Mediation, The Road Forward

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Outline

Introduction

Definition section

- Dispute
- Conflict
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Some mediation , the road forward, we may need litigation , but we find a better result in mediation, for most disputes.

“But it is foolish for the party of law and order to imagine that these forces of public authority created to preserve order are always going to be content to preserve order that

the party desires. Inevitably they will end by themselves defining and deciding on the order they are going to impose, which naturally will be that which suits them best.

-Jose Ortega y Gasset

The ancient masters were profound and subtle

Their wisdom was unfathomable

There is no way to describe it

All we can describe is their appearance.

They were careful as someone crossing an ice over stream

Alert as a warrior in enemy territory. Courteous as a guest.

Fluid as melting ice. Shapeable as melting as a block of wood.

Receptive as a valley. Clear as a glass of water..

Do you have the patience to wait till your mud settles and the water is clear?

Can you remain unmoving till the right action arises by itself.

-Tao te Ching 15

A pessimist will see difficulties in every opportunity, the optimist, opportunities is every difficulty.-Winston Churchill

This paper will explore the relationship between conflict, negotiation, litigation and mediation. The paper offers a thesis that in the area of conflict, almost every conflict that comes within the jurisdiction of the Civil Superior Court can be settled via mediation or at least the issues in dispute made 'better' or 'clarified '. The paper will go on to suggest that even in the cases where active litigation is being pursued, if mediation is

used by the parties as an adjunct process, to work on resolution of the dispute, there will be more party satisfaction in the result, and perhaps higher compliance with the settlement than if the conflict is resolved strictly by litigation.

The paper will also look at cost effectiveness of mediation versus other forms of dispute resolution, especially arbitration and adjudication. Some of this is by way of antidotal evidence and experience. I have enclosed 4 charts at the end of the paper, chart number 1, Dispute Continuum 2, Cost benefit 3. combined 1 and 2, and finally in chart 4, it depicts the future loss of income analysis of every loss of income case I have seen where the plaintiff is injured, and the plaintiff's evidence suggests, that at the point of the loss, things were going to go sky ward. I have included this chart because if the evidence is believed, it lends credence to my cost benefit analysis chart.

The paper will also look at party satisfaction at mediation process versus other forms of resoultuion. Can mediation be used to help maintain relationships, and if so is there an economic benefit. Can dispute resolution and mediation make us better people?

The paper will discuss the concept of negotiation, how parties come into conflict (for the purpose of this paper, I use the word conflict to include dispute.). How conflict resolution strategies can include mediation. The paper offers discussion on what mediation is and what the mediators try to with the process of mediation, in terms of helping people resolve their disputes. It involves setting up a process so the parties exchange information, listen to each other, see the problem as a common problem, and then work towards resolution. It is a central feature that mediation is flexible and meets

the needs of the disputants, in terms of process. If the mediation isn't successful, do the parties have other options to resolve conflicts, yes they can litigate, but even in instances where parties have invoked the litigation process, where mediation is used to parallel the dispute resolution process, there is some evidence the parties are more satisfied with the result than parties involved in litigation.

The paper will attempt to explain some of what mediators do to do in terms of resolving the dispute, helping the parties seem the others point of view and perhaps change ones perspective.

Some explanation of the words used would be helpful; the writer offers some definitions for some of the following word terms or phrases

Negotiation

By negotiation, two people accomplish by agreement, what one could not [1]

All of us negotiate all the time in order to get what we want. Usually we are not aware of the process until it breaks down and the process grinds to a halt, with each party not getting what they want.

1. Andrew J Pirie, *Alternative Dispute Resolution* (Toronto: Irwin Law 2000), 93

It is at that point the parties may say or they feel they are in a conflict. The process comes to our attention when the negotiation doesn't meet our need and we have a dispute as to meeting our interest's wants and needs.

Ury and Fisher, In Getting to Yes, at page xvii (Introduction) "Negotiation is a basic means of getting what you want from others. It is back and forth communication designed to reach an agreement when you and the other side have some interests shared and others that are opposed."[2]

When one takes a position in negotiation, it tells the other side what you want in the negotiation. But as Ury and Fisher say " Arguing over positions is unwise…,"[3] "…inefficient…."[4] "…endangers relationships….".[5.]

Where the negotiation process breaks down and parties start to fight over positions, the negotiation becomes a conflict.

Conflict

In the mediation literature much is written about conflict. Where two or people interact there is the potential for conflict. In "Alternative Dispute Resolution" by Andrew Pirie, he says at p 37 "the essential ingredient of these events …is the fight, the disagreement , the back-against the wall, the violence , the pushes and the pulls, the line in the sand, the struggle or the competition;"[6]

2. Roger Fisher and William Ury, *Getting to Yes* (Penguin Books New York 1981) xvii
3 Ibid p 4
4 Ibid p 5
5 Ibid p 6
6 Above note 1, 37

He goes on to say that much that is written about conflict and disputes seem to be saying the same thing "…alternate dispute resolution, and I suppose mediation is a "modern response to the incompatibilities, interferences and divergences behind these terms. In a conflict free world, there would be no need for alternative more mainstream dispute resolution. But given the capacity for conflict, ADR attempts to understand the contextual complexities and consequences surrounding conflict or dispute and then establish what are or should be the normal and essential responses when conflict occurs." [7]

Parties usually come to mediation because they cannot work out for themselves, a resolution to the problem that faces them.

In Goldberg et al, at pa 113, quoting Rogers and Salem, A students Guide to Mediation and the Law:

"Mediation is usually a by-product of failure-the inability of disputants to work out their own differences. Each party typically comes to the mediation locked into a position that the other(s) will not accept. The parties distrust each other and may be angry , frustrated, discouraged, or hurt" [8] The authors go on to say many factors may be affecting the inability to bring a settlement to the case, i.e. emotions, differences in opinion or in interpretation of the facts. 9

7 note 1, p 38

8 Goldberg et al , Dispute Resolution, 4th Edition(New York Aspen Publishers 2003) 113
9 Ibid 113

Much has been written about mediation, and in trying to define what it is, the meaning shifts. Reading the books in the area, trying to define mediation is much like trying to nail Jell-O to a wall i.e. lots of activity but a result that varies in quality, and not long lasting. There are many different kinds and approaches but some to the commonly accepted terms are as follow

" The first of these is that mediation aims to produce a voluntary, consensual settlement out come….As Christopher Moore puts it:' Mediation is the intervention into a dispute or negotiation by an acceptable impartial and neutral third party who has no authoritative decision-making power to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of the issues in dispute'" 10

In Dispute Resolution at p 266, the authors state that "Mediation is a process in which an impartial third party acts as a catalyst to help others constructively address and perhaps resolve a dispute, plan a transaction, or define the contours of a relationship" 11

Mediator : Menkel Meadow et al , at P 266, say:

"A variety of metaphors are useful in conceptualizing the mediator's roles. The mediator acts as a host or a chair…The mediator is a guide and educator…a referee…is a master communicator and translator….an agent of reality….a watch dog"12

10.Julie Macfarlane, *Dispute Resolution*,2nd(Emond Montgomery Publications, Canada2003) 281-282
11 Carrie Menkle-Meadow et al , *Dispute Resolution, Beyond the Adversarial Model*(Aspen Publishers, New York, 2005) p266

12 Ibid

Christopher Moore, In the Mediation Process, p18-19 states the mediator plays a number of roles;

“>The opener of communication channels, who initiates communication or facilitates better communication if the parties are already talking

>The legitimizer, who helps all parties recognize the right of others to be involved in negotiations.

>The process facilitator who provides a procedure and often formally chairs the negotiation session.

>The trainer who educates novice, unskilled, or unprepared negotiators in the bargaining process.

>The resources expander, who provides procedural assistance to the parties and links them to outside experts and resources (for example. lawyers, technical experts, decision makers, or additional goods for exchanges that may enable then to enlarge acceptable settlement options.

>The problem explorer, who enables people in dispute to examine a problem from a variety of viewpoints, assists in defining basic issues and interests, and looks for mutually satisfactory options

>The agent of reality, who helps build a reasonable and implementable settlement and questions and challenges parties who have extreme and unrealistic goals

>The scapegoat, who may take some of the responsibility or blame for an unpopular

decision that the parties nevertheless accept. This enables them to maintain their integrity and when appropriate, gain the support of their constituents.

>The leader who takes the initiative to move the negotiations forward by procedural- or on occasion, substantive- suggestions"[13]

All of these descriptions and observations are correct, and all are necessary, but not all of them happen at all times. A big part of why mediation is so successful is that the mediator, who is skilled in listening, questioning and group dynamics, can play a positive role in helping parties reshape what the dispute is about. In many cases as a result of the work done by the mediator, and as a result of the mediation process, parties may not settle the issues between them, at the mediation, but the will come away with a better sense of the issues, and as a result may resolve the conflict with or without further intervention by a mediator.

Other writers like Goldberg, Sanders, Rogers and Cole at P 111 add the following: mediators "…deal with differences in perceptions and interests between negotiators and constituents (including lawyers and clients), help shift the focus from the past to the future, and learn (often in private sessions with each party) about those interests the

parties are reluctant to disclose to each other."[14] This is important in any process trying to resolve a dispute, because the thinking that causes the problem will not help solve the problem.

13Christopher W. Moore, *The Mediation Process 2nd (*Jossey Bass Publishers, San Francisco 1996) 18 -19

14 Above note 8, at 111

Mediation is popular because it works at allowing parties to craft process and solutions unique to the problems they bring. Some writers suggest that the reason mediation is so popular and powerful is that it does more than just help resolve disputes, it has the potential to transform not only the dispute into settlement but transform the parties involved into persons with a higher purpose.

In Goldberg, et al on page 112 the quote Bush and Folger " The Promise of Mediation": p2 "The mediation process contains within it a unique potential for transforming people-engendering moral growth –by helping them wrestle with difficult circumstances and bridge human differences, in the very midst of conflict. This transformative potential stems from mediations capacity to generate two important effects, empowerment and recognition. In simplest terms, empowerment means the restoration to individuals of a sense of their own value and strength and their known capacity to handle life's problems. Recognition means the evocation in individuals of acknowledgement and empathy for the situation and the problems of others. When both of these processes are held central in

the practice of mediation, parties are helped to use conflicts as opportunities for moral growth, and the transformative potential of mediation is realized."[15]

These authors go on to say that Transformative mediation has two important points, one where people are permanently changed, then we have a world where people are better off,

15 Abov note 8 112

and 2ndly being better off means being better, i.e. 'We have within us the potential for positive and negative, good and evil, higher and lower, human and inhuman, and the ability to know the difference. What ultimately makes our existence meaningful is not to satisfy our appetites but developing …our highest potential….mediation's capacity… is unique" [16]

Types of mediation.

.The authors N Rogers and R Salem, in A Student's Guide to Mediation and Law(as quoted on Goldberg et al p 113) say at page 7 " There is no 'best' way to mediate a dispute. Mediation techniques vary with the parties, the conflict and the mediation program"[17]

As an aside I agree with this, while there is much academic writing about the various way of mediation and the dos and the donts, in practice, much is governed by the area of law, the parties and the nature of the conflict. The same authors go on to say that in child custody matters, mediation could border on counseling, while in insurance matters, "where there is generally a single issue and the parties are unlikely to have an ongoing

continuing relationship, mediators often expedite settlement by offering an opinion on the value of the case." [18]

Good Result, Fair result

How does one judge a mediation as successful? How and why is a result considered fair? In litigation, a winning party may call the trial a success and the result a fair one. Those comments are made because winners feel vindicated.

16 Above note 8 at 113

17 Ibid
18 Ibid

Those same sorts of comments probably would not come from the loser from the same trial, even though the case involved the same issues, but the perspective is from a loser who may not see success and fairness the same way .Much of the definition of good and fair, in a zero sum game, comes from which side you are on.

A mediation could be considered successful "if it accomplishes any of the following goals, giving disputing parties an enhanced understanding of their dispute and of each other's perspective, enabling parties to develop options responsive to the issues raised by the dispute, and bring closure to the dispute on terms that are mutually agreeable. Conversely the mediation process should not make negotiations more difficult, nor should it generate an outcome worse than outcomes available elsewhere. In other words,, at a minimal level, the process should do no harm". [19]

Over two hundred years ago Benjamin Franklin summer up a good result, as one that 'would not take place unless it was advantageous to the parties concerned…to strike as

good a bargain as one's bargaining position permits. The worst outcomes is when, due to overreaching greed no bargain is struck, and a trade advantageous to both does not come off at all".

Positions Versus Interests

In "Alternate Dispute Resolution", by Pirie, at page 104, the author discusses the differences between interests and positions: "In a dispute, each party has certain needs, desires, concerns fears, and hopes that motivate them to accept, or to reject offers or counteroffers. However behind offers or opposed positions often lie shared compatible

19 Above note 11 at 325

interests, as well as conflicting ones. Identifying these important interests and insisting that they be reconciled in any agreement can lead to more creativity and mutually satisfying solutions"[20]

In Getting to Yes, Fisher and Ury ,p 4 to 7 and 10 to 14, say "negotiation may be judged by three criteria: It should produce a wise agreement if possible, It should be efficient. And it should improve or at least not damage the relationship between the parties."[21]

Definition of Position, Definition of Interest

Fisher and Ury offer further insights as to why fighting over positions is such a fruitless battle and why understanding interests produces such great results. Primarily the reason

is that many parties to disputes have common interests, but this isn't determined until one gets past positions [22]

Fisher and Ury make three broad statements concerning Arguing over positions…
It produces unwise agreements, is inefficient and endangers an going relationship.
The basis of litigation is to argue over positions, and the harder one argues and fights, the deeper the parties go into these positions. Much of what doesn't work about litigation is the fight over position and lack of motivation in the system to understand interests

20 above note 11 at 104

21 above note 2, 4-7, 10-14

22 above note 7

Arguing over position produces unwise agreements "because it tends to lock parties into positions. The more you clarify and your position, and defend it against attack, the more committed you become to it."[23]

In positional bargaining like litigation, there are 'incentives that stall settlement. In positional bargaining you try to improve the chance any settlement reached is favorable to you by taking an extreme position, by stubbornly holding on to it, by deceiving the other party as to your true views, and by making same concessions.".[24]

This kind of bargaining helps delay settlement

The authors go on to say that positional bargaining becomes a contest of wills and "…anger and resentment often result as one side sees itself bending to the rigid will of the other …positional bargaining strains relationships…."[25]

" Saving time and money must be considered important, and preserving relationships, in certain cases is also a very important . But both of these are really just part of a more general goal that I consider the most important aim of dispute resolution:
that is to reach the best possible substantive result or solution to the parties problem. Some times the best solution will be one that saves time and money: sometimes it will be the solution that preserves the relationship. Sometimes it will be one that does neither of

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23 Above note 2, 5
24 Ibid 6
25 Ibid 6

these. That will depend on the many of the details of the case. But what ever the details…mediation is a process that has tremendous advantages over adjudication. The process is flexible, issues can be framed more efficiently and discussed more fully , a greater variety of possible solutions can be considered, and unique, innovative and integrative solutions are possible….Therefore mediation ought to be tried first in all cases, because the potential to arrive at superior substantive results is always greater in mediation than in adjudication. If mediation doesn't work, if there is no resolution, than the parties can go back to court."[25]

"There is also a public interest and promoting public values, public values which are important...such as reconciliation, harmony, community interconnection relationship and like. Mediation…involves a non adversarial process that is less traumatic, more humane, and far more capable of healing and reconciliation than adjudication. The writers go on to say the public value is the value of providing a moral and political education for citizens, in responsibility for themselves and respect for others….there's the potential for that kind of direct and experiential education… and that potential can only be realized in mediation The superior results that mediation helps produce related to the values that society places value on the integrative win win solutions that mediation helps produce precisely because such solutions embody in concrete terms the kind or respect for others that is the essence of civic education. "[26]

How is mediation and satisfaction with mediation assessed by Social scientists? Is

25 above note 11 285

26 above note 11 288

mediation worth go through? Are parties satisfied with the result? With the process? How does mediation satisfaction measure against other adjudicative processes such as arbitration, and trial? Is there a difference in satisfaction rates between volunteer mediators in court annexed mediation programs as opposed to professional mediators specifically hired by the parties to mediate the dispute in issue?

Does satisfaction and settlement rates vary and change with the type and kind of process?

In Goldberg et al, at p 160 the authors refer to a summary of findings, complied by sociologist C . McEwan.

There are a number of interesting findings, although the matter more research is required to support or reject some of the conclusions.

"Satisfaction with mediation in public and private sectors: The vast majority of mediator participants expressed satisfaction with the process, the neutral, and the outcome-whether the mediator was paid …or a court appointed volunteer"[27] Then summary goes on to say parties appearing in mandatory mediations were almost as satisfied as voluntary participants. [28]

How does the satisfaction rate from mediation compare to those who participated in arbitration ." Parties whose disputes were mediated were overwhelming pleased with the process …more so than participants whose cases were arbitrated."[29]

27 Above note 8, 160

28 Above note 8 160

29 above note 8 160

Relationships "Private mediation study provides support for the view that mediation is more likely to improve relationships than is adjudication. Parties were more likely to state their relationship had been improved when they used mediation, rather than arbitration."[30]

Mediation evaluation "Whether the mediator evaluated the merits of the case, thought so important by the commentators, had only slight effect in the eyes of the participants….Mediators evaluation did not affect settlement rates in the private setting, though settlement rates increased in civil court mediations when the mediator evaluated…parties expressed higher satisfaction when the mediator evaluated…and tended not to cut the mediation short, in fact evaluative mediation lasted longer than non evaluative mediation."[31]

How did the parties respond to mediators recommendations. "In contrast to the slight reaction to mediator evaluation, …mediators who recommended a particular settlement met with strong adverse reactions….The parties were less likely to view the process as fair and the mediator as neutral"[32]

Mediator qualifications: Here the results are very interesting. There didn't seem to be any correlation between training, experience and educational degrees. "Only experience

30 above note 160

31 above note 160

32 above note 160

…even approached am statistically significant relationship with settlement. The research suggests that the task of identifying qualifications for mediators that will affect outcomes or satisfaction is complicated and the common mediation qualification rules and statutes may focus on the wrong things."[33]

Disputant participation "Settlement rates were 23 percent higher if no party critical to the resolution is missing. The parties satisfaction was higher in the federal courts that encourage their attendance at mediation sessions than in the courts that did not."34

Summary of the review of the studies "Mediation is well received by the participants in a variety of settling, unless the mediator recommends a particular settlement. Disputing parties welcome rather than resent the addition of mediation to the processing of their case…."[34]

The commentators views about what is high quality mediation were not all borne out by the studies. The results of mediators were about the same for facilitative and evaluative, for mediators who were trained a little and a lot, and for mediators with substantive experience and without. Parties and attorneys did not react negatively to mediator evaluation: in fact, some liked it [35]

" Nonetheless, the research on mediation to date challenges some of the criticisms of mediation and provides strong support for its advocates. Despite the fact that disputants

33 above note 8 161

34 above note 8 161

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typically chose to invoke courts before arriving at mediation, they tend to find the mediation experience good and just…once they enter the process." [36] This research confirms the belief that if parties have a voice in the process, they will consider the process fair.

“ The very strength of the process raises concerns, given some evidence that parties may be persuaded to accept positions reflecting the mediator’s values and the process itself creates momentum for agreement.”[37]

Is there a time not to mediate? From our in class discussions and the mediations I have been through, it seems the only time one may not want to go to mediation is when the process of mediation would make your case worse, that is mediation would make the case more difficult to settle, r a threat to one of the parties.[38]

Many people would agree that choosing mediation is contextual, i.e. what kind of dispute and it is very important to match mediator to the dispute.
The literature that I read suggests there are some common objections to the use of mediation” (Bypass court, Chornenki p 136)

37 above note 8 163

38 above note 1 188-189

“1. When fraud is alleged.

2. When a precedent is required (case of public interest)

3. Where domestic violence is involved

4. When a declaratory judgment is required
5. when the parties are not willing to settle
6. when damages are not yet quantifiable [39.]

This author says that cases in these areas should not be automatically rejected, rather there should be some exploration and thought. You may want to determine if the allegation of fraud is against an institution, or a small family business where the movement of money may have been inadvertent [40] On the issues of precedent, Again one has to consider whether a settlement via mediation or precedent is the best thing for you and your client.

It is necessary for all known information about the dispute, be available to the parties before the dispute is to be mediated. In Christopher Moore's Book, The Mediation process, , in the circle of conflict, he says " Data conflicts are caused by Lack of information, misinformation, different views on what is relevant, different interpretations of data, different assessment procedures. These problems can be dealt with by a number of strategies and interventions; reach an agreement on what data are important, agree

39 Genevieve Chornenki et al, *Bypass court*, (Lexisnexis Canada Inc 2005) 163

40 Ibid 165

on process to collect data, develop common criteria to assess data, use third party experts to gain outside opinion or break deadlocks" [41] The lack of information should not stop the mediation process, rather part of the mediation process is to ensure all relevant information is produced and exchanged.

Chornenki et al says "If we were to identify one factor which does contraindicate mediation, , however, we would have to identify attitude or frame of mind. A stubborn, self centered and withholding person …is not a very good prospect for mediation. Mediation involves a level of flexibility and openness to new information and change." There is a need to be flexible, to accommodate and be receptive to the direction new information will take you. It requires a person that a person that a person not only be able to articulate, priorize and seek to actualize his or her own needs , but also be able to perform the difficult balancing act of considering and acknowledging those of the other parties at the same time" [42.]

It is interesting to note that these authors don't really follow up on point number three, ie where domestic abuse is involved or alleged. Nothing further is said, and no explanation or expansion of this point is made.

In Alternative Dispute Resolution., Pirie says that it is more important o give some

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42 note 39 137

thought to matching dispute to the mediation process and spend some thought on what one want to achieve .[43]

Further on the same author elaborates "When not to mediate, 'some say that mediation should never be used in disputes where there is a history of violence or abuse between the disputants. Disputes involving spousal abuse, sexual abuse, sexual assault, incest,'"[44].

The author goes on to say there are many reasons for this, and lists some 12 reasons, some related to the informal nature of the process, X, mediation is behind closed doors, and "the victim abuse may be furthered by the continued privatization of the violence perpetrated against them, mediations the focus on 'interests' not necessarily rights of the victim, abuser not held truly accountable[45]

He concludes "The problem is not with mediation *per se*, but with the potential deficiencies in how mediation handles cases involving violence or abuse."[46]

Other writers such as Kenneth Kressel , writing in the "The Handbook of Conflict resolution" , at 524, says, : " Mediation is not a magic bullet for resolving any and all conflicts." He points out 6 conditions in which he feels mediation will be unsuccessful or ineffective.

"High Levels of Conflict. In empirical studies of mediation, a high level of conflict is

43 Above note 1 184
44 above note 1 188-189
45 above note 1 189
46 above note 1 190

the most consistent factor associated with mediator difficulty in helping parties reach agreement. The measure of conflict intensity that correlate negatively include …severity of prior conflict, a perception that the other is untrustworthy, unreasonable, angry impossible to communicate with, …strong ideological or cultural differences.[47]

"Low motivation to reach agreement…mediator perceptions that the parties have low motivation to resolve the conflict have been found negatively associated with the probability of settlement."[48]

Low commitment to mediate, if either the parties of the mediator are not committed to the process, it reduces the opportunity for a settlement [49]

"Shortage of resources, Mediation is especially unlikely to succeed under conditions of resource scarcity"[50] The reason probably relates to the metaphor of pie enlarging and pie splitting, the pie can only get so big, so parties engage in pie taking, hoping to get enough for their side.

"Disputes involving ' Fundamental Principles', several lines of evidence support the long-cherished notion of experienced mediators that disputes involving matters of principle are especially difficult to resolve… international issues, labour and environmental disputes .[51]

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47 Morton Deutsch et al *The Handbook of Conflict Resolution*, (Jossey Bass, San Francisco) 524

48 Ibid
49 ibid 525
50 Ibid 525
51 Ibid 525

Mediation likely to be successful when, "…they have the basic cognitive, interpersonal and emotional capabilities to represent themselves. They have interests that are not incompatible. They face alternatives to consensual agreement that are undesirable (for example a costly trial)'' [52]

As an aside, there is a difference between difficult and impossible. The impossible simply takes a little longer. One of the selling features of mediation is that the process is flexible enough to tackle problems that are impossible by standards set by other dispute resolution process such as adjudication. Litigation is like a one trick pony, all it can do is issue the remedies as provided by precedent and or the enabling legislation

Parties of Unequal Power " It is thought that another barrier to mediation is were there is a power imbalance between the parties, such as resources, skill, personal traits more attuned to lasting out the, such as confidence, the ability to articulate one's position…".[53] If is true that all of the barriers talked about supra have the potential to keep parties from mediation or to make mediation an unsuccessful experience. As the author goes on to say " …mediation often succeeds in disputes with one or more of these characteristics. This is because the skillful mediator may be able to modify them in a positive direction"[54]

52 above note 47 526
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Part of how the mediator would do this is perhaps through the process of active listening to determine the positions, and through more active listening and questioning, find the interests behind the positions.

If this process reveals both sides have common interests, then the mediator can explore whether it is possible to meet the common interests.

Perhaps in the joint opening session the mediator hears some things that get fleshed out in one of the caucus. As a result of reframing, listening, active listening, looping, or a discussion with the parties over the Best Alternative to a Negotiated Settlement (BATNA) or Worst Alternative to a Negotiated Settlement(WATNA), the perceptions of the parties can tend to change somewhat.

One of the roles of the neutral third party, which is talked about in the paper in a previous section, is as a reality checker to have the parties determine that after the discussions in mediation if there isn't something better for their live and the process, than litigation. In fact in the presence of a neutral third party, people ten to act better to each other.

Deutsch says mediation is useful where personal negotiations would be unlikely to yield results, such as "intense feelings, dysfunctional patterns of communication, strong disagreement over the facts, and procedural barriers such as the absence of a forum"[55]

55 Above note 47 526

In our November session in class we identified a number of factors listed as the dangers of mediation:

1 It makes the case worse. This can happen in cases not yet ready for mediation, cases where there is a lot of emotion.

2 It may not be culturally appropriate. The point was made in Class and in some of the literature, i.e. menkle-meadow, 277 that some cultures treat the mediation differently than the west does, i.e. in more traditional societies, a wise elder, know to both sides, hears the dispute, and helps heal the dispute. In the interest based model, there may be enough cultural difference to prevent the process form working.

3. There may be a power imbalance. This point was made supra,

4. Due to the private nature of the process, there may be no accountability of the parties or the mediator.

5. The mediation process can only work well if the mediator is neutral and unbiased. The parties are more likely to trust the mediator and the process and as a result the mediation may work to help resolve the dispute.

6. If there isn't good faith participation by both parties, one may feel that they have been duped by the process.

7. Breach of confidence. If as a result of the process, confidential information is revealed to the other side, when the expectation is that it will not be, that breach of confidence can be enough to prevent the mediation form working.

8. There may be a zeal for the deal: a mediator may be responding to pressures in the market place, and want to close a deal, so his success rate is good, so he will be retained by clients who see the mediators success rate as an important factor when deciding who to use for mediation.

9. Information deficiencies. It may be a matter of insufficient information, a matter of lack of preparation, or timing, but what ever the cause, if there is not enough information for the parties to make a decision good for them they probably wont make it.

10. Unmet expectations. If there is a disconnect with future expectations, the failure of the mediation process discredits the process in the minds of participants,

11. Due to the private nature of the process and the confidentiality of the result, there may be a piece meal approach to larger problems, such as native fishing rights in BC,

12. The mediation process invites people to take risks, if the mediation process leads to some parties being less than they were before , then the process has not worked. I could not find an outside citation for this though it sounds like "Transformative Mediation" talked about by Bush and Folger. 55

13. There may be no deal or the deal may not be enforceable. The author had a mediation involving a personal injury claim with a Swiss National who was injured while she was working in Canada. During the course of the mediation, the plaintiff mentioned

twice that in Switzerland, any personal injury case could be reopened for up to 3 years afterward.

During the course of the mediation, we managed to negotiate a settlement number her lawyer recommended, and she accepted. It

55 above note 10 323

The agreement was being reduced to writing, and after the settlement document was drawn up, and before she signed it she said "Well I guess that is it" as in that's final, and three of us, her lawyer the mediator and myself repeated back, "that's it". The plaintiff signed the settlement agreement, left and walked over to her counsel's office and signed a release for the same amount. Three days later she called me, asking for more money. In my mind it sounded like settlor's remorse. (I have coined this phrase from the concept of buyer's remorse, that is after some has purchased what they have wanted, the purchaser usually suffers from some remorse or regret about having actually gone through with the purchase of the object that they wanted. Now having concluded that transaction they were interested, and having feeling of regret, if a purchaser is suffering from buyers remorse, they will thy will try to get out of the transaction. This leads to many interesting social and legal problems.)

She indicated to me, over the telephone, that after she got home it was clear to her she didn't get enough money for the case and needed some more money to conclude the deal. I indicated to her that my practice is that when an injured party is represented by counsel and they sign a settlement confirmation, I cannot reopen the settlement, no matter how

compelling the argument. I have to be able to rely on the process, ie mediation and the settlement.

She then retained a new lawyer who tried to set aside the deal. We worked for another three years to enforce the settlement, that is to have the plaintiff take the settlement. money and have the action discontinued against our insured. This ultimately cost us a lot of money and on this particular file defeated the purpose of attempting to resolve a dispute quickly and cost effectively.

In this paper I have tried to argue that negotiations that break down between the disputants, and become conflicts will benefit from mediation whether or not the parties litigate the issue in dispute. Due to the mediation process (Mediation magic or Jedi Mind tricks?) and skill of the mediator, parties are able to come to settlements that and make agreements that reflect the unique nature of the dispute. The nature of the dispute is some how transformed.

There are a number of cases where perhaps mediation should not be used, where this is abuse and the potential for ongoing abuse. In cases where there is an imbalance of power it is difficult to strike a fair balance. Is there a potential to make the conflict worse, after the mediation then before? Emotional laden disputes are problematic, although not impossible to resolve through mediation.

After the mediation, will there be uncertainly about the settlement. Will the parties be saying “is there a deal, there is no deal, what is the deal”. The author knows from

personal professional experience, that if one of the parties decides not to be bound, it takes a lot of time and money in the litigation system to make the mediated deal binding My own experience and my bias is that every kind of conflict or dispute will benefit for some form of mediation process

Some comments on the enclosed charts.

Chart number one… the dispute resolution continuum. The key to this chart is the further to the right one goes, the more expensive is the resolution process, the more uncertain the result and the parties start to give up control of the process and the result to an impartial third party.

Chart number two. Here is the cost benefit risk chart. The upward sloping line on this chart reflects the rising cost of a dispute. The positive slope of the trend line may vary but the slope will only in rare cases ever be negative. The positive slope represents the value of the case, the cost to defend, the effect of pre judgment interest, time value of money and the chance the law evolves against you, that is the law turns against your position.

It is interesting to note that as one approaches the top of the line and gets near to trial, the line represents a risk for both sides, ie the longer a file is open and the greater is the potential up side, there is also a corresponding greater risk to the plaintiff that the case may be worth a lot less than anticipated.

At any point on the time line, the case could be settled and using a Cartesian graph, and the difference between settlement and the trial is the difference in exposure the parties either try to get or give up.

Most files have an optimum settlement point, that is well short of trial, the key is to translate some of the legal arguments into risk assessment, and take advantage of alternate dispute resolution process. .

Chart number three is simply a combination of charts number two and three. All I am trying to show here is that if we take the chart reflecting time and money and put it with a chart representing dispute resolution alternatives, it is possible for parties to see that at some point there is a trade off in terms of getting a settlement on terms that present a lot less risk than a trial and more input from the parties.

Chart four represents the accounting analysis in many loss of income cases, where the plaintiff was about to have a career or a business venture take off, but for the accident. This effect of seeing the accident as the cause of a large income loss, can be interpreted many ways, it could be correct, it could be attribution, or it could be totally wrong. My point is that again the slope of the line is positive and coincides with the argument, that the longer cases are open the more money is at risk for both sides.

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