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ALOC/GOVERNMENT OF ONTARIO
EDUCATIONAL CONFERENCE

November 18-20, 2013

SKILLS BUILDING: PERSPECTIVES ON EFFECTIVE ADVOCACY IN THE MEDIATION PROCESS

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The authors gratefully acknowledge the assistance of Christie Gibson, Articling Student at Dentons Canada LLP, in the preparation of this paper.

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This paper will discuss eight important considerations in the mediation process and briefly address the rules in Ontario regarding mandatory mediation.

1. Using active listening techniques and neutral language

Mnookin recommends rehearsing a version of the story that doesn't blame the other side or characterize their motivations or intentions. Especially where both parties feel wronged, this technique can encourage the parties to view their misfortune as situational, not as something caused by the other party.

One frequently used technique is mirroring the sentiments of the other party.[1] This is done by inquiring about a topic, listening to the response, and then summarizing the response for the other party to confirm. Acknowledging the arguments of the other side can encourage an environment of understanding, yet doesn't symbolize weakness. It is important to note that nodding and smiling is no substitute to truly listening to a response, especially when there is a breakdown of understanding. Failing to inquire further about an issue not only might create a missed opportunity for settlement, but could result in the opposing party's increased frustration with the mediation process.

2. Framing issues (the importance of the mediation brief)

Being aware of a distinction between issues and emotions can assist in drafting a helpful mediation brief. Mediators who read briefs full of emotions may get the impression that the lawyer cannot control the client and such attacks do not make for a productive mediation (Kirsh & Rabinowitz, 7). Brevity is also appreciated by mediators. In the mediation each party will have the opportunity to stress issues that are important to them, so laying out clear, concise, complete, and honest facts in a brief can be the best sign of good faith at this initial stage.

The mediation brief can be a good place to include documents that will help the mediator understand what is at stake, but be careful including case law. At most, include the one or two cases that are particularly crucial to the legal position of your party (Schnurr, 8-7).

[1] Friedman & Himmelstein refer to this as the "loop of understanding" (p 47), while Mnookin et al at 63 refer to it as the "empathy loop".

3. Determining underlying interests and distinguishing those from their bargaining positions

Mediation, unlike litigation, doesn't have many hard and fast rules to follow. The flexibility of mediation allows parties to approach both legal and emotional interests, and determine underlying goals more readily.

The example of two children fighting over a piece of fruit is a helpful illustration of this consideration. Two children are fighting over an orange, and both claim they need the orange to the exclusion of the other. The situation resolves itself either by neither child getting the fruit or by one bullying the other into giving up the fruit. However, had the two children discussed the *intended use* of the orange, they would have realized that one child needed its pulp to make juice while the other needed the zest for a baking project.

In assessing a client's core issues, bear in mind that the black and white dichotomy of litigation doesn't necessarily apply to mediation. In the fruit example, the children fought pointlessly over a piece of fruit. Refusing to compromise and stubbornly insisting upon the use of the full piece of fruit could lead to a poor outcome, but recognizing that the children had different uses for the orange left both in a stronger position. Distinguishing a means to an end (obtaining the orange) from an end (obtaining the pulp/zest) can leave both parties in a stronger bargaining position and resolve unnecessary points of conflict.

To get the most out of mediation, counsel should work with their clients to figure out what is truly at issue.

Understanding a client's underlying interests is crucial in determining what issues can be 'gimmees' and what are sticking points (Kirsh & Rabinowitz, 5). Not only does this tell counsel what points are non-negotiables, but it allows counsel to give potentially meaningful concessions to the other side, a sign of good will and a demonstration of a willingness to cooperate.

4. Breaking impasses

The canonical game theory example of the prisoner's dilemma provides a framework in which we can examine the conflict trap that parties frequently find themselves in, as well as the important role mediators and lawyers can play in resolving a conflict.

The Prisoner's Dilemma:

In the prisoner's dilemma, the police bring in two suspects, and knowing that one of them committed the crime turn them on each other. In private interrogation rooms, each suspect is offered the following choice:

- Admit guilt ("Cooperate"); or
- Deny guilt and blame the other suspect ("Defect").

If both parties cooperate, the happy police officer will break a deal with the suspects and require each to serve only two years in jail. If one party defects and the other party cooperates, the cooperating party, having admitted guilt, will spend ten years in jail while the defecting party will walk free. Finally, if both parties defect, the police officer, knowing at least one of them is lying, sends both suspects to jail for eight years. This situation can be illustrated in the following pay-off matrix:

		Suspect B	
		Cooperate	Defect
Suspect A	Cooperate	2 \ 2	10 \ 0
	Defect	0 \ 10	8 \ 8

Playing this out, the suspects, unable to communicate with each other but aware of the pay-offs, would go with the best option available to them given what they expect the other party might do. From Suspect A's perspective, if Suspect B chooses to cooperate Suspect A can get less jail time by defecting (zero years instead of two). And if Suspect B instead chooses to defect, Suspect A can get less jail time by defecting (eight years instead of ten). If both suspects apply this logic, it is easy to see that the suspects will find themselves in a defect-defect scenario, which is clearly worse off than had they both cooperated.

The Prisoner's Dilemma and Mediation:

Not having a guarantee that the other suspect is going to cooperate is what causes the Prisoner's Dilemma to result in a terrible result for all: extra jail time. The Prisoner's Dilemma arises all the time in law, and is referred to by some as a "conflict trap" or "lock". This situation is particularly powerful because participants are not usually aware of its presence and its impact (Friedman & Himmelstein at 15).

Where two parties to a mediation have the opportunity to demonstrate to each other a willingness to cooperate, the accumulation of good will between the parties can encourage settlement and cooperation. This is especially valuable in a repeated game, where parties expect to continue a relationship outside of the mediation. However, even if one considers the mediation process as being comprised of multiple 'rounds' of opportunities to cooperate or defect, then it is easy to see that cooperation early on (for example, in selecting a mediator or laying the ground rules[2]) can increase your party's credibility and result in the other party's increased willingness to cooperate.

[2] This first step can be an easy, non-combative and non-emotional opportunity for parties to signal to each other their willingness to cooperate.

Moving from the defect-defect strategy to the cooperate-cooperate strategy can prove difficult, but mediation can help increase this confidence. In addition to being comprised of multiple rounds, in a mediation the parties are able to communicate with one another *between* rounds and signal their interest in cooperating.

In economics, this discovery of a solution that is better for at least one party and no worse off for any party is termed a 'Pareto improvement', and one could argue that at the core of mediation is the interest in finding Pareto improvements. As Friedman & Himmelstein put it, "[i]ncluding [lawyers] in the dialogue would prove crucial to supporting the parties' key role in resolving their dispute and keeping the trap from springing shut once again" (at 21).

If a mediator or counsel are able to communicate a firm commitment to cooperate, this can encourage both parties to work towards the cooperate-cooperate world. Unfortunately, sometimes a lack of confidence in the other party can be at the heart of an issue. Particularly if the parties have found themselves in mediation, there is a good chance that trust between the parties has broken down. Akerlof proposed that information asymmetry can lead to poor solutions for all.[3] In Akerlof's example, where occasionally a bad car, or "lemon", is sold, the willingness of a party to pay full price for a vehicle at a used car lot decreases to account for the chances of taking home a lemon. Addressing this information asymmetry head-on can be a meaningful way to help parties increase their faith in each other and result in both parties' increased willingness to cooperate.

Be creative. Sometimes a guarantee costs very little but carries great weight.

5. Managing emotions

Highly emotionally-charged disputes have the tendency to lend themselves to mediation. Contrary to the adversarial structure of litigation which encourages secrecy and combativeness among parties, mediation provides parties with an opportunity to come to terms with each other and hash out the issues. If the origin of the issue that is being mediated is traumatic for at least one of the parties, time should be given to the parties to grieve a loss. Understandably, few people will be prepared to discuss logistics of an estate mediation in the days following a loved one's death, for example.

"When dealing with grieving clients… to fulfill their professional obligations, lawyers and mediators require emotional intelligence." (Atin, 6). Lawyers can get caught up in legal issues, while clients rarely see a conflict in terms of the law. For example, clients may have an underlying goal that a court cannot satiate: e.g. receiving an apology, or reconciliation. Paying attention to the emotional issues at the heart of a conflict can even provide meaningful guidance to counsel and mediators.

[3] Akerlof, G., *"The Market for Lemons: Quality Uncertainty and the Market Mechanism"*, 1970 Quarterly Journal of Economics 84:3 at 488.

Keep in mind that being conciliatory and understanding with another party's emotional situation does not necessarily translate to being weak. One maxim, "be hard on issues, soft on people", reminds us that we can be both assertive and empathetic, a combination that Mnookin finds ideal in the production of the effective negotiator (at 55).

Another way to effectively manage emotions, especially where parties are unwilling to acknowledge one another, yet are interested in maintaining some form of long term relationship, is to engage in shuttle diplomacy, or the caucus model of mediation. This allows a mediator to move back and forth between rooms discussing with each party separately the goals and issues. For a further discussion of the merits of shuttle diplomacy in mediation, see Hoffman.

Bear in mind that some situations are not conducive to mediation. For example, situations of domestic violence or relationships where one party is likely to coerce or intimidate the other can often result in a willingness of one party to be over-conciliatory. Although it is the job of counsel and mediators to ensure both parties are heard fairly, oftentimes the protection offered by a court and a judge goes much further in allowing the interests of the bullied party to be heard.

6. Dealing with difficult personalities

In a dispute, although the relationship between the clients has almost by definition broken down, by introducing lawyers and a mediator other avenues of communication are created. Oftentimes building strong lawyer-client relationships and a strong lawyer-lawyer relationship can avoid direct confrontation between upset clients, an especially valuable arrangement if one client is particularly difficult to work with.

Lawyers can be difficult, too. Although each lawyer will approach mediation with a different tack, flexibility and understanding can go a long way. Lawyers should be aware of 'hot buttons' or pet peeves. Recognizing that your personal outlook can negatively impact your client's position can be a good reminder to cool your heels.

While some parties will be difficult by being confrontational, an equally challenging personality is the party who refuses to express their disagreement. The party that fails to express the grounds that are deal-breakers for them causes others to effectively shoot in the dark for a solution, which can be just as frustrating as stubbornness. "Expressing disagreement is a positive and critical step forward" (Friedman & Himmelstein at 66). Parties can be encouraged to disagree politely by two means: i) mediators can encourage a party to clearly state their bottom line or non-negotiables, and ii) one party can take the lead by simply laying out their bottom line or core issues. In our fruit example above, realizing early on that each party fundamentally cared about different aspects of the fruit would have led to a quicker and more amicable solution.

A final strategy when dealing with difficult personalities can be caucusing. Caucusing can be particularly helpful where one party is proving particularly belligerent or disruptive. With no audience other than a mediator, theatrics can often be kept to a minimum. Separating the parties can diffuse tense situations and help get at the real issues. This strategy also provides the opportunity for belligerent parties to save face while being conciliatory.

7. Assisting the parties in generating options for mutual gain

Even if the parties are unable to settle during mediation, an effective mediator can help parties determine what issues are truly issues and minimize court costs and the emotional toll a drawn-out litigation process.

Four areas where mutual gain can arise are outlined by Mnookin (at 13). First, acknowledged differences between the parties can create opportunities for Pareto improvements. Mnookin cites five differences here: different resources, different relative values, different forecasts, different risk preferences, and different time preferences. A second area of mutual gain is non-competitive similarities. Focusing on shared interests can encourage parties to view each other as allies, not as competition. Third, economies of scale and scope can create value. Finally, mediation can reduce transaction costs and dampen strategic opportunism.

Awareness of a party's Best Alternative to a Negotiated Agreement ("BATNA") can help establish limits of the Zone of Possible Agreement ("ZOPA"). Being fully aware of a client's best outside option lets counsel know when it's best to walk away from the table, and can provide a legitimate base from which your party can negotiate. Two parties who are unaware of the existence of a ZOPA or its limits could easily walk away with no settlement where one could have otherwise been found. Those who are able to assess their BATNA and address this issue confidently with the other party won't run the risk of missing out on an opportunity to settle.

Unfortunately, parties frequently misstate their preferences in an attempt to goad the other party into giving away freebies. Likewise, a party may lie about their BATNA, hoping that by doing so will cause a 'middle ground' solution to be more a compromise for the other party than it would be otherwise. Both situations though should be strongly discouraged by lawyers and mediators as misinformation (as discussed earlier) is a frequent culprit in breaking down the effectiveness of a mediation and opportunities to settle can be inadvertently forfeited.

For counsel who think ground can be gained by 'adjusting' the public BATNA, the best option for the client is for counsel to work with the client to increase the value of the outside option.

8. Helping the parties analyze the opportunities and risks of litigation as an alternative to a mediated settlement

One possible BATNA is litigation. However, this is often a prohibitively expensive outside option. In recent years, as the practice of litigation has become more complex it has also become more expensive. The threshold, thus, for a willingness to enter into mediation as a financially viable alternative has increased. Importantly, though, particular fields have shown a drastic increase in cost, pushing particular types of conflicts (such as estates conflicts) towards mediation more readily than others. (Kirsh & Rabinowitz, 1).

When considering the outside option of litigation, bear in mind that not only are there added financial costs to the client but that litigation "may also result in additional stress and deterioration of family relationships" (Atin, 5).

9. Rules of Civil Procedure on Mandatory Mediation

In 1999, the Ontario *Rules of Civil Procedure* were amended to introduce mandatory mediation in many matters in Toronto, Ottawa, and the County of Essex. Today, Rule 24.1 contains the general rules about mandatory mediation, while Rule 75.1 applies to will changes, contested applications to pass accounts, claims against an estate, dependent support applications, the removal or replacement of an estate trustee, and estate trustee compensation. Familiarity with the rules will assist counsel in determining whether mediation is mandatory. Awareness of this step in the litigation process can also help counsel frame the litigation process for a client: planting the seed at an early stage of the solicitor-client relationship will help a client form a healthy approach towards the resolution of the conflict.

One last consideration for counsel is that Rule 2.02 of the Ontario *Rules of Professional Conduct* mandate that a lawyer "shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis" and "shall consider the use of alternative dispute resolution (ADR) for every dispute". Awareness of the benefits of mediation assists counsel in fulfilling their ethical obligations under the *Rules*.

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