Simple Cost Effective Ways to Improve Your Performance at Mediation

By David Stark

This article will consider simple, cost effective suggestions that parties can use to increase their effectiveness at mediation and increases client satisfaction.

On November 1, 2010, new practice rules were introduced in Alberta, which provide *inter alia*, for mandatory mediation (or a form there of). As a result, many lawyers who have little or no experience with the ADR process now will be required to engage the process.

The new rules provide that the spirit and the direction "... is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and effective manner." (Rule 1.2(1)) also called the foundation rule.

Rule 4.16(1) provides "the responsibility of the parties to manage their dispute resolution include good faith participation in one or more of the following dispute resolution processes with respect to all of any part of the action

Peace rules the day where reason rules the mind.

Collins

a. a dispute resolution process in the private or government sectors involving an impartial third person;

b. a court annexed dispute resolution process;

c. a judicial dispute resolution process described in rules 4.17 to 4.21

d. Any program or process designated by the court for the purpose of this rule...".

The requirement that lawyers and clients now spend some time thinking about and participating in dispute resolution means those parties will need to be focused and work at how to get the best bang for their mediation buck. Being prepared for and engaging in mediation means thought, preparation and the exchange of the proper material, and correct action.

"Well begun is half done."-Keats

Here are a few suggestions.

"How things start is how they go." an old saying, but so true in the mediation world. The experts in this area talk about *"sensitive dependence on initial conditions"*, because so much of what happens in life generally, and mediation specifically, depends on how the parties and the process start. So the question is "how do we work at the little things at the front end of mediation to make the mediation a success."?

Start with the practice of thinking about mediation and thinking about it often. Think about it early in the litigation process. The rules now help the parties focus on the early resolution of disputes. In the litigation process, mediation can always be kept as option B. Litigation is very good at helping the parties produce and receive documentation and outlining rights and positions. Litigation is not so helpful to get the parties to talk, listen, and explore interests and solutions.

Spend time thinking about the appropriate form of dispute resolution, i.e. private mediation as opposed to JDR. Some cases are better for one form than the other. In the back and forth world that represents litigation, chances are if you propose a mediator, or form of process, the other party may say 'no'. Offer options; provide the other side with an option of process and with a list of mediators that are acceptable to you. Chances your learned friend will accept some of what you offer. Parties like choice and want to have input on the process.

Before you show up for the mediation, think about the Invisible things that could be unhelpful, that all parties bring to mediation. By invisible I mean the mental part of the process.

1. ADVOCACY BIAS: At its basic form, advocacy bias means conflicting parties will think to themselves "I like my cause better than your cause, primarily because it is my cause and lines up with what I think the world looks like". The basis of this is attribution which means "I like people like myself and I like people who believe in what I believe in, and I will look for information to support it."

2. REACTIVE DISCOUNTING: At is basic form, again between conflicting parties, they will say to themselves, "I place no value on whatever my opponent says including offers, because it comes from my opponent, therefore has no or little value."

3. CONFIRMATION BIAS: Parties will say to them, "I will place more value on information that supports what I think about the world or confirms my belief." Sometimes even in the face of overwhelming evidence to the contrary, parties in a dispute will cling to the same outdated information or evidence that initially fuelled the dispute.

In litigation and the dispute resolution process, advocacy bias, reactive discounting and confirmation bias will usually work together to prevent the parties from looking for new information, will prevent active listening, will devalue information the other side has and prevent the parties from engaging each other in meaningful dialogue to effect resolution.

What to do about it? There are many options that get proposed. Some options are better than others. The list includes such things include: fight harder, better lawyers, more process, and widen the conflict. None of those things work in the long run. Sometimes simply being aware of what is happening and trying to be open minded will help the parties communicate. As the old saying goes "if something isn't working don't do more of it." The minute the parties change the game and engage a neutral third person, such as a mediator, the dynamics change. Offers of mediation or settlement that flow from the other side through a neutral third party are seen to have more 'value'. Something as simple as engaging a neutral third party to see if the other side is interested in mediation, makes the offer to mediate of more value and worth considering. The perspective from a third party neutral usually is a way to deal with advocacy bias or reactive discounting because it comes from a party that does not have a stake in the outcome.

Parties should consider, "Who can attend the mediation"? The parties to the litigation should be there. Sometimes one of the parties will want a friend or a parent, who isn't a party to the litigation, to attend and be in the mediation room. If this request is raised, before you proceed, get the consent from the other side. Perhaps involve the mediator and have the mediator convey the request. That way it has the potential to be perceived as less partisan, and probably will not generate the knee jerk opposite response. If the parties agree, and the attendance of the non party is as an observer, then the mediator should monitor the process carefully to make sure the non party truly is an observer. As an aside, it is my practice to have everyone attending to sign the mediation agreement. That way there is no misunderstanding afterwards about whom and what is covered by the confidentiality provisions in the mediation agreement. In caucus, the friend may have more of a role in the discussion, but in the general session, participation of non parties has the potential to derail the mediation process.

Sometimes the question comes up, what if the friend, who cannot attend the start of the mediation, wants to be a late entrant? At times someone who isn't a party, but probably related to one of the parties will want to join a mediation that is well in process. This is similar to trying to jump onto a moving train. I haven't jumped on a train, but from what I have seen, the results are messy. In my experience if the late entrant is allowed to join mediation in progress, that new party has to be brought up to speed, and that process has the potential to undo all that has happened, even if their contribution is caucus discussion only. My suggestion is to say no.

Where should the mediation be held? Does location favour one side or the other? There is a lot written about the perceived home field advantage effect, i.e. "I get a better result if the mediation is at my office." Location can also be an artificial barrier. What I have seen work consistently well, is to be flexible. Since the plaintiff is the only one in the process who probably has not been through mediation before, if plaintiff counsel offers to host the mediation, that concession will have the effect of putting the plaintiff at ease. Some parties may have better facilities and the location may be more convenient. My experience is that in the big picture, venue can be a non issue that parties end up fighting over but shouldn't.

What pre mediation work should the participants engage in? Make sure that you have enough information to make an informed decision at mediation. If medical or other experts reports come in late, simply move the mediation date so all sides have enough time to prepare. In complex cases I will call the parties and have a telephone conference to keep the process on track.

Always confirm time, date and location of the mediation. This can be done simply and efficiently through email. You would be surprised how many times well educated professionals who pride themselves on their ability to communicate well, end up getting the little points wrong. This can have the effect of derailing the mediation.

Generally, the parties exchange briefs approximately a week or so before the mediation. The briefs usually set out each parties understanding of the issues in question and their legal position. Parties want to advocate but this can drive the parties apart especially if there is a wide discrepancy between the parties

Continued page 36

Continued from page 35

on damages. I try to assure the parties that the briefs usually represent an ideal result. From my perspective it is more important for the mediator to get copies of the medical reports, expert reports and the cases that the parties are relying. It is my feeling I can be more helpful if I know the case as well as the parties.

At the mediation, each party gets to fully talk about the issues as they see them. After each party does this, then there may be some rebuttal required. After this further discussion, the parties will have a better understanding of the issues to be discussed, and the mediator and the parties will produce an agenda for discussion. The job of the mediator is to be flexible with the process, to help encourage dialogue, and to work with the parties to outline the issues in dispute.

What kinds of things are helpful in the mediation? Use low cost - high yield items, bring good manners to the table, be on time and be professional. A former President of the USA said "civility should not be viewed as weakness". On the issue of time, in my opinion being on time or being late is a way to show respect or disrespect to your opponent. Be known as a person who is always on time and people will respect you for it. Perhaps an apology is appropriate. Many times conflicts are fuelled by a lack of an apology. The provinces of Alberta and British Columbia have passed apology legislation to get around some of the problematic aspects of apologies.

Prepare, use websites and data bases, and file review check lists. Sir Francis Bacon said "Knowledge is power". Spend time preparing your case before mediation. If you are relying on cases, refer to them and provide copies. Make sure that all your arguments get a dry run. Don't "wing it" People who wing it usually crash. The dry run will prepare you for your case and the counter arguments from your learned friend.

Confirm the decision makers will be present at the mediation. In some cases, ie. multi-party litigation, parties in other parts of Canada or the USA, that isn't possible. I have done a number of mediations where one or more of the parties cannot be present and attends via telephone. If it is your client who cannot be there, can you re book the mediation? If not, make sure the other side has notice and can make an informed choice whether to proceed or not. My experience is that while it is preferable to have all the parties at the same mediation, it isn't the kiss of death if they are attending via phone. What is more important, in my opinion, is the willingness of the parties to negotiate and settle the case.

Make sure that you have the right mediator. Not all mediators are the same or have the same style and training. Parties are different and will have different perceived needs for the mediation. Some mediators are more facilitative, some more evaluative. Quite often the parties will want to work with someone they have a history with. The sense of being familiar with the person and their process may be a required stipulation in order to get to mediation quickly.

Has there been any pre mediation bargaining? In the pre mediation meeting ask the parties about the negotiation history of the file. Have there been offers and counteroffers? What about offers made without prejudice? Do the parties start from that position, or are the without prejudice offers not to be referred to? The mediator should find out what the parties think at the pre mediation meeting, and the parties should have a response to the above questions of prior offers.

Use opening statements to get clarity on process and content, be clear and use this process to help develop an agenda. Sometimes a party will want to forgo an opening statement or want to keep it brief and say their position is in the mediation materials. In my opinion this is a mistake and will prevent the parties from fully engaging each other in meaningful dialogue about the matters in dispute.

At the mediation, try to keep the interruptions to a minimum. This can be a challenge, since the mediation will usually may be at the office of one of the parties. Parties will have phones to keep in touch with their office, text messages etc. If there is going to be an interruption, bring it up early, explain why and apologize.

What can you agree on, going into the mediation? Can you take liability off the table, even just for the mediation? Perhaps the parties can agree on the special damages or other out of pocket numbers. Accumulate yeses, help the other side agree, and it commits them to the process.

The parties should develop an agenda from the opening statements, and spend time talking about what is important to their side. It is helpful if the parties use 'I' statements. Work through the agenda, item by item, and if you cannot reach an agreement on a particular item, talk about ranges of numbers and move on to the next item.

If an issue is contentious, try to deal with it in a way that doesn't derail the process. Avoid lines in the sand, ultimatums, such as "unless you agree...". When I am having my pre mediation meeting with the parties, I meet with the plaintiff and their counsel separately, because the plaintiff, who usually has not gone through mediation before, perhaps needs a little more one-on-one time, and to be told about the process. I assure them that the other parties will view the file objectively but may say some things that may make the plaintiff angry. That is not the purpose; rather defence counsel has a professional job to do. To the lawyers, it is professional undertaking, but to the plaintiff it is personal. I also tell the plaintiff that it is usual that there are different interpretations to the same information that is before all parties at the mediation. Parties rarely convince the other side of being right. What is more helpful is to gain an understanding of the other's position, and then the question becomes, what will happen in trial if they are right?

Some phrases that can be used to avoid contentious language: "Here is what this looks like to us"; "We are here to listen, to be fair and to see if we can negotiate", and "This is a case with some difficulties". One plaintiff's lawyer I do mediation work with, talks about his case and says it has blemishes, but it also has some good parts. He acknowledges upside and downside.

Listen to the other side's opening statement and prepare open ended questions. Ask open ended questions and actively listen to the answer. Paraphrase if necessary. Open ended question use the words "where, what, when, why, who" and "Tell me a little about". Open ended questions will help you find out what is behind the other party's position. Litigation has parties answer questions with yes or no. In mediation we take a different tack. You want to know more about the parties. You want to develop information about the emotional drivers what are below the positions. Ask the questions and now be quiet, listen and seek to understand. In this process try to address the other party not their lawyer. In order to check your understanding, summarize and paraphrase. If you can convince the opposite party you are listening for understanding this will help lead to an agreement. Hold your emotions in check and avoid personal attacks.

In the bargaining process, don't be surprised if the other side isn't reasonable. It is an assumption that if I am reasonable the other side will be also. This assumes tit for tat negotiating. If the other side is not being reasonable ask about the basis of the assumptions, cases relied upon, expert reports.

Use objective measures to justify your position. Refer to leading cases, meds, doctor's opinions, experts. This is important because it now takes the matter out of the realm of what the parties think, and into the realm of what experts think. Their opinion is more important and will help diffuse the fight.

In the mediation process, use the mediator, and where appropriate, ask for his or her help or experience in caucus. My own practice is to start the mediation as interest based and facilitate the discussion. In caucus, the parties may ask what I think and at some point I l may tell them how I see the case.

Mediations are dynamic processes, and while it may appear nothing is happening, things are. Be patient and remember it may take 5 to 8 moves to get a case settled. Even if it appears there is nothing happening, as long as the parties are together, there is something happening.

Negotiators who are tired, hungry and cranky will not make good decisions. Take breaks; bring in food and beverages when appropriate and help keep the process moving.

Sometime when a deal is almost done, one of the parties will raise an issue that was not on the agenda and perhaps not even talked about all day. There may be very little evidence to support that part of the claim. This sort of 'nibble' for extra compensation has the potential to cause the parties to go back to positions they occupied earlier in the day. Don't be the nibbler. The mediator may want to break and ask what is behind the new issue. I usually ask both parties, in the bigger context is this worth it?

The objective is to settle the case. If an agreement is reached, make sure the deal gets papered and signed before people leave. Memories are fallible. In the euphoria of settlement, small details can be overlooked. My practice is to have a blank settlement agreement with me and have one of the parties fill out the document, outlining the terms and conditions of the settlement, and to have all settling parties review and sign.

Continued page 38

Continued from page 37

Parties will suffer from settlement remorse, either thinking they paid too much or received too little. This is similar to buyer's remorse, that feeling the day after you have purchased that perfect piece of furniture and you ask yourself if you should have done that. The same thing happens with cases that settle. I tell the parties this so when they experience it, it is not a new feeling that drives them to try to undo a settlement.

When the case settles at the mediation, if there is an issue of convenience, i.e. one of the parties may be from out of town, perhaps the concluding documentation could be completed while the parties are still together at the conclusion of the mediation.

Parties can bargain all day but perhaps they do not settle. Can offers be left open so parties can think about the offer? If yes, put time limits on the offers. Many cases settle at mediation, (my experience is that in excess 95 % of cases settle at mediation). A party that has thought about their case, in a certain way, for a long time, may need a little more time to digest information that reflects a new reality.

It may be that a party will want to think about the final offer over night, or review it with a family member. In my opinion there is no down side to saying yes and lots of upside. If you agree to extend the offer, do so for a specific time i.e. until 4:00 pm the next day. Part of the difficulty to saying no to this request, is that you are effectively forcing a party into a take it or leave it deal, and my experience is most parties put into this position will say no and will leave it.

If offers are left open, consider whether the mediator will act as a natural conduit for communication. In many cases I have followed up with both sides over a series of days or weeks. The reality is that once lawyers are through with a mediation and get back to their office, other matters come up and the initiative that was generated at mediation can be easily lost.

After the mediation, do a post-mortem and debrief, ask what worked and why, and what didn't work, and why and how do we change it. As part of the de brief replay the mediation. Professionals in all areas do this, and it should be used as part of the process of constant improvement.

In the end, have patience in the process, be prepared to cooperate, but you may have to compete. Don't be surprised if the other side isn't reasonable when you are. Try not to let your emotions rule the day. Be prepared, do your best and remember you are in this mediation because the problem you have needs to be solved together and is not a conflict to be won.

Recommended reading - Dispute Resolution

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1. *The Seven Habits of Highly Effective People*, Steven Covey.
2. *First Things First*, Steven Covey.
3. *The Handbook of Dispute Resolution*, Deutsch.
4. *Getting To Yes*, Roger Fisher and William Ury.
5. *Getting Together, Building Relationships that Last*, Roger Fisher and Scott Brown.
6. *Give and Take*, Karrass.
7. *Make Peace with Anyone*, David Lieberman.
8. *Dispute Resolution, Case Studies*, Macfarlane.
9. *Rethinking Disputes*, Macfarlane.
10. *Beyond Winning, Negotiating To Create Value In Deals and Disputes*, Robert H Mnookin.
11. *Nelson on ADR*, Robert M Nelson.
12. *Getting Past No*, William Ury.