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MEDIATION TACTICS

From the 1st of November 2009, a new regime came into the District Courts throughout New Zealand. As a consequence, all disputes filed in the District Court are effectively steered to a mediation process.

The way litigation is dealt with in New Zealand is changing, and mediation as an alternative dispute resolution process, will ultimately be the primary way disputes are resolved.

It is important therefore to learn good mediation tactics to help you through the process. It is also important that you take advice from someone who is experienced with the process and the tactics used throughout a mediation.

You should start off by making sure you have a plan before going to mediation. It should be a flexible plan depending on how the process goes, but there should be a plan in place as to what you wish to get out of the mediation.

No one comes out of a mediation feeling good because of a victory, but you should aim to come out with something you can live with.

It is unwise to start off a mediation, or very early on in the mediation, with an offer. Making an offer too soon often makes the other side feel pressured too soon. It is always a good tactic therefore to simply discuss the problems and issues that need to be resolved, and break them down.

Once the issues have been worked through, only then should offers be discussed. If you are going to be the first party to put an offer on the table, you need to be able to justify how the offer was calculated. Obviously, you never put your best offer forward first.

If you have worked out a good strategy before going to mediation, you need to stick to it as best you can and take advice from your legal adviser.

It is too easy to get taken up with the moment and talk too much at a mediation. This is where you need your plan to be flexible. A lot can be learned about your position at a mediation, and about your case, which could be detrimental to you if it is not resolved at mediation, even though the process is confidential.

The reason your strategy needs to be flexible, is because you do not know what position the opposition will take as you move through the process.

It is dangerous to have an inflexible plan because depending on how the other side react, or the path they wish to take through the mediation process, you may alienate the opposition.

It is often easier to break down the dispute into multiple issues and try to resolve them one issue at a time. Always be prepared to work through multiple issues individually rather than globally.

Most important of all, you must set yourself a realistic bottom line before going into a mediation. If you are expecting to have to pay money, what is the maximum you would be prepared to pay. If you are expecting to be paid a sum of money, what is the minimum that you would expect to be paid.

In setting your bottom line, you need to measure it against the cost of an extended litigation process where the outcome is not guaranteed to be in your favour.

If you would like to discuss the process of mediation and tactics to be used to resolve a particular dispute, please feel free to contact Eugene Collins or Michael Moohan.

- ***Next issue— What Happens if Your Trustee Retires by Paul May***