say a long time ago as a mediator and forgetting my papers completely, I managed to leave them in my briefcase on the drive and drive off without them. And my assistant had a set of papers but in fact we never opened the bundle, we never referred to them. We knew the thing, we knew what the issues were, the parties knew what the issues were, never needed to go to the papers, so there's a lot to be said.

Miryana: Back to this issue of guidance, does the audience feel that it is the responsibility of the mediator to provide more guidance? Yes, lots and lots around the room.

Audience: And one of those situations, I think the mediator picks up usually parts that are already experience or perhaps someone's style of the process, it would be useful for the mediator to involved with good experience. Then the mediator would have wasted his time and it is very expensive for you and the firms, and in fact aggravate the lady who doesn't have...

Audience: Well that problem is always going to be got somebody on the other party decides, has got no experience at all and you'll get documentation that fat and they'll come into the hearing and they'll rabbit on for hours, and it's dealing with that situation, you maybe an experienced mediator in mediations yourself. Dealing with that bad lawyering on the other side is always difficult, I don't know how to deal with that, because if they go on you feel that you've got to do something to present your client and you get into defence mode straightaway.

Colin: I think it's where the mediator perhaps has a role to play in there. I think we need to wrap it up, I think we need to go back into the main room and I will just thank the panel for their contributions. Thank you.