ADVOCACY OUTSIDE THE COURTROOM–

A BETTER DEAL FOR YOUR CLIENTS?

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WHY MEDIATE?

If you have defined yourself as a *trial* lawyer, the idea of resolving a dispute through mediation may necessitate tweaking your perception of how best to serve your client.

When I was a civil litigator – 1978-1988 – I loved a good court room battle; the more blood, the better. When I was a Judge on the Supreme Court of BC – 1988-2012 – I initially enjoyed watching a good fight. But, increasingly, I noticed that lawyers sometimes wanted to fight more than their clients did and often missed signals that their clients' strongest desire was to end the battle.

As a mediator – 2013 to present – I realize (belatedly) that litigation risks and litigation costs are so overwhelming that many clients are best served by resolving their disputes quickly and cheaply – outside the courtroom, rather than in it. The key to successfully resolving a dispute is to find that "sweet spot" where the parties' positions and interests overlap/intersect.

A fruitful example (pardon the pun) is where two cooks fight over ownership of a single orange. Their positions cannot be reconciled. A skilled mediator may determine that their interests can be reconciled: one cook only wants the orange for its juice and the other only wants it for its peel. By finding out what each party really wants, both parties are able to get what they want – a true example of a "win-win" scenario.

I am grateful for this opportunity to share my thoughts on mediation. My focus will be on wills and estates, disability, and personal injury cases.

MY FIRST MEDIATION – ACCIDENTAL SUCCESS IN SPITE OF MYSELF

Many years ago, while I was still on the Bench, the Registry informed me that a number of lawyers had requested me as the presider for a three day settlement conference set in a personal injury case (not a motor vehicle accident case). "Ah", I said to myself smugly, "Those perceptive counsel want *me* to sit in Court and listen to them for 2 ½ days, read the material, adjourn for a couple of hours and then tell them what I would decide if I were the trial judge." To my surprise/horror, counsel advised me that they wished to make presentations in Court on the first day, and then we would all move to Reportex where I would meet with each party in caucus. I was less than enthusiastic but agreed to embark on this procedure which was utterly foreign to me. My initial reaction (which I didn't share) was not quite "Do you know who I am?" but very close.

I had done my last examination for discovery in 1988 in those ancient shabby offices on Granville Street: miserable furniture, windows open, dingy curtains fluttering, the room always too hot in summer and too cold in winter. Walking into Reportex, [and now of course Charest], was like appearing on a Hollywood set – glamorous and comfortable with yummy food. However, the idea of going between breakout rooms with numbers on a little piece of paper was less enchanting. But, all mediations have peaks and valleys and develop their own rhythm. By the third day, I was utterly caught up in the process -- the plaintiff and two of the three defendants were tantalizingly close to a satisfactory resolution. I shared their assumption that they were all working together in good faith towards a solution. The final number I had to get to finalize the settlement would come from the government's lawyer. When I went to his room, he said "I don't have instructions." Horrified, I glared at him and said: "Get on that phone to Allan Seckel (then Deputy AG and previously counsel at Russell and DuMoulin when I was there) and tell him Madam Justice Allan says you are to get instructions right now." I doubt that he phoned Mr. Seckel but he did get instructions and the matter settled. I confess that, as a mediator, I have often regretted that such a useful, if a tad heavy, weapon is no longer available to me.

LITIGATION V. MEDIATION

Litigation is characterized by considerable expense and risk and, even if your client wins at trial, the costs of achieving the "win" might considerably outweigh the benefits, not to mention the fact that your hard fought victory might disappear on appeal.

Mediation is both cheaper and faster than litigation; the parties, not some unknown judge, make the ultimate decision – they control the process. One important point to make to your clients is that, at mediation they have the decision making power but, at trial, they will have no control over the ultimate decision (other than of course, the competent work done by their counsel).

Mediation is efficient. A court day is, at best, four and a half hours. A mediation day can be as long as the collective stamina of the group permits. Twelve or thirteen hour mediation days are not uncommon (although ideally not back to back). Any agreement reached should always be documented on the same day so that the minutes of settlement form a binding contract between the parties.

In many cases (e.g. wills variation claims) the judge you draw in the Registry sweepstakes may be critical. There is a wide spectrum of judges: some may be staunch advocates of testamentary autonomy; others may place much more emphasis on the moral and legal obligations of will makers to their spouses and children.

Different types of cases have different dynamics and those dynamics greatly affect the mediation process. But many of these types of cases remain suitable for resolution by mediation.

Wills and estates litigation, like family law, is uniquely "hot". Some people refer to wills and estates law as "family law with a dead body". Indeed, by definition, family members come to the table with a long and intimate family history, whether happy or unhappy. It seems that the opposite of love is not hate but, rather, apathy. Siblings and spouses rarely appear apathetic in family disputes. A trained mediator can allow the parties to explore that family history and, in certain cases, even achieve some reconciliation, whereas at trial there is no discussion – only a recitation by each party of their view of the evidence which is then tested by cross-examination, not by a skilled facilitator. Trial leaves little or no room (once all of the "dirty laundry" has been aired in public) for parties to reconcile any differences; instead people become even more entrenched in their positions.

Disability claims are particularly amenable to mediation. A client who has been denied Long Term Benefits by an insurer has limited options in court. A successful plaintiff cannot expect more than an award of arrears and an order that the insurer continue to make disability payments –- at least until the next dispute as to the plaintiff's disability arises. At mediation, the parties are able to craft a unique solution in order to end the insurance contract with a lump sum payment. Both parties walk away knowing the final resolution of the matter and, because a final resolution is preferable, insurance companies have become sophisticated and their representatives come to mediation with the intention of settling the claim reasonably.

Mediations of personal injury claims are a mixed bag. I expect that senior, more experienced, adjusters with appropriate instructions attend mediations on larger claims and those cases may be easier to settle than smaller claims. Regardless, if both parties come to mediation properly prepared and instructed, settlement is always possible. Because of the length of time between mediation and trial, plaintiffs in personal injury cases are often very motivated to settle. On the defence side, the costs of trial should (and hopefully do) motivate defendants to focus on settlement at mediation, rather than a decision, at trial.

HOW TO PREPARE FOR MEDIATION

A successful mediation requires meticulous preparation. Thorough and organized mediation briefs are critical. As counsel, you should, in your mediation brief, set out the facts, the issues and the relevant law, as well as the positions of the parties. Describe any negotiations between the parties. Consider making a reasonable settlement proposal in advance of the mediation to create a starting point for the negotiations.

Your briefs are your opportunity to convince the other parties of the strength of your position and, to avoid any elephants in the room, you should deal with any weaknesses in your case head on.

Your opening statement at the mediation is not the best time to make your strongest points. All parties will have arrived at the mediation with a firm view of the strengths and weaknesses of everyone's positions and they will be unlikely to change their views as a result of what they hear during the opening statements. Indeed, the mediator may not want you to make opening statements in a family or wills and estates case, where the parties are extremely emotional and any openings by opposing counsel are viewed as adversarial and hostile.

Opening statements at mediation are not jury addresses. Florid rhetoric will fall flat with your colleague, an experienced insurer, and the mediator. I would suggest opening with your (realistic) best case scenario but indicating that you are at the mediation to compromise and reach a fair resolution.

Advocacy can often be best achieved by co-operative focus on resolution rather than by continuing expensive litigation. The skills involved in mediation are very different from those at trial. A trial is almost always a zero-sum game. A successful mediation involves compromise and it is essential that there not be a clear winner and a clear loser at the end of the day.

You cannot choose your judge but you can choose your mediator. Different cases call for different mediator skills. You may need a mediator who is very experienced in a particular area of the law. Some mediations call for facilitative tactics and others for a more evaluative approach. Do you want a mediator who is interventionist? Empathetic? Is cost a factor? Consider all of these factors when deciding whom to engage as your mediator. If you want a particular style (facilitative/evaluative) tell the mediator why he/she has been chosen. Many mediators can move between facilitative and evaluative techniques depending on the parties needs/wants which may, themselves, vary during the course of the mediation. Keep your mediator informed (usually done in caucus or by pulling the mediator aside) about where you would like (need) him/her to go to assist your client in settling the matter.

HOW TO PREPARE YOUR CLIENT FOR MEDIATION

Counsel need to manage their client's expectations and discuss a range of reasonable expectations, not just the client's best case scenario. Think out and discuss how your offers may proceed.

You should explain the mediation process carefully to your client. For example, caucusing may be a foreign concept and your client may wonder, but not ask, why the mediator is spending so much time with the other side.

Warn your client that the other party's first offer will inevitably be *very* low (defendant) or *unrealistically* high (plaintiff). Consider how much "process" your client needs. Some parties need to make and consider numerous offers before they get to a realistic range where settlement is predictable.

In a personal injury case, the range of non-pecuniary damages for a particular injury may be relatively tight but the range for loss of income earning capacity and future care costs is likely to be vast. What is the realistic range? Case law is little help as the jurisprudence in this area is difficult to rationalize.

Consider whether there are intangible factors that are important to your client, e.g. ending stressful ongoing or potential litigation; keeping or reviving family bonds.

Have your client dress and groom to make a good impression and discuss how he or she should behave at the mediation. Remind your client that the other side (and their counsel) will be assessing them, (particularly plaintiffs in personal injury matters) to determine whether they will be a good witness if the case proceeds to trial.

Determine whether the plaintiff wants to actively participate in the mediation and carefully review any statement he or she might want to make. Being confrontational is unlikely to be a useful tactic.

In personal injury claims, plaintiffs' counsel should inquire whether the insurer wishes to question the plaintiff with respect to the status of his/her ongoing injuries, treatment, his/her work history. Counsel should prepare his/her client to answer those questions (or not).

WHEN IS THE BEST TIME TO MEDIATE A DISPUTE?

Determining when mediation is appropriate is a judgment call. Some cases (perhaps a wills variation claim where the size of the estate is not disputed) are ripe for mediation, even before the pleadings are filed. On the other hand, personal injury claims should not be mediated prematurely. Generally, for mediation to be a viable option, the plaintiffs' injuries should be sufficiently resolved or the outcome from the injuries predictable.

Obviously examinations for discovery and document discovery may be critical to a proper assessment of a claim. But if too much time passes, the parties' positions and their view of their legal "rights" harden. As the cost of litigation increases, each party may need to "win" and decide, rightly or wrongly, that there is too much at stake to compromise. Litigation will take on a life of its own. You have to determine when the plaintiff is psychologically ready to settle.

HOW IMPORTANT ARE JOINT SESSIONS?

Joint sessions seem to be in and out of fashion in mediation circles. I believe strongly in the value of joint sessions in all, or virtually all, cases. Joint sessions enable the mediator to set the mood and engage all of the players – lawyers and clients – in the mediation process.

In personal injury and disability cases, joint sessions enable the insurer and the plaintiff to actually see and assess the decision maker on the other side of the file.

In wills and estates (and family) cases, the parties may resist being in the same room together or having the other side's support person in the same room. I believe that it is extremely important that everyone hear the same words from the mediator at the same time. If people are uncomfortable together, the mediator or the lawyers should explain the critical importance of joint sessions. The litigants and their support can be seated strategically so that adversarial parties are not glaring at each other across the table. Regard, of course, must always be had to power imbalances between spouses. If there are any issues of violence, joint sessions are not recommended.

In many cases, particularly when emotions run high, it may be counterproductive for counsel and the parties to speak at the joint session. In my first wills and estates mediations, I was pleased to see the effect of my opening remarks on the parties – their shoulders descended from their ears and they were clearly prepared to engage in a cooperative process they were going to control. Each side was antagonistic to the opposing party and, of course, to counsel for the opposing party. So, when counsel made opening statements, (and really, what can you add to what you have already said in your mediation brief?), the effect was that of lobbing grenades on to the boardroom table. All shoulders again ascended to the ears. My experience has led me to conclude that, in certain instances, it is preferable for the mediator, who is perceived by the parties as being neutral, to summarize the issues and the parties' positions on those issues.

What about observers? At a family mediation, I acceded to everyone's request that a particular support person – the daughter of one of the parties – not attend the joint session; instead she waited in another room while I conducted the joint session. As a result, everyone except the daughter listened to me reassure the parties that they were in a safe, cooperative place and heard me explain the relative virtues of mediation over litigation cost and the risks of litigation. Unfortunately, the daughter (who was there supporting one of the parties) never budged from her perception that she was there to fight fiercely for the rights of her parent.

One exception to having a joint session may be when the plaintiff is suffering from a traumatic brain injury. In that case, the plaintiff may not appreciate how much he or she may be harmed by hearing his or her counsel describe the damage incurred in the accident. As one of the virtues of mediation is flexibility, in this type of circumstance, the plaintiff might be present during the mediator's opening remarks and then leave while counsel make their opening statements.

USE YOUR MEDIATOR

As a mediator, I like to communicate frankly with counsel before and during the mediation. I hope that counsel will share relevant information that will help me move the process forward. For example, if your client has unrealistic expectations about what he can obtain at the mediation or even at trial, the client may well be open to a reality check from the mediator who is perceived as knowledgable and neutral. Everyone involved in the process can usefully suggest creative ways of resolving the issues in contention. One of the joys of mediation is the freedom to brainstorm and think outside the box.

Being neutral, mediators are often the best judge of the personal dynamics that are playing out in the mediation. This is valuable information for counsel to hear.

CAUTION TO MEDIATORS

You must resist the temptation to do anything at all to relax the litigants. In one very tense estate mediation, the siblings were in different rooms and, as the day wore on, everyone's nerves frayed and tempers flared. One of the siblings, a very large burly logger and trucker strode over to the window and, if it had opened, I am sure he would have jumped out. Without engaging my brain, I blurted out: "Would you like me to give you a shoulder rub?" (Just as well that blurt never happened when I was on the Bench). Everyone in the room turned to me in disbelief. Thankfully, the trucker logger said: "Really, you would? Um, no thanks" and sat down in his seat, much more relaxed. I realized that I had tried to say that I knew he was very, very upset and I hoped he could relax. And what if he had said "Yes?" I guess I would have had to rub his shoulders. I have never been tempted to blurt out a similar statement but I have, on occasion, repeated this story and it has had the same effect.

WHAT HAPPENS WHEN YOU SETTLE?

First, suppress the urge to run out and have a martini. It is imperative to paper the settlement on the same day (or evening) and avoid overnight buyer's regret. Your client must understand all the terms of the settlement. This is the last chance for the plaintiff to change his or her mind. Counsel and the parties must sign the minutes of settlement. The minutes form a contract and its essential elements are offer and acceptance. There must be no unconscionability or ambiguity. If the plaintiff is a minor or disabled, you may need the approval of the Public Guardian and Trustee or the Court. You must put your mind to whether you need a consent dismissal order or discontinuance and releases.

CONCLUSION

Mediation empowers litigants to determine the outcome of their case. Indeed, mediation empowers mediators. It is incredibly satisfying to see litigants arrive at a fair resolution that puts an end to ongoing litigation risk and cost. To reach a successful conclusion, it is imperative that all of the participants, including the mediator, come to the table with realistic expectations and after careful preparation. V