What's it all about?

MUNICIPAL ADR – Part 2

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As noted in last month's article, mediation is a form of assisted negotiation. Seen from this perspective, you should approach mediation with the view that preparation is the key to a successful outcome – as it is in any negotiation. This article will discuss what is involved in preparing for and attending mediation in a municipal, or indeed any setting.

Once the decision has been made, in conjunction with the municipality's lawyers, to utilize mediation as the appropriate form of dispute resolution, or you are required to do so as part of a mandatory mediation program, your preparation begins. The first step is the selection of a mediator who has the right mix of acquired skills, training, education, experience and natural abilities to help resolve the specific dispute. Although extremely important, this step is often approached by disputants in a very casual fashion.

Choosing a Mediator

What are the qualities that make a good mediator? There is no simple answer to this question. Successful mediators come from many different backgrounds and have varied life experiences that make them effective conflict managers. Do you need a mediator who uses a facilitative or an evaluative approach? If you have a community dispute, should a transformative mediator be selected? Should the mediation be interest-based (problem solving), which is most common, or rights-based? These are important considerations in finding the right person for your case.

While competence depends partly on the type of the dispute and the parties' expectations, a competent mediator will probably have many of the following qualities:

- overall people skills;
- training in mediation;
- knowledge of the mediation process;
- good verbal (plain and neutral language) and listening skills;
- thinks "outside the box";
- helps people work together as a team;
- impartial and respects the parties;
- ability to gain the parties' confidence;
- balanced approach to control of the process;
- initiative and the confidence to use it;
- reflective;
- trustworthy and dependable;
- keeps information confidential; and
- calm under pressure.

Many mediators belong to organizations that have codes of conduct/ethics for their members and sometimes, specific rules for the conduct of mediation.[1] Although a debatable point, the most important skills for a mediator are impartiality, the ability to communicate, and the ability to define and clarify issues, while at the same time controlling the temptation to become involved in the substance of the dispute. At a minimum, you should look for these attributes in the mediator you select.

Preparing to Negotiate

Once you have – with your lawyer's help and the other party's consent – selected the mediator, then your own preparation begins. The choice of who will represent the municipality in the mediation process is of utmost importance and must be made with care. Since this person's role is much more central to the process than in litigation, he or she must be ready to play that role. The limits, if any, of the person's authority to settle must be clear and conveyed to both the mediator and the other party.

Just to be clear, a quick meeting with the municipal solicitor immediately before the scheduled mediation session is not sufficient, and will lead to frustration and missed opportunity. The question of whether the municipality is negotiating in good faith may also arise, which will poison future dealings and may make settlement less likely. A

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1 For example, the ADR Institute of Canada, Inc. and the Ontario Bar Association – ADR Section both have codes of conduct, as do court-connected mediation programs.

well-prepared participant will not need to be protected from themselves by the municipality's lawyer!

Here are some ways disputants can become more effective participants in mediation.

Know the facts – Know your municipality's case and why you are in the mediation process. This includes possible settlement options. Often, this basic step has not even taken place by the time the bediation begins.

BATNA, WATNA and RATS – Know your best alternative to a negotiated agreement (BATNA),[2] worst alternative to a negotiated agreement (WATNA), and realistic alternative to a settlement (RATS), so that you can decide what the parameters of a negotiated agreement should look like. You are not ready to mediate if you do not know your alternatives to a settlement at mediation. In most, if not all cases, the mediator will, at some time, likely ask what you really want or need to reach a resolution of the dispute. It goes without saying that your municipality's credibility will suffer if you do not have an answer.

Informed representation –The person chosen to represent the municipality must have a realistic view of its position so that he or she can evaluate the other party's position. In some cases, it may be better to end mediation and precede with litigation, rather than resolve with an unsatisfactory agreement; but, your representative will not know this if he or she is unaware of the alternatives.

Devise a strategy – Decide what you want to achieve by way of settlement and how you are going to do it. The potential success rate in mediation is obviously affected by the alternatives available to each side. In litigation, cost is a major factor for an individual, and a settlement is a way to end the litigation with a known cost and outcome.

Choose a starter – Decide on who will begin your case in the mediation – the municipality's representative or its lawyer. This will vary from case to case. The opening is valuable, so do not give in to the temptation to grandstand. Show that you understand the practice and dynamics of negotiation, and use every opportunity to promote resolution.

Mediation model awareness – Make sure that you are aware of the mediation process to be used. There are many different models used in the mediation, but all have from four to 12 distinct "stages" and usually include the following (although not necessarily in this exact order):

> ***Stage 1 – Introduction*** – The purpose of this stage is to set the tone for collaboration and negotiation.
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> ***Stage 2 – Issues*** – In this stage, the parties explore the reasons they came to mediation and what they hope to achieve.
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> ***Stage 3 – Interests*** – In this stage, the parties explore the interests (needs, desires, wants, hopes and fears) behind their positions leading to a broader set of objectives for use in seeking a satisfactory outcome.
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> ***Stage 4 – Option generating*** – In this stage, which often involves "brainstorming," the parties seek options that may satisfy the disputants' interests.
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> ***Stage 5 – Solutions or selecting an option*** – By looking at the options generated in the last stage, the parties can often come to creative and sustainable resolutions. It is very important that any agreements reached at this stage are clarified and summarized before being written out in clear language.[3]

Listening skills – Always keep in mind that a mediation session is not a trial, based on legal and factual positions. It is facilitated negotiation. Use active listening skills. If you ask questions, make them open-ended; it is not an examination for discovery or cross-examination. Pay attention to body language. Pick up on what others are saying and use that information to help you. Highlight the positive, but do not ignore the negative. Encourage direct communication with the other disputant.

Focus on interests – If possible, separate the people from the problem.[4] Be seen as a problem solver. Mediation is generally interest-based, so try to move from positions to interests and on to mutual interests.

Be firm – but not inflexible. You must reflect insight, determination, competence and readiness to go to trial, if necessary.

Don't play "hide and seek" – If both parties do, then each will be evaluating different cases. If parties are evaluating different cases, common sense tells us that dispute resolution will be more difficult, and any opportunity for transformative mediation will be lost, while interest-based mediation will be frustrated.

Focus your opening – While putting your own case forward, demonstrate that you recognize both sides will have to move if there is to be resolution. Do not threaten or bluster. Do not talk about money in your opening statement. Make sure your opening is to the other party, not the mediator. Your comments are for the benefit of the other party, not the mediator, since he or she has no decision-making power. Make your opening clear and focus on key issues.

Make a good first impression – Participants in mediation often miss this opportunity at the mediation, for fear of giving away too much information. In reality, you must show why the other side should give you money or whatever else you are looking for. If, on the other hand, you are defending a case,

2 Alternative dispute resolution has many acronyms. BATNA as a concept comes from Roger Fisher, William Ury and Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In*, 2nd ed. (New York: Penguin, 1991). WATNA seems to have arisen from practice, while RATS appears to have come form Australia. See Tania Sourdin, *Alternative Dispute Resolution*, (Sydney: Law Book Co, 2002) at p. 59.

3 See James Chicanot and Gordon Sloan, *The Practice of Mediation: Exploring Attitude, Process and Skills* (Victoria, B.C: ADR Education, 2003) at pp. 32-40 and Andrew J. Pirie, *Alternative Dispute Resolution: Skills, Science, and the Law* (Toronto: Irwin Law, 2000) at pp. 170-178 for overview of other models including the classic twelve-stage model of Christopher Moore.

4 *Getting to Yes*, supra.

you might propose creative settlement options still available for consideration at mediation that will not be realistically available at trial.

Trust the mediator – Work with the mediator and be as frank as possible in the circumstances. Make sure that there has been an agreement on whether caucus sessions are confidential before going there.

Prepare a summary – As part of your preparation, give the mediator a summary of the dispute or "mediation brief." While required in mandatory or court-annexed mediation, this is an area that is often treated in a perfunctory fashion. Work with counsel to make this as persuasive as possible without being argumentative, so that the mediator will read this and have a sense of what is involved in the case.

Role for Municipal Solicitor

Participants in mediation need, and should expect, that their lawyers will understand the dynamics of conflict and the dispute resolution process. With the rapid pace of change in the legal system and in substantive law, it is not surprising that many lawyers – even experienced litigation counsel – have not yet developed the same comfort with mediation as with litigation. Mediation is dynamic, and not the "soft" process some lawyers and participants believe it to be. Mediation requires, and indeed demands, that preparation by participants and their lawyers be focused and thorough.

Even with the increasing use of mediation as the most popular form of ADR process, and the development of court-connected mediation in Ontario, Saskatchewan and elsewhere in Canada, some lawyers see their role in mediation as quite limited. They basically explain the process to the client, may make the opening statement, provide legal advice, and then effectively withdraw from participation in the process, leaving their client somewhat lost. On the other extreme, some lawyers try to dominate the process and behave in an adversarial manner, as if they were at trial, which often prevents their client's participation in the process.

Municipal lawyers have a central role in, and responsibility for, making mediation work for you in a constructive, creative and productive way. In mediation, the lawyer is truly "counsel" to his or her client. He or she helps the client present their side of the dispute and their interests to the other party, in such a way that the mediator's presence should be almost redundant. The lawyer as problem solver has the ability to analyze situations by taking into account client or party interests, and the many factors and circumstances of the dispute. By translating client positions into interests, generating and assessing conventional and novel options to address the problem, counsel performs a valuable service to the client who is often unable to step back from the conflict to carry out this function. Perhaps most importantly, counsel can work to build consensus around an option that best addresses the goals and interests of a client or the involved participants.

Teamwork for Positive Outcomes

From the above discussion, we can see how proper preparation for mediation is a matter of teamwork between municipalities and their counsel. Participation in the actual mediation only carries this collaborate process forward. When properly prepared for the process, studies have demonstrated that even when mediation is not as quick or inexpensive as expected, disputants prefer the mediation option over litigation in over 80 percent of cases.[5] Participating in mediation is hard work, but can lead to creative, sustainable and often transformative outcomes in disputes for municipalities and other entities in conflict. *MW*

5 See the various reports on court-connected mediation in Ontario and Saskatchewan by Dr. Julie Macfarlane and other studies from the United States including Texas.