Thirteen Steps to Success at Mediation

By David Stark

"Blessed Be the Peacemakers", Matthew 5:9, New Testament.

"There was never a good war, or a bad peace", Benjamin Franklin.

I have been involved in Alternate Dispute Resolution since 1991. At that time I was working with an Insurer and the new Director of Casualty had a file he assigned to me and said, almost in passing, there was mediation next week and he wanted me to attend. I knew nothing about mediation but it sounded like something I didn't want to participate in. I said what's that, he explained the process in terms that left me feeling that this was not going to be a very manly way of resolving a dispute, i.e. No yelling, posturing, table pounding and at some point one party storm out, to make a point.

What happened in the mediation was rather surprising. The mediator kept the parties focused, he used a flip chart to create an agenda, issues that needed to be talked about were put on this agenda, and when we were stuck on one of the issues, we moved to something else. At the end of the day, the case settled, the plaintiff seemed to be happy and the mediation process seemed to be leaving everyone with satisfaction in the process and the result.

I didn't realize it at the time, but watching a professional mediator at work made the process seem very easy, and that is one sign of a professional at work. Malcolm Gladwell says that the sign of a master is someone who has spent 10,000 hours perfecting their craft, and makes the task they are involved in seem effortless.

Since that case in 1991, I have participated in close to 2,000 mediations, with over 700 as a mediator.

Back to 1991, to better understand the process, I undertook training as a mediator, started teaching part of the Bar Admission course on Negotiation, and then finally left my Company job to take up Mediation work full time in 2005.

The First Generation of dispute resolution books, as I call all them, focused on the dynamics of the negotiation process, and on the mediation as group dynamics and communication and seeking information from the other side to determine if underlying the position, there were interests that would meet others similar interests. The matching and meeting of interests allowed parties to move past the positional fight. These books also brought in game theory to predict potential outcomes. Much good has come from these ground breaking books, such as "Getting to Yes", "Getting Past No" and "Getting Together".

The Second Generation of negotiation books started to focus on what is going on in the mind of the individual negotiator, what biases, and what mind traps existed. Diagnostic tools like MRI scans and psychological testing showed how the brain worked, and which portions of the brain fires in certain situations. Questions like, "What did negotiators struggle with in terms interpretation of facts"; "How did cognitive dissonance arise"; "How do we account for the perceptions of facts". What I have found fascinating is how parties with the same information or facts, can come to polar opposite conclusions about what those facts mean. The conclusions then represented the reality the parties would work. Books like "Thinking Fast and Slow", "The Black Swan" and "Mistakes Were Made" light the way to see when, where and how cognitive errors occur and help us avoid them.

After each mediation I would make notes about the type of case, what was memorable about it, what worked and what didn't. I found that notwithstanding the type of mediation, there were a number of trends that started to emerge, and I started to keep track of those trends so I would have means of working with the parties to help them move to settlement.

1. When you have a dispute that turns into a conflict or may turn into a conflict, think mediation early and think mediation often in the process. While litigation is an integral part of the legal process, and one way to resolve disputes, litigation and the role it plays and the rules it is practiced by, help produce records and documents, produces evidence and a record of proceedings, helps define rights, etc., litigation has limitations. Limitations such as it is not good at getting parties to sit down, listen to each other, work towards an understanding of each other's interests, and what the dispute is about, and help parties work toward a settlement . Litigation is time consuming, expensive and the results are often unpredictable.

Mediation helps increase the opportunity of early cost effective settlement. The mediator and the mediation process may help with things like document production, timing of and production

of expert's reports and timelines to get to meditation. Not all mediators are the same, also pay attention to the kind of dispute you have and who would be the right mediator.

2. How we see the world has a lot to do with how we respond to the world. We process the world with a number of biases that are running, most of the time, as a sub-program in our mind. Attribution is the basis of most misleading judgements, a program that is always is running and we may not know it. It says things like, "I like people like me and dislike and distrust people who are different." We then seek evidence that will support how we view the world (Confirmation bias), we get attached to our cases and the outcomes (Advocacy bias) and then devalue what the opposition says (Reactive discounting). Because of these biases, we miss opportunities to create value in settlements, because our mind is closed to new information. Face to face meetings, active listening, and being open to new information helps take us out of our biases.

3. The amount of preparation is usually a big predictor of success. Most cases that go to mediation are not about making new law, rather, how the facts fit an existing precedent. Preparation includes all the background work on file, investigation, the right treating doctors, preparation for Questioning, the right experts and the cases to be reviewed and provided, and of course, right mediator. Rarely will over preparation be an issue. Preparation can also include team work, brainstorming, and a perusal through Canlii.

As a part of preparation remember the phrase, "sensitive dependence on initial conditions". What this means is "how things start is how they go", so spend some time thinking before the mediation and give some thought to what would help the mediation start and run smoothly. Confirm date, time and place of mediation. It is my experience that many well-educated professional people will overlook the simple but obvious things that should be checked. This is now easy to do with e-mail and text. Also give some thought about food i.e. snacks, lunch, drinks etc. My experience is well fed negotiators make better, more rational decisions. I always make it a point to bring healthy muffins to mediations

Also remember that "low cost high yield" skills like good manners are important. Being polite and on time always yield high dividends. Being on time shows respect to your learned friend and don't be that person who has the reputation of always being late, people hate dealing with someone who is always late.

4. The mediation process is a dynamic process that tends to move with more fluidity than you would expect, but not always in the same direction. At times mediations seem to run backwards and at times mediation may seem like it has stalled. (The nature of dynamic equilibrium suggests that as long as the parties stay at the mediation, parties are making progress.) Watch this and be part of the process to move the mediation forward. Where I have seen mediation start to stall, offers that seem to go backward, or new items are added to the agenda late in the process, positional bargaining and brinksmanship.

Most mediators have been trained in a four step process: (for example: introductions, opening statements, brainstorming for solutions, working towards a settlement or conclusion, or something similar in process) but the mediation can move forwards and backwards through that process, and there will be a number of different negotiating styles from the opposite party i.e., soft v hard, positional v interested based, tit for tat. Seek to collaborate, be prepared to compete, learn to be versatile, and learn to shift your style based on what is being sent from the other side.

5. As part of the mediation preparation process, spend some time thinking about where you want to go and how to get there. Remember, it will probably take 5 to 8 moves to get to a settlement position. If necessary, set a floor position, as part of your pre-mediation planning, and no matter what, don't go below the pre-set floor unless that position is well thought out. The mediation process will trigger emotional responses and can cause parties to act irrationally, so if you are getting caught up in the moment, remember the floor price. One of the lawyers I deal with calls it the upset position, when I asked him to explain, he said if he goes lower than that position he is upset. Spend time thinking about the needs of the other party, (BATNA, acknowledgement, apology), what does the other party really want, and where do they want to end at, and how do we get there.

6. Use opening statements to get clarity on both the content and process. What are the expectations of the parties, perhaps hold out the olive branch, with an apology, or a statement of intent i.e. "we are here to listen and work hard towards settlement", be clear, and use notes and an agenda. The opening statements are an important part of the mediation process and it is usually over looked and not utilized enough by counsel, in terms of their opening presentation, and allowing the clients to be involved in the mediation process. In many cases, having the parties speak helps humanize the process and reinforces that the mediation is really about working with the clients to help them settle the case. A lot can be gained in using the opening to communicate to the other side; we are trying to understand you. And remember listening for understanding does not mean agreement.

7. Listen to the other side's opening statement and prepare open ended questions (who, what, where, when, why, tell me a little more). Take notes and notice body language especially

Continued page 18

Continued from page 17

from the litigants. This will tell you more of the story, more than the legal aspects of the case. My observation is that most people, including parties in disputes, will do things that make sense to them. The task is to find out what that is. Positions will be communicated and only after the passage of some time, will the interests emerge.

8. Now be quiet, and pay attention to the verbal and nonverbal messages coming from the other side, and watch what messages you are sending out. Over half of the communication we send out is nonverbal, so pay attention. Sometimes, if possible, take a wing man with you - one person talks and the other takes notes and observes. My experience is that at any given time there are a number of different realities going on in the mediation room. The reality the lawyers work with is different from the realities the clients have, and is different from what the mediator may be following. One of the tasks for the mediator is to follow all this and bring sense and order to the process. In order to figure out what is happening, keep track of what is happening and listen, then compare notes with your side and perhaps the mediator at the break.

9. Hold your emotions in check, do not respond to attacks. It is important to listen and acknowledge what is said - when you feel the emotions rise, or you don't know what to do, take a break. Ury calls this "going to the balcony". Take a break, pause, and breath; the practical point of this suggestion is while emotions are running high, pause and regroup mentally. The Sympathetic nervous system responsible for fight/flight/freeze, powers up the body for survival but does not necessarily allow the brain to think rationally. When upset, or in doubt, or if you need time to think, take a break. This will allow the parasympathetic nervous system to engage, and help restore mental balance.

The mediation process will, from time to time, involve the expression of many emotions, and as counsel, you may be identified with your client and attacked. Try not to rise to the bait - engage the mediator's assistance and take a short break. This emotional discharge happens often in Family Law and Wills and Estate matters, and to a certain extent is cathartic.

10. Seek to be persuasive from the other party's perspective, understand what they are saying, take notes to show understanding, ask questions, paraphrase, allow parties to hear the phrase, after listening to them, that "if I was in your place I would do the same thing". I believe this much is true, that if we went through the others whole life experiences and ended up at mediation, we would be taking the same position as them.

As you develop and work through the agenda, find places where you can agree and collect yeses. The more items you can agree on, the more Parties will feel bound to the process and will continue to participate.

11. Summarize and paraphrase to insure understanding and agreement. To get clarity and understanding, feedback in your words of the other parties' position and their interests will help identify the position as a common one and not a problem that is

theirs or yours. It is important to see the mediation as a process to solve a common problem, this helps remove the attribution bias, and helps work hard to solve a common problem. The parties move from listening to understanding.

12 Neither rush nor delay the closing of the deal. If the matter is concluded at the mediation, have something signed before the parties leave. I remind the parties that litigants don't always get what they want at trial, and the same is true of mediation. Think carefully about an offer that is very very close to your end position.

When I go to mediation, I have all parties in the room sign the mediation agreement. I also have a blank settlement agreement for the end of the process. Have something signed before parties leave. Memories are fallible, and tend to fade in a short period of time or memories get reconstructed. Within 48 hours parties will be reconstructing the deal and details, such as the settlement amount, how much and payable to whom and when; it will start to fade and be reconstructed. It is common for the parties to have a bit of remorse on a settlement, similar to buyer's remorse, and then the questioning and self-doubt starts. It is all part of the process of settling and letting go, and if the agreement is in writing it is easier for the parties to move past it.

13. Re-Occurring Situations, ruminations on various themes: Non-Parties, late parties, previous offers and splitting the difference. Do not be afraid to ask about the mediator's experience or for the mediator's help in caucus. Most mediators have training in situations, skilled in the law and human interaction, their skill can be used to understand why roadblocks happen, depersonalize conflicts, face the one off situation, and move to resolution.

- Non-parties: What do you do if a non-party, such as spouse, family member or friend wants to be part of the mediation? Sometimes as part of mediation training, law firms or insurers will want to have juniors sit in. Attendees who are not parties are only allowed by consent; see if the other party will agree and then put some rules in place to make sure the non-party is non-interfering in the process. In most instances it is helpful to have the non-party in the room, but their role is usually confined to listening and support, and that may change in the caucus, where the non-party can be helpful in helping the mediator understand other aspects of the dispute, e.g. injured and non-injured spouse.
- Experts: In some cases where there is technical evidence being relied on, it can be instructive and helpful for the parties and the Mediator to have experts for both sides present. This will be extremely helpful to understand the risk. Cases involving Engineering or other specialized evidence, such as Economics or Medicine are examples where I have seen this work, but again need consent of the parties.
- Late Entrants to the mediation: Almost without exception, these are non-parties, and it is a mistake to allow someone to enter a mediation late. They will have a tendency to want to whole mediation process recast in order to be brought up to date, and then the second guessing begins. The rule I try to follow is you need to be here when we start, if not, no late entrants.
- Previous Offers: In a mediation where the parties have some prior negotiation, and the briefs don't reflect this, I ask the question "where do we go from here"? I try to find out by asking each party in caucus if there has been prior bargaining, especially without prejudice offers, that one party or the other do not want brought up at mediation. Prior bargaining cannot be ignored, especially if the starting position at mediation is now higher than previous offers. The bell cannot be unrung
- Offers to be reflected on: Perhaps a party may want to think about an offer overnight, or take the offer back to management. This is usually a good thing to do, allow the offer to be open for a short period of time. To not allow this option means that one party is forcing the other into a take it or leave it option. My experience is the person being pushed into that option will leave it, and the matter will not settle.
- Calling a friend: Perhaps one party, usually the plaintiff, will want to talk the offer over with a wing man, a spouse, parent, grandfather, family friend, elder, etc. The party may want to do this at the mediation via phone, or may want to do it post mediation before acceptance. In my opinion, no harm comes from letting a party do this. Keep the offer open for a short period of time. If a party is not allowed to do this, and is given a take it or leave it position, again, most parties will

Continued page 21

Continued from page 19

leave it, and you have lost a chance to settle and you may not get it back again.

- Split the Difference: After all the science and the art of negotiation, if the parties are still apart, we may see "split the difference". This seems to make sense because each party gives up something that looks the same to get the deal done. What to split and how large the difference is will depend on the type of case. I caution the parties not to "split the difference to soon" for a number of reasons. Firstly, it is usually the last move in mediation. Secondly, it seems to work well if the number being split is small, given the context of the overall number, i.e. $10,000 to be split on a case of $500,000.

  Thirdly, it is seen as inherently unfair to split the difference on a split the difference, for example if the parties have ended up at $175,000 and $125,000. A split the difference would mean a settlement of $150,000. Let's say the plaintiff at $175,000 proposes a split to $150.000: It is seen as inherently unfair now for the defendant to split the difference again to the difference between the $150,000 offer and his position of $125,000 or $137,500. It appears the defendant has only moved $12,500.00, and if the offer is accepted, the plaintiff has now moved from $175,000 to $137,500, a total of $37,500.

"This is not the end, it is not even the beginning of the end, but it is perhaps the end of the beginning." Winston Churchill, on the Invasion of France, June 6th 1944, D-Day.

This summary is hopefully merely a beginning. This summary represents post-mediation thoughts, musings and reflections, while travelling in cabs, waiting in airports and while on a planes travelling home. I see this article as a sort of open source document that hopefully will start a trend or process: that it will be the start of your efforts to track what works and what doesn't, and allow success to follow success. As you chronicle your successes, think why something has worked, and the same for things that don't work(do more of what works, and stop doing those things that don't work, simple hey!) ask why, and try to improve for the next mediation.

As you work for continuous improvement, perhaps a chronicle of your efforts will be published to help move Alternate Dispute Resolution, the spirit and the process, forward.

ADR Readings

1. *The Seven Habits of Highly Effective People*, Steven Covey
2. *First Things First*, Steven Covey
3. *The Handbook of Dispute Resolution*, Deutsch
4. *Order Without Law (How Neighbours Settle Disputes)*, Robert C Ellickson
5. *Getting to Yes*, Roger Fisher and William Ury
6. *Getting Together*, Roger Fisher and Scott Brown
7. *Inside Out: How Conflict Professionals Can Use Self Examination to Help Their Clients*, Gary Friedman
8. *The Conflict Resolution Toolbox*, Gary T Furlong
9. *Dispute Resolution in the Insurance Industry*, Anne E Grant
10. *Simple Heuristics That Make Us Smart*, Gerd Gigerenzer, Peter M. Todd
11. *Blink*, Malcolm Gladwell
12. *The Tipping Point*, Gladwell
13. *Mind Wide Open, Your Brain and the Neuroscience of Everyday Life*, S. Johnson
14. *Thinking Fast and Slow*, Daniel Kahnman
15. *Bozo Sapiens, Why to Err is Human*, M Kaplan , E Kaplan
16. *Give and Take,* Chester L Karrass
17. *Making Peace with Anyone*, David Libermann
18. *Dispute Resolutions Readings and Case Studies*, Julie Macfarlane
19. *Rethinking Disputes*, Julie Macfarlane
20. *Beyond Winning, Negotiating to Create Value*, Robert H. Mnookin
21. *Nelson on ADR*, Robert M Nelson
22. *Practical Wisdom, The Right Way to Do the Right Thing*, Barry Schwartz
23. *The Optimism Bias, A Tour of the Irrationally Positive Brain*, Tali Sharot
24. *The Black Swan*, Nassin Nicholas Taleb
25. *Mistakes Were Made (But Not by Me).* Carol Tavris and Elliott Aronson
26. *The Dance of Folly*, Barbara Tuchman
27. *Getting Past No*, William Ury
28. *Power of a Positive No*, William Ury

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