Alberta Civil Trial Lawyers Association

Fall Paper...Dispute Resolution, The New frontier

"Animis Opibusque Parati" (Prepared in Mind and Resources)

"The power of thought, the magic of the mind"-Byron

The name of this seminar, "Dispute Resolution, the New Frontier" is aptly named, because of the introduction of new rules last Nov, which provides for mandatory Alternate Dispute Resolution before a matter can get to trial, and while ADR is new for a lot of lawyers, there have been lawyers who have been doing mediation and mediation like work for a long time. The slogan "new frontier" is levied more at a way of thinking. In an adversarial based system, many of us were taught the only way to settle a dispute was to invoke the rules of procedure and end up in trial, with a decider of fact, rendering a judgement where one side wins and the side loses. Win lose

While litigation is good to setting out rights and obligations, and the production of information and documentation, litigation promotes positional thinking and win lose bargaining.

The growing popularity of mediation as an adjunct process to litigation led to mediation or alternate dispute resolution being used by the parties pre trial, and now, being added in the rules which came in force in Nov 2010.

Brief over view on mediation

Mediation as a form of ADR, has many advantages in the way the disputes are resolved and the way relationships between conflicting parties, can be saved

Mediation can be defined as a process where conflicting parties work out an agreement for themselves, in the presence of and with the help of a neutral third party. The definition of mediation is much debated, but one of the critical elements for this article is that the mediator has no power to impose a settlement, rather the parties themselves with counsel craft a deal.

What are the advantages, well first and foremost, in my mind, is the flexibility the process has; it can be made amenable to almost any dispute, in almost any area of the law. The flexibility further then extends to the process the parties want from the mediator. A good mediator should have a variety of styles i.e. facilitative, evaluative, transformative etc. The flexibility extends to location, timing, timelines and production of information. Part of the flexible process is whether the mediator will have a pre mediation conference call of discussion with parties. This helps narrow down the issues, and helps focus the discussion at eh mediation table

Production of Information. While litigation is very good for this and the development of evidence, the litigation process is not good for resolving disputes, building trust and maintaining relationships. Litigation in and of itself, is not helpful as a process of using the information constructively for dispute resolution. I have been involved in mediations where litigation developed the information, and then the parties agreed to use mediation to explore settlement. With the involvement of a neutral third party the mediation process allows parties in dispute to listen and respond better, an effect documented and stated as the Hawthorne effect.

Control over the process. While litigation is conducted by a prescribed set of rules, often subject to different interpretation, and outside the control of the parties, the mediation process puts the control over process back in the hands of the parties. This often starts with the selection of the mediator, usually a consensual process. In a trial you don't get to pick your judge. With respect to time allowed, the parties usually agree to can agree to the length of time for the mediation. time, ie 4 hours, a day , a week, etc. The parties decide when it is over.

The time lines for production of documents, experts reports rebuttals can be put into place by agreement ,

The parties also exert control over the mediation process itself, by asking the mediator to do different things depending on the stage of the mediation i.e. when to caucus, when to give reality checks. The parties have direct control over the outcome... They can participate directly in it and make the outcome predictable, rather than unpredicatable

Cost. Generally the cost of one day of mediation, which usually produces a settlement, is a fraction of the cost of going to trial. Depending on prep time and hourly rate, mediation could cost between $1,000 to $4,000. Sometime, the cost of the settlement may be more because the parties may have used litigation to help develop information related to the case.

Communication. Mediation helps improve communication by having all parties of interest in the same room hearing the same things, at the same time, communication is not filtered through the litigation process, a process of interpretation and screening. It is at the mediation that the parties usually hear for the first time, from the other side, direct impressions of what the case is about.

Selection of the mediator. One of the most important aspects of Mediation, is who should be selected as mediator? Things to consider... mediator's reputation, trust of the parties,

educational background, experience, substantive knowledge of the law, actual or perceived conflicts. Ask the question, is this the right mediator for this case?

Positive Expectations I tell parties that my experience is that 97 % of cases I have been involved in has settled at the mediation or shortly afterwards. I tell them mediation is extremely effective at dealing with this kind of case that may or may not have an emotional overlay. Mediation is very effective where there are wide swings in the risk, and in the numbers. This generally gives the parties hope, which helps drive the resolution process.

Risk Analysis In the litigation process there is no certainty. Counsel will not predicted outcomes, it is impossible to do, and the factors that cannot be controlled relate to many things, witnesses, expert testimony, etc. but the parties can do risk analysis on the information presented at the mediation, and can take steps to make a settlement certain, instead of an uncertain result at trial.

Time. Sometime it appears that nothing is happening. The mediation process allows parties to take the time they need to work towards a settlement. It has been expressed as allowing the magic of mediation to work. Most mediation is done on the basis of the four step model,(insert explanation here) and in that four step model, things usually do not proceed evenly or smoothly. It maybe a little muddy sometimes and parties may move back and forth in the steps instead of in a straight line, but all of this is ok, if the process allows the parties to do this in a constructive way . I encourage the parties to be patient, and if parties are talking and doing risk analysis, and still present, something is happening.

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Do great results happen by accident? In my experience the answer is no. Good or great results happen because of work, diligence, thought and planning. (Remember to plan all the way to the end. The goal is to settle the case, when plans meet obstacles, parties improvise, which brings you to the next issue to be resolved, there is never a substitute to thinking several steps ahead and planning to the end. I.e. the settlement)

This paper will explore and discuss the following topics:

- What type of mediation, JDR or private? Can you choose the judge you want, what about private mediators?

-preparing a mediation brief-too much too little where is the mark you should try to hit

-Managing client expectations-what have you told the client, what has the client heard and how can you be sure.

-Managing client involvement-it is the clients process, how involved is the client and how open at the mediation

Getting informed instructions- the goal is to settle, so how do you track that moving target.

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Much depends on the type of claim, and the client, are your screening on liability, and the way client has acted since the loss, has the client treated, has the client over treated, has the client followed the prescribed course of treatment.

So much of what happens will depend on your reputation, guard it and, it is the cornerstone of power and your ability to achieve great results

Part of the answer of how to choose the right process and mediator was discussed by Goldberg, and Saunders, in their article "Fitting the Forum to the Fuss: A user friendly Guide to selecting an ADR procedure, 10 common barriers "(The negotiating Journal, Vol 10 No. 1 January 1994)

> -Poor Communication, in litigation there usually is no trust so the parties rarely openly and clearly communicate. This impacts all kinds' meaningful discussions. The parties may have different communication styles which will prevent the parties from understanding needs and issues. Mediation is very helpful because the mediator acts as a means of communication between the parties and can help refocus the energy to deal with resolution of the dispute.

> -The need to express emotion, sometimes the parties will need to express some emotion, heal a bit (transformative) Sometimes counsel will carry resentment or anger that can be effectively dealt with by the mediator and venting of emotions may be a helpful with the mediator helping with active listening, thereby reframe the inflammable statements to acknowledge the emotion and at the same time address the interests that need to be address.

> -Different views of the facts. Most cases are not about a difference of law, they are about a difference of facts, and how will the law deal with them. I ask parties to ask themselves the following question, "What happens if the other side's expression of the facts is accepted by a trial judge and then what happens to the assessment of the case. The parties usually will not agree to a set of facts (perhaps liability, because it is usually conceded, if only for the purpose of mediation) While litigation is great at generating information, it is not helpful at getting parties to an agreement on a set of facts.

-Different views of the legal outcome if a settlement is not reached. Parties may feel they have a relatively high chance of success at trial, and if both parties feel the same way, there appears to be no down side risk. This type of brinksmanship is something I see a lot (advocacy bias- I like my case better than your case, reactive discounting- any offer from the other side is not worth anything because it comes from them, and confirmation bias- if I see the world a certain way, I will look for information that confirms that.) Both parties may feel they have a 75 percent chance of being successful. Without acknowledging any split of position, a mediator might propose an overall number that makes both sides happy.

-Issues of principle. One of both parties may feel a fundamental issue needs to be addressed first, which will usually be a barrier to settlement ie 'we don't pay claims of drunk people who fall down and hurt themselves". Working with that party in cacaus, the issue can be talked about, and perhaps parked to get the mediation going. WAR STORY In recent case I mediated, plaintiff counsel wanted a concession from the defence that the case we had that morning was a serious case and would warrant a large future income loss of income number. This type of tactic has the effect of creating a barrier and has the potential to stop the mediation dead. Another common issue of principle, is the question of what authority does the representative from the insurer have.

-Constituency pressures. One or both of the parties maybe at cross purposes, due to the company, Industry or interest group they represent. The defendant insurer may want to settle claims by year end, the plaintiff may want to go to trial, and the corporate defendant may have a different agenda. (ski hill cases). Here the mediator can conduct pre mediation meeting to act as a sounding board, and or scapegoat.

-Linkage to other disputes. One lawyer may represent a number of plaintiffs from the same loss, but not in a class action. The parties may have an informal sense of how they rank re their losses, How the most serious case is settled will affect the value of the other claims not at the table.

-Multiple parties, unrelated interests, related to the above, common incident, ie bus crash. Or home construction problems, the mediation process allows for the flexibility to be designed for the range of parties, damages and the dispute.

-Different lawyer client interests. there may be a series of realities going on in the same room, counsel see the case from a legal prospective, failure of which to act properly will have professional consequences, and the client may see the settlement as a way of changing their life.

-Jackpot syndrome. Some time the plaintiff may feel trial will produce a jackpot of money in the form of damages, compensatory, punitive, and other. Here a mediator with experience can say with the benefit of experience, what the tyep and range of damages maybe and this can be binding or non binding.

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 not had very much 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

(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..

(point of adr, Insurers may want to do adr before pleadings are issued, is this a mediation within the rules .. probably not there is no "action"... Also if mediation settles part of a case, are the parties then free to go to trail, ie mediation settles quantum, and then a judge hears liability. Aso what is the role of non binding arbitration)

(Size of case. Quantum... all cases have to go to m.. this may force the parties to look realistically at settlement earlier in the case ie before or after questioning)

(good faith.. is this defined, how does one decide, most mediation agreements provide the process is without prejudice, is it good faith for the parties to say my offer is in my brief, to be unyielding, to go to mediation but have no constructive discussions

The requirement that lawyers and clients now spent some time thinking about and participating in 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.

JDR rules, 4.17, 4.18, 4.19, 4.20, 4.21

Purpose of judicial dispute resolution

4.17 The purpose of this Subdivision is to provide a party-initiated framework for a judge to actively facilitate a process in which the parties resolve all or part of a claim by agreement.

Judicial dispute resolution process

4.18(1) an arrangement for a judicial dispute resolution process may be made only with the

agreement of the participating parties and, before engaging in a judicial dispute resolution process,

and subject to the direction of the presiding judge, the participating must agree to the extent possible on at least the following:

(a)that every party necessary to participate in the process has agreed to do so, unless there is sufficient reason not to have completed the agreement:

(b) rules to be followed in the process, including rules respecting

(i) the nature of the process,

(ii) the matters to be the subject of the process,

(iii) the manner in which the process will be conducted,

(iv) the date on which and the location and the time at which the process will occur,

(v)the role of the judge and the any outcome expected of that role,

(vi)any practice or procedure related to the process, including exchange of materials, before, at or after the process(?)

(vii) who will participate in the process, which must include persons who have authority to agree on a resolution or the dispute, unless otherwise agreed, and

(viii)any other matter appropriate to the process, the parties of the dispute.

(2) The parties who agree on the proposed judicial dispute resolution process are entitled to participate in the process .

(3) The parties to a proposed judicial dispute resolution process may request that a judge named by teh parties participate in the process.

Documents resulting from judicial dispute resolution

4.19 The only documents, if any , that may result from a judicial dispute resolution process are

(a) an agreement prepared by the parties, and any other document necessary to implement the agreement, and

(b) a consent order or consent judgement resulting from the process .

Confidentiality and use of information

4.20(1) A judicial dispute resolution process is a confidential process intended to facilitate the resolution of a dispute.

(2) unless the parties otherwise agree in writing, statements made or documents generated for or in the judicial dispute resolution process with a view to resolving the dispute

> (a) are privileged and are made or generated without prejudice
>
> (b) must be treated by the parties and the participants in the process as confidential and may only be used for the purpose of that resolution process, and
>
> (c)may not be referred to , presented as evidence or relied upon, and are not admissible in a subsequent application or proceeding in the same action or in any other action, or in proceeding of a judicial or quasi judicial nature. (arbitration)
>
> (3) Subrule (2) does not apply to the documents referred to in rule 4.19(settlement agreements)

Involvement of judge after process concludes

4.21.(1) The judge facilitating a judicial resolution process in an action must not hear or decide any subsequent application, proceeding or trial in the action without the written consent of every party and the agreement of the judge.

(2) the judge facilitating a judicial dispute resolution process, must treat the judicial dispute resolution process as confidential , and all the records relating to the process in the possession of the judge or in the possession of the court clerk must be returned to the parties or destroyed except

(a) the agreement of the parties and any document necessary to implement the agreement, and

(b) a consent order or judicial judgement resulting from the process.

(3) The judge facilitating a judicial dispute resolution process is not competent to give evidence nor compellable to give evidence in any application or proceeding relating to the process in the same action, in any other action or in any proceeding of a judicial or quasi judicial nature

Mediation Paper questions...

>. What type of mediation to choose? Depends on the claim and the nature of what is in dispute, a judge's opinion at JDR on a question of law or the interpretation of

>preparing a mediation brief.

>Managing client expectations

>Managing client involvement

>Getting informed instructions

Mediation Paper questions...

1. What type of mediation should I choose? This question has a couple of parts, for instance, do I chose private mediation or a JDR, and if I chose private mediation, what kind of mediator do I pick? Who is the best mediator for this type of claim? If I choose to do a JDR , do I have any control over the selection of the Judge?

The answer to the question what type of mediation do I choose, is further layered by the question, what type of case am I bringing to mediation, that is what is the dispute about. In my experience most cases revolve around a dispute as to a set of facts that will then drive liability and or quantum. Rarely will the dispute be an unresolved legal question. If it is , or if there is a question of law, a JDR is helpful JDR helpful where the fight is over an interpretation related to a legal term, statute. Also if the case needs more legal analysis, it may be appropriate to involve a judge. The judges can say, "this is one judicial JDR, difficult client that will not listen to me or has big ideas of his or her own. Client that needs the sense of authority, person in authority to tell them of the value.

Perhaps also where there is an issue of law to be determined. Some time it is very helpful for both counsels to have judge say what their thought are n a legal principle

Perhaps also where there is an issue of law to be determined. Some time it is very helpful for both counsels to have judge say what their thought are on a legal principle

Sometime the JDR is appropriate because one side or another has a difficult client that will not listen to counsel, or has ideas of his or her own about the legal outcome. Some client need to hear it from a higher authority, and that kind of client needs to hear it from a judge. But here is the rub, due to the none binding nature of the process, the client that has to hear it from a judge can ignore the judges view it if is one that counsel doesn't like. (this happened to me on a large fire loss, defense counsel wanted a JDR so he could hear it view on liability. When the view was contrary to what he thought i.e. the judge thought his client his client was liable, defense lawyer simply ignored the judge's opinion and then wanted to press on to trial.

JDR ... free client money, in the psychology between p and d, an intransigent client, judge can say one of 80 but a good idea of which way the wind blows...esp on liability or legal issues.

Legal issues, sympathetic client, tough dc or ir (shaken lose by judge) or intransigent client, embarrassment factor to hang on to positions in front of judge

Private mediation

>In choosing private mediation there will always be some legal analysis, but where there isn't a fight simply about the facts rather the case has an emotional over lay, a mediator will be helpful at addressing that, finding the interest behind the position, and helping move the parties toward settlement.hat position, there is always some portion of legal analysis. In my experience almost all cases carry some form of emotion driver, ie anger, fear, resentment, anxiety. Here the mediator can work with the parties to design a creative, flexible, process can be designed specifically for the case in question. i e case involving potential for loss of future income, it is about the loss but it is also about the concern of future loss...

>With respect to private mediation, it allows more flexibility in dates, and process, with private mediation you know who the mediator is and you know that the mediator will travel to the venue of the mediation i.e. other parts of Alberta and BC.

>The mediation requirements of private mediation are less onerous, the brief requirements depends on the mediator (if producing a brief would be a barrier and prevent the parties to get to the mediation, I tell them I simply want copies of the meds and perhaps the offer letter that have passed back and forth.

> relaxing and the lawyers have more control over the process. It is also helpful to the process that I have a background as a lawyer, and I have worked with the insurers and have seen hundreds

In my experience, 95 to 98 percent of the cases I mediate settle at mediation. What about the cases that don't what happens to them... Well if the usual rules of busyness and inertia kick, by the time the lawyers get back to their offices they are on to the next case and any initative gained from the mediation is soon lost. When a case doesn't settle, before the parties leave the mediation, I canvass where it would be help if I followed up in a day or two. If the answer is yes or it would hurt, then I go back to the party I feel has expressed the most interest i the follow up, or the party that received an offer and didn't respond,

In the follow up, over the course of a number of phone calls, and some days later, the cases invariable settle.

With private mediation there is more choice of venue, such as offices of counsel plaintiff, or counsel for defendant or neutral location. I have rented hotel rooms, motel rooms, and in one case counsel for the defendant and the insurer stayed in Calgary, and I traveled out of town to take the mediation to plaintiff counsel who worked out of his house (mu breakout room was the bathroom.)

One plaintiff counsel told me that where there is an emotional overlay, he almost always prefers private mediation to a JDR, mediation, because it is easier to enhance the value of the case, without much more money once the emotional over lay is removed.

2. Preparing the mediation brief.

After you have picked the form of mediation, and given some thought about who will be the mediator, the next item on the do so list, should be the preparation of the mediation brief. Here there are many different flavours to spice up the preparation of the mediation brief. Again much of what goes into the brief depends on the seriousness of the claim, the volume of the medical records, experts reports etc.

Some of the plaintiff's counsel I talked to, who had done defense, work felt that the preparation of the mediation brief by defense counsel, is done for a variety of reasons, some for the mediation, some for marketing and is produced for a relatively sophisticated client and as such the brief is technically harder to write. From the perspective of plaintiff counsel, my thoughts are keep it simple, set out the issues, do the analysis, and get the brief out the door. Don't let writing the brief be a barrier to mediation and in most cases less is more. If there are issues such as contrib. Neg, liability, mitigation, deal with them in a way that puts your best foot forward, yet doesn't derail the process. One pc I talked to said too much detail in the brief, becomes a flash point for the defence. Don't get ensnarled with little details. The main picture of the case will come out at the mediation..

Keep it simple but be through on the heads of damages. Make sure everything is covered, and have someone else in the office do a dry run on the brief after it is done.

Without exception, know your file and concede what needs to be conceded. If you know your case you can always refer the documents that are enclosures of from you file. Make sure the other side has enough information to make an informed decision.

Because the plaintiff has the onus of proof, put best side of the case forward. There can be multiple layers to it. Clear concise statement of the facts, without creating or provoking a response on the other side. I.e. avoid positional language, such as "the conduct of the defendant was reprehensible" or how "reasonable" your position is

What are the facts, what is not in dispute? Objectively and from our perspective this is what the case looks like.

What facts are in dispute, and what is the evidence, on the contrary position, what do we accept or rejection. Generally the lawyers I have worked with will stake out a strong position, which is ok but you don't want the brief to take the process backward. Successful counsel will always include a phrase that acknowledges that the party is coming to the mediation in a good faith effort to settle the case. Whether it is JDR or Private mediation, the brief should reflect a potential trial outcome. There has to be some basis in reality ie briefs should reflect the trends in the case law (asking a $1,000,000 generals for a head injury isn't realistic due to the Trilogy cap). From the defense, perspective I have seen def briefs that are a little pointed and will run defences such as liability, contrib. Neg and mitigation, in such a way the plaintiff will take offense want to leave.

If you as plaintiff counsel receive a brief like this from your learned friend, first of all don't take it personally. Secondly, spend some time preparing your client for it. There are many perspectives on a file, and this is one of them. I think it is important for the plaintiffs to read both briefs ie theirs and the defense brief. When I am having my pre mediation meeting with the plaintiff and counsel, I tell the plaintiff that the guys on the other side of the table are not bad guys, but their professional job is to raise all the issues and defences that need to be raised.

Depending on whether the mediation is private or JDR there will be a difference in legal analysis, ie less legal analysis for private mediation.

Another perspective on brief writing comes from a very senior lawyer I have known for many years. He says preparing a mediation summary is a lot like writing a settlement letter to an adjuster or lawyer with a view of settling the case, so from the start, there is a continuation of the dialogue to settle. Another very senior member of the bar said that he likes private mediation becaseu his brief is a settlement letter with all the medical infor.

Preparing for the mediation brief...

I thoroughly review the file to refresh my memory, are there going to be big arguments re liability or credibility, review the meds, include colour photos and look at the cases and do an assessment. The client reviews the brief before it is exchanged. I keep the brief simple and to the point.

I explain that every case has pluses and minuses. There is no perfect case . When I get one I AM GOING TO RETIRE.

Preparing the brief... A jdr brief has a persuasive side to trying to sell an argument. And the brief has to have a certain form. In a private mediation less of an advocate, but hope

the mediator will come to a certain conclusion. The JDR brief as formal requirements, with highlighting etc

3. Managing client expectations starts from the first interview, and all the communication from start to finish, until the client picks up the settlement cheque. Attached as Appendix I is a "Motor Vehicle Interview Sheet" generously provided by Steve Grover from the Firm of Grover and Company in Calgary. Forms and checklists are handy to use to make sure all relevant information is captured. Ask questions, from this sheet, you will be able to make some inital assessments. With the interview form, and subsequent meds, communicating to the client and managing client expectations, the key is to get to reasonable range, with your client, and the insurer pre mediation. Plaintiff counsel should provide a written analysis of the case with a breakdown of the heads of damages, with details i.e., generals, the range, wage loss... here are the issues, didn't file taxes, etc, may be short employment history, some review of liability and causation. All of this will be set out in a letter.

Fundamentally the job of PC is to A. Investigate the loss

B review and quantify the loss

C Get an offer in the range... that can happen with negotiation or mediation. If yes the case is settled, If not then off to trial.

Some time the client expectations and advice from client will butt up against the involvement of a mediator who will try to tell counsel what the case is about. Again all this is case specific, but it probably isn't helpful to have the mediator, telling counsel that a case is bad, esp. if it is unsolicited and it can be a barrier to settlement, esp. if the mediator has less expertise in the area. Mediations normally go from facilitative to evaluative, but only with the consent of the parties. Sometimes counsel will not have control of his client and will ask the mediator to help with a reality check. The mediator in caucus will be asked to talk to the client and impart his wisdom on a particular matter. It is my experience that unrealistic plaintiffs will have one or more of the following the following scenarios operating:

-I have a friend who said he received double this for the same injuries

- I have researched on line and this case is worth x

- I have a cousin in real estate the case was worth x

* The problem with all these scenarios is the advice is being given by people who have not skin in the game.

If I am asked , I will acknowledge that I have no professional responsibility for the case and I don't want to second guess counsel, `then I tell them this is my impression having just seen the material for a short periods of time..Counsel can get blinders on. (Bradley case)

GY this is something where if some communication is good more is better. A lot of it depends on the case, who is on the other side, who your client is. Mediation assumes that settlement position changes over time. Is the client willing to consider compromises, and this has to be communicated to the client and the client has to hear and demonstrate that. Most lawyers I work with will have sent their client a written record, for the benefit of the client and counsel. Case fits in below that, some clients will want you to be very aggressive, to be used as a battering ram, to try beating the upper limit, others will simply want to get what is fair, but a majority of the clients want you to maximize the recovery...

For most of the case the law isn't in dispute, but rather the facts and how would the law treat them... i.e. wage loss... here the clients should be able to follow the ebb and flow of the discussion.

The clients can help work with this info and it is inter wound with the injury.

There are clients that are influence by media, sometimes bogus statements that will be used to try to influence the position of the PC... (Everyone is an expert)

Client at the mediation needs to be involved. Cedric said that usually he won't put limits on the questioning of the plaintiff, the information needs to get out so the defendants can assess the claim. It really doesn't further settlement to become too legally technical... get the facts out because that is what usually drives the settlement (even is discovery, will not object to continuation of discovery ... need to get the information out...

3. Client expectations... starts for the first interview, and client usually ask two questions...

>and I going to trial and > how much, to which one personal injury lawyers answers...I don't know and I don't know... client shave to be told that so much depends on the facts of the case treatment, , medical history and other problems, such as past losses, WCB claims, treatment, or lack thereof,

Client should be counselled to go to the doctors as required and be honest, if there are credulity issues, it will hurt the P

The P need to be honest of the pre and the post meds it is my experience that if the claimant is credible and the other side likes the P and the P is honest, it will mean fair compensation.

Deal with liability, credibility, etc.

. Client expectation, paper the file so the conclusion is apparent. Here the client expectation are important, if the Ir doesn't like the client because of greed or other matters, then it is harder for the insurer to compensate, if the adjuster doesn't like the p.

Managing Client expectations.

Starts with the first interview and goes on until they pick up the cheque some files come to me from other lawyers due to failed client expectations.

Comes from the first interview. Try not to give a number or have the client draw a line in the sand never ask the client settlement related questions in the room with the dc

The client is the boss and tells when to settle much of the client expectations are done by the functional cap on the GD. The upper functional cap from the trilogy sets the stage for allot of other things to slide into place

If the expert's reports come in, they get reviewed along with other evidence as to what they mean for settlement at the mediation...a week to 10 days before the mediation I will and go over the process. Part of this is to go over strategy and not be put on the spot. Will always take a break, and not look for instructions in front of the other side,

4. Managing Client involvement

. Client involvement, brief the client as to what to expect, the nature of mediation, the steps, etc, and depending on the relationship you have with the insurer and defense counsel, you may allow some Q and A and help provide some additional information, which allows the ir to make decisions. Q and A at the mediation is fine, need to help the

adjuster because this is usually the first time the inr has met the P. The q and a help get more information and perhaps get the Inr to feel some empathy with the P.

In terms of the offers and the clients expectations, offers go back and forth but at some point I may want to be there to see what the other side does and then I can talk to the client.

Much depends on the case, the mediator and who shows up on the other side and defence counsel. If there is a sense that the defense counsel his client are serious about settling and the client involvement will help move the process, it is probably a good thing to have the client very actively involved. Sometimes the dc and ir rep will ask, is It be ok if we ask your client some more questions, get a better view of the case. (This question is usually driven by the formula- more info, better view of the case, potential more money for the settlement, and the adjusters file will pass an internal audit) Usually this is the first time the adjuster will have met the plaintiff and there is a need to get to know each other. If the questioning is to ensnare the client, don't let it happen. Sometimes a let's see what happens approach keeps everyone relaxed and allows the Q and A to proceed. Sometimes the question is asked is the q and a an informal questioning? If you are satisfied the other side is really listening, has good intentions and will make a bona fida effort to settle, then it is probably good to let your client have more involvement rather than less. From my perspective, I feel it is hard for the plaintiffs to speak about a difficulty they may have carried for years, but the up side is they have a chance to positively influence the outcome by their involvement (more so than at a JDR or trial)

It is important to have the client pay attention, be aware of the process, be aware of his role in the mediation, be aware or what the mediator is saying and be aware of what the pc is saying. The awareness need sot come with a commitment ask answer questions.

It is amazing in this process that one of the main derivers on the direction of the mediation and quantum of compensation, all else being equal, will be whether the client is likable, credible sympathetic, and whether the other side ie insurer and defense counsel like your client. Sometimes the best way to build empathy is to have the client tell the story is an open and forthright way, and not put up barriers to that kind of exchange at the mediation.

With respect to managing client expectations on quantum, esp on general damages, , a lot is done by the upper limit from the trilogy cases of the Supreme Court of Canada in 1978. It is simple to explain to the client that in terms of general damages, the most seriously injured person gets approximately $350,000.00 for general damages,(where ever the upper limit is now) and then your case fits in below that. Some clients will want you to be very aggressive,

to be used as a battering ram, to try beating the upper limit, others will simply want to get what is fair, but a majority of the clients want you to maximize their recovery...

From my experience, in most cases the dispute isn't about the law, rather the dispute is about the facts and what is the result after the law is applied. An example is wage loss for a self employed person who hasn't filed taxes for a few years. There are a number of scenarios to consider and in any event, the client needs be able to follow the ebb and flow of the discussion.

The overwhelming thought is that since this is the client's case, they need to be engaged at the mediation and need to be involved. Some lawyers I have dealt with usually don't put limits on the questioning of the plaintiff because the information needs to get out, so the defendants can assess the claim. From a certain perspective, It really doesn't further settlement to become too legally technical. Get the facts out because that is what usually drives the settlement. This will also help the client get involved in the process and telling his or her story will be therapeutic. The sense of being open and honest help drive the process, and make the adjusters job easier. There is a flip side Sometimes it will be necessary to stop the Q and A because counsel doesn't want to his client ff in the position where the defense will received a free discovery. Pay attention and watch the process.

5 Getting Informed Instructions.

In the negotiation dance of offer and counter offer, it may take 5 to 8 moves to get a case settled. Make sure you stay for the whole dance.

The whole purpose of the exercise is to get the case settled, and in order to do so counsel will have prepared, through the life of the file, an assessment of that the case is worth. When an offer comes in within the range or if it is the last offer, the question then become should it be accepted.

In advance of the mediation, most lawyers have prepared an assessment, and there will be a bottom line number, in the evaluation. Sometimes the bottom line changes a bit and between client and counsel, they will have to talk about what to do. In a mediation the numbers move throughout the day.

In any event when the last numbers are on the table and presented either by the plaintiff or the defendant, I will leave the room so the parties can openly discuss the next step. When I come back in the room, they may have accepted. It is a good practice to have a memo signed by the client that the number has been accepted. If I am asked what I think about the offer, It is my experience that by the end of the day both parties are in the Zone of I will give a frank evaluation. At the mediation you don't know what will happen, but keep notes, if a number is accepted, it is a good idea to have keep notes. I

always have a chart i fill out that I can share with the parties on the history of the negotiations over the day

If an offer is accepted I have a form i get the parties to fill out, and very one gets a copy.

before they leave they have a record, of the settlement I have seen counsel show with a form letter that ahs the number they have accepted, they key is to have a record, so perhaps followed with an e mail on the settlement,. I always show up with a settlement document, to be completed by one of the parties,

In terms of the offers and the clients expectations, offers go back and forth but at some point I may want to be there to see what the other side does and then I can talk to the client.

I will have sent a detailed settlement offer with the clients approval... sho speaks first loses.

Come in make an offer... then tell them I am next door. See what their response is to the offer to the last offer .. line in the sand offer.(private mediation easier to handle) watch what is happening..wants worst thing to do is to bring someone to the mediation who doesn't know the file(on either side to the table)

Parties can be told it is a good settlement, not perfect, few if any are

Plaintiffs may want to be told what they are getting i.e. net numbers, the point is the case is worth what is worth, if the matter goes to trial, a judge isn't going to care what your net is, and be wary of the client who says I need (specific number here) in my jeans .. The key is the value of the case and all the rest flows,

Usually here there is an attempt to renegotiate the lawyer's fee, in order to have more money flow to the client

Gy informed instructions... usually vary what you need from client to client will need something different... Perhaps less detailed eg. Subro claims more cost benefit analysis.

An ind client may be more invested in a position and has been so for a while so it may be more difficult to get them to sign off, I.e. to get the pen to move, all of this varied with the nature of the claim and the target that parties had coming in.

At the end of the process or towards the end, parties may be tired, hungry at a low state and unfocused.   It may be necessary to rewind a bit, keep notes other numbers(I do) and the plaintiff may have lost focus, bring them back, the purpose is to settle, and get the point of the last offer that needs to be responded to heads of damages,

Remind the plaintiff the br
ief represents a successful trial

Getting informed instructions... very important to have written instructions to settle

Have a boiler plate form, letter...

> 1st paragraph, settlement is final, no matter what happens, and

>2nd paragraph I don't have to settle now or anytime soon,

>then copies of medical reports are attached,

> Loss of income information

>positive and negative things that relate to the case i.e. credibility i.e. Drug use, other accidents

> Liability an

Closing thoughts

And in the end, have patience in the process, be prepared to cooperate but you may have to compete. The object of the process is to get the matter settled. Benjamin Franklin said a bad peace is better than a good war. From an interest based negotiation perspective, you will find that you will have to deal with the same group of adjusters and defense lawyers, and much of what you do and how you conduct yourself, will effect future deals and settlement. Yur reputation is the most valuable thing your bring to the table. Protect it and work hard to get it .. good.é

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.

Post script...

Case study on what not to do...

> serious accident... plaintiff vehicle totalled... no hospitalization or EMS but very bad seat belt bruises

> plaintiff retains counsel early who does not help her with DTP and the effect of the MIR

> Plaintiff claimed that the treatment providers told her she would have to pay for this.

> No treatment, no mitigation no effort to return to work, very few dr appointments.

> At discoveries, undertakings given and answered by counsel... NO specials, No housekeeping, 2 weeks wage loss (on the last point there was good evidence at the mediation that the accident kept the plaintiff off work from one of his jobs for at least a year.

> The mediation was set up 5 years after the loss. The insurer and counsel needed documentation to support the claim. The was very little evidence to help the plaintiff with the onus of proof. onus on the p to prove. Merely showing up at the mediation and saying all these things 6 years after the loss, isn't helpful

Briefing the client on the process and the law...

At trials a person doesn't get everything they want, the same thing at mediation... a good settlement makes both sides a little unhappy... if someone is dancing out of the room, something wrong...

Client involvement... tell their story, what was like, what happened, what bit is like now.

The mediation has to have a transformative aspect.

Client involvement... form of mediation... people are intimidated, pick the most friendly

Have the right evidence

Brief your client, thoroughly... include going over the evidence from discovery and the medical evidence

Confirm time date and place of mediation... if at the court house brief client on security and help client through. If possible travel together... people have a habit of getting lost... unintended consequence

Have client read both briefs

Arrive early to settle

Meet with mediator and client

At mediation, introduce your client. In order to give client the full effect of the day, do more than our position is laid out in our brief... spend some time walking through the case and settling out the issues as you see them. Involve the client and help coax out the story.

You can't always get what you want...parties don't get what they want at trial, the same happens at mediation

Offers back and forth... plaintiff counsel says...If this goes to trial I cannot guarantee a result... it is a bot like quantum physics, that we can talk about probabilities and ranges but it is improbably that you will get more than 300k and more likely less.. The offer is in the range

Mediation Article for the Barrister... due May 20th 2011

"A bad peace is better than a good War" -Benjamin Franklin

“A deal that makes both sides a little unhappy is probably a fair settlement”-Heard in a mediation training course

“You can’t always get what you want” -Sir Mick Jagger

“Simple cost effective ways to improve your performance at mediation”

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

Mediation defined.

Mediation is considered part of the alternative dispute resolution process because mediation is an alternative to litigation and trial, which has been the traditional way of settling lawsuits. Mediation is voluntary (subject to the new rules) and non binding, i.e. there is no agreement unless the parties agree there is one. The neutral third party, the mediator doesn’t act as an arbitrator and cannot force the parties to settle.

Parties that agree to proceed with mediation do so under a mediation agreement that provides inter alia, that the process is nonbinding, confidential and without prejudice. (KINDS OF MEDIATION)

The agreement also provides that anything learned at the mediation cannot be used in any subsequent legal proceedings.

The mediator acts as a neutral third party, and as such is neither legal counsel to any party nor a compellable witness to any legal proceeding.

Generally, the parties exchange briefs approximately a week before the mediation. The briefs usually set out each parties understanding of the issues in question and their legal position. 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 will produce an agenda for discussion.

As the parties go through the issues on the agenda, one or more of the parties may want to break into caucus. I may want to meet with each party to further discuss the case. Anything I learn in these discussions is confidential unless that party wants me to share this information with the other parties.

I will ask the parties about the negotiation history in the dispute and at this point parties may want to make offers or counter offers.

I should emphasize mediation is very effective at resolving disputes, primarily because all the parties are in the same room and in this process have the opportunity to measure the risk of success and failure. No party gets everything they want at trial, and at mediation I ask the parties to consider that. I ask parties to be open and flexible, and to try to understand the other's position.

When the case settles I have a memorandum of agreement that I get counsel and the parties to sign. The agreement sets out the settlement terms, the amount of the settlement, and any other relevant terms or steps.

The mediation process can take anywhere from three to six hours, and some mediations are longer and some are shorter. Mediation is a very effective flexible process used to resolve many different kinds of legal disputes.

If you have any questions, I will be happy to answer them at the mediation

Regards

David P Stark, Stark Mediation …. "Turning Disputes into Settlements"

Expectations... Where a plaintiff has have had a case for a long time i.e. it is an old case and it preoccupies the mind of the plaintiff, on mediation day they may hear something that conflicts with what they believe and the plaintiff may need some time to digest the new material. This can be so even if their lawyer has said the same thing many times before. Hearing the news from the opposite party sometimes is a bit of reality check and shock.

Most mediation engage in a four step process or modifications thereof

Four stages...I Opening statements. For the party giving the statement, you can act as an advocate, and the client has an opportunity to be involved in the mediation process by describing how their live has been affected by the loss. I encourage parties to be actively involved. It is their process and in the case of most plaintiffs, almost everyone at the table usually has done a number of mediations, and for them it is a business, but for the plaintiff, it is their claim and their life. In most mediations the plaintiff goes first because they have the burden of proof, and lay out their theory of the case. Then the defendant gets to talk about what the case looks like from their perspective.

Sometimes counsel says, as part of their opening, " the issues are in my brief, and I will not rehash or read my brief", while counsel are free to do what they want , my suggestion is there is more to be gained by having some detail in the opening statements.

II Discussion of the issues. From the opening, the parties will have identified items that represent positions, for the agenda. In discussing the positions, opened ended questions, such as 'tell me a little more about x..," will help explore what s behind the position to reveal interests.

III explore settlement options.

IV conclusion, settlement etc

Flexibility of process the process is dynamic and fluid so the mediator should be able to switch gears, most mediation start a certain way i.e. the process is a dialogue and the mediator facilities the discussion, and part of the mediation may be interest based, parties working towards solutions that they bring to the process but at some point the parties may want to hear from the mediator.

Decisions about how to and amount of caucusing

First of all the parties should not ask this too soon. When is the right time, I find that as the mediation process goes on, there may be fewer concession (a signal) and the responses may have slowed down ((another signal) of perhaps the parties reaching the end of the line Many mediations go sideways because the parties abandon their role i.e. negotiators and draw in the mediator before the parties have really explored issues and talked about ranges of damages on heads of damages.

Interest based... remember the first step is to separate the people from the problem... As much as we try it still appears at time that when parties come to me mediation, the plaintiff is the problem

A number of factors have come together to help promote the rise of alternate dispute resolution as a way of resolving legal disputes, such as length and cost of trials, uncertainly of result, cost of appeals, the lack of a justifiable net result.

Many arguments and legal disputes start as a contest of principles to be proved right or wrong, and at some point the litigants become weary of the fight, and look for a meaning way to have resolution and also keep face.

Mediation is considered part of the alternative dispute resolution process because mediation is an alternative to litigation and trial, which has been the traditional way of settling lawsuits. Mediation is voluntary and non binding, i.e. there is no agreement unless the parties agree there is one.

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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 not had very much experience with the ADR process now will be thrown into the requirement for mediation

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

(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 spent some time thinking about dispute resolution means that parties will need to be focused and work at how to get the best bang for their mediation buck

This article will discuss simple and effective ways to increase your effectiveness at mediation, work at cost effective dispute resolution and hopefully increase client satisfaction .

Well the we must start at the beginning,

How things start is how they go, an old saying but so true in the mediation word. The experts say sensitive dependence on initial conditions, so much depends on how we start. How do we work at the little things at the front end of mediation to make it successful?

>Invisible things all parties bring bring to a mediation-

- ADVOCACY BIAS: At its basic form, advocacy bias means between conflicting parties 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 mean 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

-REACTIVE DISCOUNTING at is basic form, again between conflicting parties, I place no value on whatever my opponent says including offers, because it comes from my opponent.

-CONFIRMATION BIAS- 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 information to the contrary, parties in a dispute will cling to information that initially fuelled the dispute.

Advocacy bias, reactive discounting and confirmation bias will usually work together to prevent parties from valuing information the other side has and engaging in meaningful dialogue.

What to do about it. The minute the parties engage a neutral third party, the dynamics change. Offers of mediation or settlement that flow from the other side through a third party have more ‘value’. 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 out come

-Also be aware of Autistic withdrawal, and chase dynamics

>

Invisible things you bring that are good

Integrity...a good reputation and integrity are valuable companions to have at the settlement table

Character,   negotiations can sometimes fail, all other things being equal, because one party doesn’t trust the other. A history or fair dealing and keeping agreements, can be the swing factor in a deal.

> Prepare, you cannot over prepare, use canlii website, and file review check lists. Do you and your client have enough information to make an informed decision? Litigation is great at producing information and allowing parties to defend legal rights and positions but is not very good at allowing parties to openly and freely talk about the interests (hopes, dreams, fears, concerns) that are the

drivers underlying the positions. Try to 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 counters

> Use low cost high yield items, such as be on time, be professional and be polite

>Plan, as the old saying goes if you fail to plan, you will plan to fail. Planning is well worth the time

-give some thought about the case, overall and what is about, is it about money, emotions hurt feelings. Spend some time thinking about where the end of the negotiation process is.

Can you say there is points where you draw the line, conversely, watch the emotions and the reaction to overly chase a settlement? If you need a time out take one...

> Prepare, you cannot over prepare, use canlii website, and file review check lists. Do you and your client have enough information to make an informed decision? Litigation is great at producing information and allowing parties to defend legal rights and positions but is not very good at allowing parties to openly and freely talk about the interests (hopes, dreams, fears, concerns) that are the drivers underlying the positions. Try to 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 counters

>Always confirm the details of the mediation, i.e. time date, place, you would be surprise how many times well educated professionals who pride themselves on their ability to communicate well, end up getting the little points wrong. I.e. Time, date and place.

On one case I mediated, there were five defendants, with insures, waiting for an hour because the plaintiff forgot the mediation started to 9 am instead of 10 am If this happens to your, can you use the time effectively to start to get some agreements with the parties

Parties want to advocate but can drive the parties apart i.e. numbers. Both parties try to convince the mediator that their camp is being fair, reasonable and they are right. The job of the mediator' has to work with the parties to show them that the thinking that caused the dispute will not help resolve it. The solution lays out there somewhere. From my perspective it is more important to get copies of

the meds and reports that the parties are relying, I can be more helpful if I know the case as well as the

>Briefs, a good idea if done in a way that deals with the issues and the law, without being positional. parties. One of the other issues with briefs that have numbers i.e. for the heads of damages is that most lawyers I know will put number s in the briefs that would represent a great day at trial.

As an aside the parties have to move between 5 to 9 times in the negotiations before there is a settlement

At the mediation try to keep the interruptions to a minimum, this can be a challenge, the mediation will usually may be at 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 to going into the mediation, can you take liability off the table, even just for the Perhaps agree to the special damages or out of pocket numbers, mediation. Accumulate yeses... Help the other side agree and it commits them to the process.

> If an issue is contentious deal with it in a way that doesn't derail the process, avoid lines in the sand, ultimatums etc. When I am having my pre mediation meeting with the parties, esp. the plaintiff who usually has not gone through a mediation before, I tell that them that the parties try to view the file objectively and will say some things that may make them angry, that is not the purpose, they have a professional job to do, to the other lawyer it is professional, and to you it is personal. I also tell them that there are different interpretations to the same information that is before us...parties riley convince the other side of being right, helpful to gain understanding, and then ask yourself this question, what will happen in court if they are right...Avoid ultimatums.. Just another position... Unless you can agree

Some phrases that can be used... 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 lawyer I do mediation work with, talks about his case and say it has blemishes, but it also has some good parts to.

>Avoid personal attacks, (separate the people from the problem), avoid irritating language, i.e. our position is reasonable, our reasonable offers etc... Don't state that you're reasonable and the other side

>Ask open ended questions and actively listen to the answer, paraphrase. Open ended question that use the words... were, what, when, why, who... Tell me a little about...litigation has parties answer question with yes or no... In mediation we play a different game, we want to know more about the parties. We want to develop information about the emotional drivers what are below the positions...

The resentment, the anger and the fear...

>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 assumptions, cases etc.

> Use objective measures i.e. refer to cases, meds, Dr. 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 than mine, it now becomes

> Use the mediator, lean on him or 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, I will tell them how I see the case because usually the matte ahs just come to me and I have lass bias... (Hopefully)

> Mediations are dynamic processes, and while it may appear nothing is happening things are, be patient, and remember it takes 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... dynamic equilibrium.

>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 are over looked. I usually have a blank settlement agreement with me and i usually ahve one of the parties fill out the document, outlining the terms of the settlement , and have all settling parties review and sign. Parties will suffer from settlement remorse, you know 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 .

If there is an issue of convenience , ie one the parties may be from out of town, perhapstrhe concluding documentation could b completed while the parties

>if you don't get a settlement, can offers be left open so parties can think about the process. Put time limits on the offers. Many case settle at mediation, my experience is that xs95 % settles. A party that has thought about their case for years, in a certain way, k may need a little time to digest information that reflex a totally new way of looking at a case a totally new direction.

>On files that don't settle, it is my practice to follow up after a couple of days, and 95 cent of that case settles

Confirmation bias... I look for information that confirms what I believe. I come to a dispute with a sense of what makes sense, I will search for information that works into my bias and I will reject information that does not fit. Dangerous because the information that doesn't fit may be information that I should be considering.

Autistic withdrawal... reaction to tough bargaining and tactics is to withdraw. Where an aggressive is a passive, or one side gets an extremely good result at a JDR, one of the parties will withdraw, and will not be heard from again for a while

Chase dynamics... Procrastination causes the other side to chase for information. Where an active negotiator is dealing with a passive or slow responder, the chase is on

Split the difference,, usually as a last move, when all the science of mediation and interest based negotiation has been played out, it is usually the last move after all the science and the art of bargaining , a split the difference seems to make sense because it hits both sides equally, allows the parties to settle and gives a sense of having achieved a result. As the last move, it is implicitly unfair to split the difference on a split the difference..

For example party A plaintiff is at 50,000   party B defendant is at 40,000...

B proposes a split the difference to 45,000 a move of 5000. If A now proposes a split on the split the number offered is 47,500 and B has moved 7500 in tow moves and A has moved 25000.. sense of unfairness..

,

>After the mediation, do a post-mortem and debrief, ask what worked and why, and what didn't work, why and how do we change it. As part of the de brief replay the mediation the way bridge players reconstruct games. Professional athletes do this all the time, and should be used as part of the process of constant improvement.

Good manners cost nothing. A fomer US president said "Civility is not a sign of weakness"

Tyr not to respond too emotionally, to have emotions is human and some times paties will have emotional outburst, it susally isn't helpful to use the outburst to try to adavance uyour case.

Piece meal or the whole settlement

Power of round numbers v merit based negotiations

Knowledge is power- Sir fancies Bacon, Time and patience have power-David Stark

Negotiators who are tired, hungry and cranky will not make good decisions. Take breaks, bring food beverages when appropriate,

Walk in the others shoes

Power of the apology, the apology act in bc

Final offers , how to get around road blocks and lump sums, but in the lump sum revers engineer the number to make sure the other party is still bargaining in goo faith.

Has there been any pre mediation bargaining? In the pre mediation meeting ask the parties about the negation history of the file. Have there been offers and counter offers . No matter what eh briefs say, it is hard to ignore previous offers and counter offers.

What about offers made without prejudice. Do the parties start from that position, or are the without prejudice offers not to be referred to .

New late evidence, information