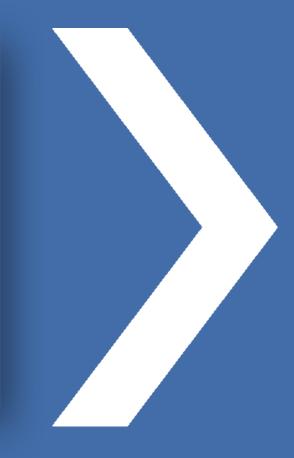
#### **Russell Kennedy Government CPD**

Practical preparation tips for mediation, and doing it well when you're there

18 February 2022

Suzanne Rieschieck, Principal Paul Somers, Principal





Melbourne > Sydney

- All attendees will be on mute and their cameras turned off for the entire webinar
- We have BD tech support live to assist with any technical issues
- Use the chat function for any comments/technical issues
- Use the Q&A function for specific questions related to the webinar content – Questions will be addressed at the end of the webinar
- There will be a post webinar survey link sent at the end of the webinar.
  We value attendee feedback
- We will also have a QR code linking to our feedback survey towards the end of the presentation so you can provide instant feedback

The information contained in this presentation is intended as **general commentary only** and should not be regarded as legal advice

Should you require specific advice on the topics or areas discussed, please contact the presenters directly

### Introduction

 Successful or productive mediation outcomes don't 'just happen'

• *"If you fail to plan, you plan to fail"* [Benjamin Franklin]

#### **Goal of mediation**

- To achieve an outcome that both parties can accept.
  - Such an outcome:
    - is not always a "win/win" outcome, or even a "win" outcome (although nice when it is!);
    - doesn't just "happen" where parties have entrenched positions; it takes preparation.
- A mediation is a carefully crafted theatre. The stakes are high, the time is limited and there is a high probability your opponent has thoroughly prepared. If you turn up without having done the same, you will be at a disadvantage.

- Be clear on what the parties actually disagree on (as distinct from the arguments)
- Identify your motivators
  - What is important to your position?
  - Why?
- Are you and your lawyer on the same page?
  - be aware of how your position will be presented
  - Avoid excessive detail or complexity in the opening statement
  - Who will talk? How will they talk?
  - Who will attend and what message does that send?

- Devil's advocate: Ask yourself, can you identify your opponent's motivators?
  - What is most important to your opponent?
  - What do they really want?
    - How do they feel about the dispute?
    - How would they say you have behaved in relation to the dispute?

- Having identified the parties' key motivators, use that information in the development of:
  - negotiation strategies for the mediation; and
  - settlement strategies and options.
- Mindset/set expectations
  - Accept that you don't have to convince the mediator or your opponent that you are right; you almost certainly won't!
  - Expect the unexpected; new information sometimes emerges in mediation and you may need to be agile.
  - remember mediation is not a process for assigning blame

- What are the costs to date to the department or organisation in addressing the issue?
  - diversion of resources (staff and funds)
  - reputation
  - precedent
  - legal costs
- Consider, if the dispute does not settle:
  - What happens next?
  - What might it cost?

- Follow the ground rules:
  - don't interrupt when the other person is speaking
  - resist deliberate "button-pushing" (personal attacks or insults)
  - respectful conduct (no hostile non-verbal expressions e.g., eye rolls, loud sighs, laughing, groaning when the other party speaks)
- Conversely, if the opponent is not respectful, don't take it personally stay focused on the objective of an agreed outcome

- Listen! The opponent might disclose more than expected.
- Be comfortable with silence:
  - it can prompt people to say more than they planned
  - it helps you avoid impulsive or reactionary comments
- Presentation of key issues needs to differ from past discussions. Use the mediator to help with this, for example they can:
  - give the parties structure
  - ask questions to clarify issues
  - re-focus dogmatic thinking
  - diffuse discussion around heated topics

- Avoid absolutes (eg "never" and "always"), because they
  - constrain flexibility
  - invite contradiction
- Avoid impulsive comments, they're rarely helpful.
- Demonstrate appreciation for offers made by the opponent which genuinely address your position/concerns (even if inadequate).
- Is the opponent being co-operative or competitive? Consider how this impacts what you reveal and how you may frame offers.

- If you reach an agreement, take time to record the settlement carefully and accurately, preferably immediately
  - keep the communication open during this process so that new issues (legal, practical or logistical) do not derail the overarching agreement.
- If you don't settle, mediation is still a valuable information gathering tool – credibility of witnesses; individual motivations; dynamics between multiple opponents

- Reputation
  - political consequences; need for awareness of broader political ramifications of decisions
- Delegation and authority
  - advanced planning (departmental approval or council resolution required?)
  - sufficient delegated authority to agree a settlement
  - mechanism to obtain increased authority levels or scope if required on the day

- Policy considerations
  - Decisions need to be broadly consistent with departmental policy
- Regulatory framework
  - Consideration of any applicable statutory or regulatory constraints or process
  - Model litigant rules

- "If you fail to plan, you plan to fail"
- Know why you're there and what you can do or accept to resolve the dispute
- Tailor and apply appropriate techniques to maximise the prospect of a constructive outcome
- Understand your political and regulatory context

#### **Q&A – Your Russell Kennedy Contacts**



Suzanne Rieschieck Principal

P: +61 3 9609 1544 E: srieschieck@rk.com.au



**Sarah Manly** Principal and facilitator

P: +61 3 9609 1691 E: smanly@rk.com.au



Paul Somers Principal

P: +61 3 9609 1664 E: psomers@rk.com.au



#### Feedback

Scan this QR code to provide instant feedback on the session.



Russell Kennedy Pty Ltd info@rk.com.au russellkennedy.com.au

#### Melbourne

Level 12, 469 La Trobe Street Melbourne VIC 3000 PO Box 5146 Melbourne VIC 3001 DX 494 Melbourne T +61 3 9609 1555 F +61 3 9609 1600

#### Sydney

Level 6, 75 Elizabeth Street Sydney NSW 2000 Postal GPO Box 1520 Sydney NSW 2001 T +61 2 8987 0000 F +61 2 8987 0077 An international member of



russellkennedy.com.au

Liability limited by a scheme approved under Professional Standards Legislation.