

## Design in Dispute Resolution Practice: Tips and Tools

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### INTRODUCTION

Effective dispute resolution (DR) processes must fit the unique circumstances of a dispute and the particular needs and dynamics of parties. DR practitioners must be mindful of these complex variables when designing the process. This article outlines practical tips and tools for DR practitioners in designing effective DR processes, and considers the important role of party advisors in assisting their clients. It provides a useful table outlining various process elements that can be considered and adjusted by practitioners and advisors.

### PRACTICAL DESIGN TIPS

#### Party suggestions and feedback

Seeking parties' feedback on how they think a process could be structured can build rapport and trust between parties and the DR practitioner, and assist them take ownership of the process. However, DR practitioners should be aware of the risk that parties may disagree about the process, which could damage the process at an early stage. It is important the DR practitioner maintains their role as facilitator and owner of the process, making the final decisions on how to structure it effectively.

#### Design as a continuous exercise

Changes to one aspect of a DR process will impact other aspects, so it is important for the practitioner and party advisors to continually reflect on whether parties' needs are being met. This may be particularly important in multi-party disputes, where coalitions can form between various parties as the process progresses.<sup>2</sup>

#### Dealing with emotion

Many disputes involve high levels of emotion. It is important for DR practitioners to consider whether it would be constructive to discuss their relationship or not. For example, there will be differences in what is required in commercial negotiations and what is required in disputes involving parties that need to have an ongoing relationship, such as separating parents.

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<sup>2</sup> L Susskind et al, "What We Have Learned about Teaching Multi Party Negotiation" (July 2005) *Negotiation Journal* 395, 396.

## Design according to mediator strengths

DR practitioners should also consider designing their processes in line with their own strengths. For example, some practitioners may prefer to work in face to face contexts, rather than over the phone.

## Communication manner

DR practitioners should be careful to alter their language, manner of communication and what they communicate, depending on the context of the dispute and the parties' backgrounds. For example, if the process involves experienced legal representatives, the DR practitioner may not need to provide a lengthy opening statement explaining the process.

## A PRACTICAL DESIGN TOOL

The following table is intended for practical use by DR practitioners and party advisors to assist them design tailored and effective DR processes. The table consolidates the authors' academic research and lessons from their own experience to create a tool to help generate ideas and consider options in designing DR processes. The elements in the table are set out in alphabetical order, and can be added to as you discover more in your own practice.

Elements of dispute resolution practice: Considerations for effective design		
Element	Options and considerations for DR practitioners	Options and considerations for legal representatives
<b>Apology</b>	<ul style="list-style-type: none"><li>• Consider if apology is essential for process success (e.g. for restorative justice it will be imperative). If so, party willingness to apologise should be canvassed at intake – may affect whether process goes ahead.</li><li>• Consider how apology will be given – e.g. verbally, written, both, face to face, telephone.</li><li>• May be useful to rehearse/read/ discuss the apology or request for apology in private session.</li><li>• Consider whether encouraging an apology may be harmful to the process (e.g. it may be fruitless, even insulting in some commercial negotiations).</li><li>• Consider cultural impacts.</li></ul>	<ul style="list-style-type: none"><li>• Avoid encouraging client to apologise if it would be insincere – it may damage the process.</li><li>• Consider whether it is necessary to canvass with client their willingness to apologise.</li><li>• Consider how apology will be given – e.g. verbally, written, both, face to face, telephone.</li></ul>
<b>Attire</b>	<ul style="list-style-type: none"><li>• Dress in a way that will assist parties to feel at ease and that fits the circumstances and environment (e.g. wearing a suit and tie may not be appropriate in some circumstances, such as community or family disputes, but may be expected in others, such as commercial negotiations between legal representatives).</li><li>• Consider whether it would assist to discuss with parties what they should wear to a joint mediation.</li></ul>	<ul style="list-style-type: none"><li>• May need to remind or encourage client to dress appropriately.</li></ul>

<b>Co-mediation</b>	<ul style="list-style-type: none"> <li>• Consider whether it would help to balance power or make parties and/or the mediators feel more comfortable.</li> <li>• Options for co-mediator to provide diversity/reflect party characteristics: different gender, ages, expertise (e.g. lawyer/psychologist/expert), cultural backgrounds, levels of experience, life experience.</li> <li>• Decide how tasks are delegated between co-mediators – e.g. one lead mediator, mediators lead alternate stages, who takes notes, etc.</li> </ul>	<ul style="list-style-type: none"> <li>• Consider financial implications for client.</li> <li>• Consider whether a co-mediation model would suit the client better than a solo mediator.</li> <li>• If selecting mediators, consider what co-mediation team would best meet clients' needs/the circumstances of the dispute.</li> </ul>
<b>Confidentiality</b>	<ul style="list-style-type: none"> <li>• Confidentiality may be an issue for discussion and resolution in the mediation.</li> <li>• Options for addressing confidentiality: <ul style="list-style-type: none"> <li>– Parties sign confidentiality agreement – drafted by lawyers, mediator or parties</li> <li>– Parties verbally agree on confidentiality</li> <li>– Whole process is confidential</li> <li>– Parties may speak with other identified individuals.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Consider what information should/must be kept confidential and how it should be protected.</li> <li>• Consider if it is necessary to raise issue of confidentiality with client and DR practitioner prior to joint session.</li> <li>• Consider whether the client will need to make public announcements and if so, how that will be provided for.</li> <li>• Consider what obligations the client owes and to whom.</li> </ul>
<b>Data / Fact dispute</b>	<ul style="list-style-type: none"> <li>• Consider what information parties should disclose.</li> <li>• Options for addressing data disputes: <ul style="list-style-type: none"> <li>– Parties discuss options irrespective of data dispute</li> <li>– Parties collect information to resolve data dispute</li> <li>– Process includes binding expert opinion</li> <li>– Process includes non-binding expert opinion</li> <li>– Parties go to expert determination if mediation fails.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Consider what information needs to be disclosed and the best way to do this for optimum chance of settlement.</li> <li>• Consider what information would be helpful to bring to private and joint sessions.</li> <li>• Consider if expert opinion is essential or would assist.</li> <li>• If expert opinion required, consider: <ul style="list-style-type: none"> <li>– Who would be best to do this</li> <li>– Who will pay the expert and how they will be chosen</li> <li>– What would be the best placement of expert opinion within the process.</li> </ul> </li> </ul>
<b>Ground rules / Guidelines</b>	<ul style="list-style-type: none"> <li>• Options for setting ground rules: <ul style="list-style-type: none"> <li>– Parties decide ground rules in discussion facilitated by mediator</li> <li>– Mediator sets ground rules</li> <li>– Ground rules are strict and specific</li> <li>– Ground rules are broad</li> <li>– Strictly or loosely enforced</li> <li>– Parties decide consequences</li> <li>– Mediator decides consequences.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Consider what ground rules are important to your client.</li> <li>• Consider what ground rules are important for you, if any.</li> <li>• Consider how the client can be supported in following ground rules and guidelines for an effective process.</li> </ul>
<b>High emotion</b>	<ul style="list-style-type: none"> <li>• Consider whether dealing with relationship</li> </ul>	<ul style="list-style-type: none"> <li>• Consider whether client</li> </ul>

	<p>and communication issues will assist the process and/or the parties going forward.</p> <ul style="list-style-type: none"> <li>• If fruitless to address, or difficulties cannot be overcome, consider whether shuttle mediation and/or a purely bargaining style would assist.</li> <li>• Consider: <ul style="list-style-type: none"> <li>– Using private sessions or breaks</li> <li>– Length of sessions – it may assist to keep them short and set parties small tasks to complete for joint incremental progress;</li> <li>– Suitable agenda items (e.g. communication, roles, etc.)</li> </ul> </li> </ul>	<p>expectations need to be managed and/or explored.</p> <ul style="list-style-type: none"> <li>• Consider whether it is important for the client to deal with relationship issues.</li> </ul>
<b>Input from DR practitioner</b>	<ul style="list-style-type: none"> <li>• Options: <ul style="list-style-type: none"> <li>– Purely facilitative</li> <li>– Provides information</li> <li>– Gives an opinion on what would happen if parties went to court.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Consider what level of input from a DR practitioner would most assist in reaching settlement.</li> <li>• Consider which DR practitioner has the best style, background experience, etc.</li> </ul>
<b>Information for parties about the process</b>	<ul style="list-style-type: none"> <li>• Options: <ul style="list-style-type: none"> <li>– Provided by mediator at or prior to intake</li> <li>– Parties attend a general information session held by the mediating organisation</li> <li>– Parties attend information or training session together, prior to or during process</li> <li>– A combination of the above.</li> </ul> </li> <li>• Consider: <ul style="list-style-type: none"> <li>– Who delivers the information</li> <li>– How the information is delivered (e.g. verbally, paper format, DVD, website, email, post, etc.)</li> <li>– How party understanding of process is assessed.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Consider: <ul style="list-style-type: none"> <li>– What information your client needs</li> <li>– What information you can provide</li> <li>– What advice/information can be provided by others.</li> </ul> </li> </ul>
<b>Intake</b>	<ul style="list-style-type: none"> <li>• Intake options: <ul style="list-style-type: none"> <li>– DR practitioner does intake</li> <li>– Someone else, such as intake officer, does intake</li> <li>– Intake face to face</li> <li>– Intake over the phone.</li> </ul> </li> <li>• Consider: <ul style="list-style-type: none"> <li>– Location of intake</li> <li>– Who participates in intake – party, representative, support person</li> <li>– What information is collected</li> <li>– What information is provided</li> <li>– How process is described</li> <li>– What documents are signed and by</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Consider who should attend intake.</li> <li>• Consider how to best prepare your client for intake.</li> </ul>

	<p>whom.</p> <ul style="list-style-type: none"> <li>• Ensure statutory requirements are met (e.g. Australian family law requires particular information to be provided to parties by family DR practitioners).</li> </ul>	
<b>Language</b>	<ul style="list-style-type: none"> <li>• Consider whether an interpreter is required, and if so, who will act as interpreter (e.g. is it appropriate that a family member or support person act as interpreter, or should an independent interpreter be engaged, and whether, in small communities, even an independent interpreter may know one or more parties?)</li> <li>• Consider the best choice of language (formal/informal/foreign) to assist the parties to understand and feel comfortable in the process.</li> </ul>	<ul style="list-style-type: none"> <li>• Consider whether the client understands and is comfortable with the DR practitioner's style of communication.</li> <li>• Consider what you can do to support the client to understand and feel comfortable in the process.</li> <li>• Consider whether an interpreter is needed for your client to understand the process and, if so, who will meet that cost.</li> <li>• Consider whether any aspects of the process or the law need to be further explained to your client.</li> </ul>
<b>Lawyers</b>	<ul style="list-style-type: none"> <li>• Consider whether or not legal representatives should attend mediation.</li> <li>• Some options to manage legal representatives' participation are: <ul style="list-style-type: none"> <li>– Attend and sit next to party/client</li> <li>– Attend and sit at a separate table</li> <li>– Attend but in a separate room so party sees during breakout or can access any time</li> <li>– Mediator allocates tasks to lawyer</li> <li>– Lawyer speaks for party/client.</li> </ul> </li> <li>• Consider, if legal representatives bring laptop/tablets into the room, how that will be managed.</li> </ul>	<ul style="list-style-type: none"> <li>• Consider whether your attendance at mediation is beneficial and/or necessary.</li> <li>• Consider, if you are going to attend, what your role will be.</li> <li>• Consider at what point the client gets advice (e.g. before, during and/or after the intake/DR process).</li> <li>• Consider what tools you will need in the room. (e.g. computer and printer to work on and print off agreement, etc.)</li> </ul>
<b>Meeting structure</b>	<ul style="list-style-type: none"> <li>• A process can be structured using any combination of single sessions and joint sessions. Consider also the sessions between particular parties. (e.g. in multi-party mediation there may be a number of bilateral mediations, as well as all party joint sessions).</li> <li>• Consider length of sessions and time between sessions.</li> <li>• Consider whether sessions will be conducted face to face, by phone, online, or a combination of modes.</li> </ul>	<ul style="list-style-type: none"> <li>• Consider what structure would best work for you and your client, considering availability, value for money, ability to do tasks outside the process, etc.</li> </ul>
<b>Parties / Participants</b>	<ul style="list-style-type: none"> <li>• Number of parties (small, medium or large groups) may influence number of mediators required.</li> <li>• Options for participation where there are a large number of participants include: <ul style="list-style-type: none"> <li>– All participants attend all sessions</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Consider whether your client has any issues that would benefit from discussion with a particular other party or wider group ( e.g. in a multi-party dispute.)</li> </ul>

	<ul style="list-style-type: none"> <li>– DR practitioner assists groups to elect representatives to participate in mediation.</li> <li>– Representatives meet with their wider group outside the resolution process. Meetings may be facilitated by DR practitioner.</li> </ul>	
<b>Power imbalance</b>	<ul style="list-style-type: none"> <li>• When a significant power imbalance is apparent or likely, consider options: <ul style="list-style-type: none"> <li>– Shuttle / shuttle over the phone</li> <li>– Support people / advisors attend</li> <li>– Support people and/or advisor in separate rooms</li> <li>– Duress alarm is available.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Consider the needs and wants of your client.</li> <li>• Consider what would enable your client to be in the best position to participate meaningfully.</li> </ul>
<b>Safety</b>	<ul style="list-style-type: none"> <li>• Consider whether: <ul style="list-style-type: none"> <li>– The location is appropriate</li> <li>– Parties should arrive separately</li> <li>– A more vulnerable party should leave first</li> <li>– Security or police are/should be available</li> <li>– Duress alarm is/should be available.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Consider: <ul style="list-style-type: none"> <li>– Client safety</li> <li>– Your safety</li> <li>– DR practitioner safety.</li> </ul> </li> <li>• Consider what your obligations are.</li> <li>• Consider what the legislative requirements are.</li> <li>• Consider what information needs to be shared and with whom</li> </ul>
<b>Time</b>	<ul style="list-style-type: none"> <li>• Consider: <ul style="list-style-type: none"> <li>– Number of hours in a session</li> <li>– Number of sessions</li> <li>– Time between sessions</li> <li>– Whether parties complete tasks outside DR process, and report back.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Consider what timeframes you and your client require or what would work best.</li> </ul>
<b>Timing</b>	<ul style="list-style-type: none"> <li>• Consider ripeness in the context of party willingness to be involved, as well as emotional preparedness.</li> <li>• Options for when mediation occurs include: <ul style="list-style-type: none"> <li>– Parties employ DR practitioner to support negotiations from outset.</li> <li>– DR practitioner does intake with parties, provides information and asks them to come back later.</li> <li>– Parties employ DR practitioner to resolve all issues shortly after dispute arises.</li> <li>– Parties employ DR practitioner to resolve some issues shortly after dispute arises and then parties try to resolve other issues privately.</li> <li>– Agreements are trialled by parties who return for follow up session.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Consider whether your client is emotionally prepared to engage in the DR process.</li> <li>• Consider what your client might need or what might need to happen for them to be ready to mediate.</li> <li>• If your client is not ready, consider whether they would benefit from an intake session or information session about the DR process.</li> <li>• Consider urgency of issues for resolution.</li> <li>• Consider whether issues can be split and dealt with at different times.</li> <li>• Consider whether an agreement reached through the DR process be trialled</li> </ul>