Draft 1.2

A Lawyer's Primer in Preparation for a Domestic Mediation

Cobbled together by KENNETH J. GLASNER, Q.C.

> **<u>Atticus Finch</u>: If you just learn a single trick, Scout, you'll get along a lot better with all kinds of folks. You never really understand a person until you consider things from his point of view…. Until you climb inside of his skin and walk around in it.**
>
> (To Kill a Mockingbird (1962))

MEDIATION

A concise definition of mediation is the process of adjusting each party's level of expectation without suffering a loss of face. In many cases, the process deals strictly with money. On other occasions, the process deals with the interests of the parties (their needs, wants, and fears) - not their position.

Mediation is different from the adversarial litigation process. It does not involve the search for truth about the legal and factual issues in the case but rather is involved in a search for a final solution to a dispute. In order for mediation to be successful it requires not only trust in the mediator but also a commitment by the parties to resolve the dispute. Failure in either one of those factors will result in the dispute continuing.

The lawyer's role in mediation is quite different from that at trial. The lawyer is not there to be confrontational. This is not the time to object to evidence or call the other side a liar or a cheat. He or she is there to assist in resolving the dispute and to prepare the Memorandum of Agreement once that dispute has been resolved.

It is important to prepare a Mediation Brief for delivery to the mediator in sufficient time for the mediator to be able to absorb an understanding of the nature of the dispute, coupled with any collateral factors prior to entering the mediation session.

One of the important functions of the party and their lawyer is to listen. When one is talking and one is listening, only the one who is listening is learning.

SUBJECT MATTER, PROCESS, AND CULTURE

A mediator should understand the subject matter, the process and the culture. By subject matter I mean the mediator's understanding of the context of the dispute whether it be negligence, corporate, employment, estate, regulatory, trust, land or some other area.

Does the mediator understand the process to be implemented in assisting the parties to resolve their dispute? Generally, but not always, a process protocol might include the following:

1. Telling of the story by each party including reviewing the chronology of the dispute.
2. The identification of the issues, problems, concerns, needs and wants of each party.
3. The development of options and alternatives.
4. Building on the alternatives to assist the parties in fashioning their solution either through open conferencing or caucus conferencing.
5. Setting down in writing the agreement reached by the parties.

When I use the word "culture" I use it in the same context as Michelle LeBaron uses it in her book, *Bridging Cultural Conflicts*. She defines it as "what fish swim in". It is all around us.

Each of us come from and live in a number of cultures. When I use the term I use it in a non-limiting sense as meaning more than ethnic, racial, or religious. The culture surrounding mediating a motor vehicle accident case is different from that of a fire insurance case, an employment case, a real estate case, a wills variation case or a professional association or self-regulating body case. The cultures of those employed in the real estate industry in the Lower Mainland may vary from the culture of their colleagues practicing in Prince George or Quesnel or Kelowna.

Each of us live in many cultures which affects our thinking in different ways. Each case is different and requires counsel to provide input either orally or in writing, or both in sufficient

time for the mediator to digest the information in order to assist the parties to resolve the outstanding issues which may or may not be apparent at first blush.

Mediation:

1. can be compulsory
2. can be mandatory (See the BC experience, especially the *Law and Equity Act*)
3. can be contractual
4. can be consensual. (ad hoc)

THE COURT'S VIEW OF MEDIATION

In July of 1996 the Right Honourable The Lord Woolf, Master of the Rolls published his final report on changes to the civil justice system in England and Wales. That report considered and recommended "a new landscape" in providing services to litigants, including not only the concept of proportionality but also a change in the existing paradigm in resolving disputes in a public forum. At page four for his Lordship's report, Lord Woolf states:

> **1. The new landscape will have the following features.**
> **Litigation will be avoided wherever possible.**
>
> **(a) people will be encourage to start court proceedings to resolve disputes only as a last resort, and after using other more appropriate means when these are available.**
>
> **(b) information on sources of alternative dispute resolution (ADR) will be provided at all civil courts.**
>
> **(e) before commencing litigation both parties will be able to make offers to settle the whole or part of the dispute supported by a special regime as to costs and higher rates of interest if not accepted.**
>
> (See CPR 1.1 – 1.4)

The rapid rise of mediation and its benefits have been commented on by the English Courts in *Dunnett vs. Railtrack* PLC [2002] EWCA (C.A.) Per Brooke L.J.:

> **Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are required beyond the power of lawyers and courts to achieve. This court has knowledge of cases where intense feelings have arisen, for instance in relation to clinical negligence claims. But when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live. A mediator may be able to provide solutions which are beyond the power of the court to provide. Occasions are known to the court in claims against the police, which can give rise to as much passion as a claim of this kind where a claimant's precious horses are killed on a railway line, by which an apology from a very senior police officer is all that the claimant is really seeking and the money side of the matter falls away.**
>
> **It is to be hoped that any publicity given to this part of the judgment of the court will draw attention of lawyers to their duties to further the overriding objective, in the way that is set out in Part 1 of the Rules and to the possibility that, if they turn down out of hand the chance of ADR, when suggested by the court, as happened on this occasion, they may have to face uncomfortable costs consequences.**

Lord Woolf, in his *Final Report on Access to Justice*, stated:

> **"(d) Two other significant aims of my recommendations need to be borne in mind: that of encouraging the resolution of disputes before they come to litigation, for example by greater use of pre-litigation disclosure and of ADR, and that of encouraging settlement, for example by introducing plaintiffs' offers to settle, and by disposing of issues so as to narrow the dispute. All these are intended to divert cases from the court system or to ensure that those cases which do go through the court system are disposed of as rapidly as possible. I share the view, expressed in the Commercial Court Practice Statement of Dec. 10, 1993, that although the primary role of the court is as a forum for deciding cases it is right that the court should encourage the parties to consider the use of ADR as a means to resolve their disputes. I believe that the same is true of helping the parties to settle a case."**

Compare the above quote to a comment written in *The Solicitor's Journal and Weekly Reporter*.

(September 6, 1919 at pg. 84) some 90 years ago:

> **A barrister is a fighter. Lawsuits are gladiatorial shows, like prize fights in the ring or the cock fights and bear-baiting sports of old. The barrister is felt to be a sort of pugilist and the sporting instinct makes him a favourite of the crowd. Again, the wig and gown lend glamour to the profession which the populace feel, just as they feel the charm of the Royal pageants and the Lord Mayors' Shows.**

The English courts have recognized the change in the landscape and have where applicable adopted the concept encouraged by Lord Woolf. One of the leading English decisions is *Halsey v. Milton Keynes General NHS Trust et al* [2004] EWCA Civ 576. The English Court of Appeal dealt with the issue of the imposition of costs as a sanction (not the ability of the courts to require parties to engage in the mediation process) against a successful litigant on the grounds that he refused to take part in Alternative Dispute Resolution. The Court sets out some of the factors which they take into consideration whether a party has acted unreasonably in refusing Alternative Dispute Resolution. Those factors include:

1. **the nature of the dispute;**
2. **the merits of the case;**
3. **whether other settlement methods have been attempted;**
4. **whether the costs of mediation would be disproportionately high;**
5. **delay;**
6. **whether the mediation had a reasonable prospect of success.**

Permit me to belabour the point further. A recent training course for the Hong Kong judiciary involved, among other matters, educating of the judiciary in applying ADR as a method of resolving disputes that would otherwise find they way through the normal trial process. The lengthy paper cited numerous decisions of the English courts encouraging mediation including dealing with the issue of costs as set out in the *Halsey*.

In May of 2008 Sir Anthony Clarke, Master of the Rolls delivered a paper on the future of civil mediation in England in Wales. His Lordship said at page 3 of his paper:

> 1. **Over and above education what can the judiciary do? What we certainly cannot do is sit back and do nothing. Those days are now long gone. Active case management and the overriding objective very properly put paid to the days of the passive judge. One thing we can do is to render mediation part of the normal pre-trial case management process. There is of course a potential problem here, of which you are all well aware. I refer to the Court of Appeal's decision in *Halsey*, although it is to my mind much maligned. Lord Justice Dyson, giving the judgment of the court, in that case held that compulsory ADR would breach the right to fair trial as it would amount to an unacceptable constraint on the right of access to the court. He concluded that while the court could and should encourage ADR robustly it could not compel the parties to engage in it.**

MEDIATION TIPS

Eileen Barker in her article on *Tips for Lawyers in preparing for Mediation* sets out in concise form a useful check list. I have reproduced most of her checklist.

1. Timing is Everything

- In general, mediate at the earliest possible time to avoid wasting time and money, provided that the parties are ready to settle the case.
- Ensure that you are sufficiently informed to evaluate the case for settlement.
- Ensure that the key players have been identified on each side.

2. Select the Right Process

- Do you want the mediator to provide an evaluation of each side's case?
- Is your client interested in restoring/repairing their relationship with the other side?
- Would face-to-face discussions be helpful?

3. Select the Right Mediator

- Is the mediator's style evaluative or facilitative, or both?
- Is the mediator comfortable with face-to-face discussions, if needed?
- Does the mediator have sufficient experience?

4. Prepare for Mediation

- Identify the factual, legal, and non-legal issues that must be resolved.
- Identify the individuals who must be present
- Set aside sufficient time for the mediation.
- Bring any key documents or data with you to the mediation and/or distribute in advance.
- Be prepared to resolve the dispute on the day of the mediation.

5. Prepare Your Client

- Explain the process, including the stages of mediation.
- Emphasize that the parties are the decision-makers.
- Prepare client to participate effectively during mediation.
- Realistically review the strengths, risks and costs of going forward.
- Determine a range of acceptable outcomes.

6. Prepare the Mediation Statement

- Summarize the procedural history and status of case.
- Identify key factual and legal issues.
- Describe any important non-legal issues.
- Provide pertinent pleadings and exhibits.
- Review history of any settlement negotiations.
- Include confidential letter to mediator, if appropriate.

7. Strategies for the Joint Session

- Remember that your opening remarks set the tone for the entire process.
- Address yourself to the decision-maker(s) on the other side.
- Avoid arguing with, attacking or alienating your adversary.
- Encourage your client to participate fully.
- Be willing to listen to and address the issues raised by the opposition.
- Look for areas of agreement or common ground.
- Don't be impatient to begin bargaining; allow the parties to "have their day in court."

8. Working with the Mediator

- Treat the mediator as a collaborator, not an adversary.
- Share risks and weaknesses, as well as strengths.
- Do not mislead the mediator about your position,
- Use the mediator as a sounding board to explore strategies and options.
- Be creative.

DOs AND DON'Ts

DON'T

1. Add fuel to the dispute. This includes encouraging the client to litigate by focusing only on the strengths of the case, denigrating the other side, over-identifying with the client and/or the conflict, failing to provide a balanced view, and failing to caution client as to the risks and costs of litigation.

2. Prevent your client from talking with the mediator and/or the other side.

3. Block or rush face-to-face discussion and/or emotional expression between the parties.

4. Use hardball negotiation tactics including taking extreme and rigid positions, imposing arbitrary preconditions to settlement negotiations, etc.

5. Focus excessively on future litigation such as discovery, motions, etc.

6. Attempt to manipulate or mislead the mediator as to your clients' true position and convictions.

DO

1. Encourage the parties to talk about what's most important to them, including how they feel about the situation and what they need. Let them say what's on their minds. Be patient.

2. Ask your client to see the other side and accept some responsibility for the problem.

3. Address your client's desire for revenge or retribution. Seek the mediator's help with this if necessary.

4. Make sure your client knows the weaknesses of their case and the risks of proceeding to trial.

5. Make sure your clients know how much it will cost them to proceed to trial.

6. Use the mediator as a collaborator. Enlist the mediator's help in achieving a settlement that will meet your client's real needs.

I concur with Allan Stitt's understanding of mediation when he says in his book, *Mediating Commercial Disputes:*

> **A decision to attend a mediation is not a decision to settle. It is a decision to explore the possibility of settlement and to see if there is a settlement that makes more sense for both disputants than continuing with the dispute. If there is not, the case should not settle.**

There are many books available to the practitioner and to their client on mediation and arbitration. My two favourites are:

1. Mediating Commercial Disputes, by Allan Stitt, Canada Law Book

2. Getting Past No, by William Ury;

Cobbled together by:
Kenneth J. Glasner, Q.C.
glasnerqc@telus.net
http://glasnerqc.tripod.com