"Mediation and Other Stuff"

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Mediate.ca
Dispute Resolution Services

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Welcome to "Mediation and Other Stuff", my monthly newsletter about alternative dispute resolution from an Ontario perspective.

I am pleased to announce that I have been awarded the designation of Chartered Arbitrator (C.Arb.) by the ADR Institute of Canada, Inc.

If you have a topic that you would like covered, please contact me.

Colm Brannigan

Mediation Advocacy

Effective representation of your clients in mediation calls for advocacy skills of a different type than for trial. As a mediator in a significant number of litigated cases, I have noticed a few common mistakes made by lawyers of all levels of experience and competence.

The Unprepared Lawyer

The trial lawyers' mantra of "preparation, preparation" is as important in mediation as in any other hearing. Underestimating the amount of work in preparing for mediation is a mistake. Mediation is assisted negotiation and knowledge is power.

One of the keys to success in mediation is to help the mediator present your case to the other party. To do this, you should help the mediator by discussing the facts and your reasonable evaluation of trial outcomes.

Preparation will confirm if mediation is appropriate or if further discovery is needed to maximize the potential for resolution. Without preparation this important timing issue may be overlooked.

The Unprepared Client

Your client should have a general understanding of the mediation process and must also know his or her specific role in the process which is quite different than at examinations or trial.

Go over your evaluation of the case with your client before the actual mediation itself. It is quite embarrassing, and very upsetting to the client, to hear his or her lawyer and the mediator discuss these matters when the client had no idea that success in the case was not a sure thing!

Proper client preparation avoids the need for posturing in front of the client during a private caucus.

A similar but different problem relating to client preparation is in the area of expected legal fees and possible exposure to costs. The mediator will be asking about these issues, and it is most unfortunate if your client hears about them for the first time in mediation.

Not Making it Clear That You are Willing to go to Trial

Mediation is not about settlement at any cost. While both parties are generally better off settling then taking their chances at trial, the key to obtaining a reasonable settlement is to make clear that you will go to trial if you cannot achieve your BATNA (Best Alternative to a Negotiated Agreement).

It is not necessarily a failure on your part if you do not resolve the case.

While you should participate fully in a good faith effort to bring about a settlement with the mediator's help, but there are cases in which a trial is the appropriate dispute resolution process!

Wasting Your Opening Statement

Most mediators ask each party to make opening statements.

Do not use the opportunity to present aggressive or inflammatory statements of the case.

It is often best to say nothing or perhaps to state that while one's client feels strongly about the correctness of his or her position, the client is here to bargain in good faith, or words to that effect.

Your message is often more effective and clear when delivered through this means.

Leave it to the mediator, in private caucus, to discuss problems with the opponent about its case. But be prepared for similar treatment by the mediator during private caucus with your own client.

Mediating With Insufficient Authority

One of the biggest aggravations for everyone in mediation is to reach agreement, only to find out that the settlement needs to be approved by another person not present at the mediation.

Sometimes it is impossible to have the decision maker present, but this should be made known to the participants as early in the process as possible. If possible make arrangements to have the decision maker available by telephone.

If the mediator does not cover the topic in his or her opening, ask about any limitations on authority at the beginning of the session if not before!

Here is a book I recommend:

Cinnie Noble, L. Leslie Dizgun and D. Paul Emond, MEDIATION ADVOCACY: Effective Client Representation in Mediation Proceedings, Toronto, Emond Montgomery Publications, 1998.

If you would like more information on this topic, please contact me.

ADR Case of the month:

Fehr v. Kennedy 2010 WL 2802032

Fehr sued Kennedy in federal court for legal malpractice. Fehr claimed that Kennedy advised him to reject a settlement offer made at mediation and he received a less favourable result at trial.

The trial court found that state law precluded Fehr from introducing any confidential mediation communications into evidence, and that without the introduction of any mediation communications, Fehr could not raise a genuine issue of material fact for trial.

Fehr appealed to the United States Court of Appeals. The Court of Appeals held that confidential mediation communications are inadmissible under Oregon statute law which states:

Mediation communications and mediation agreements that are confidential . . . are not admissible as evidence in any subsequent adjudicatory proceeding, and may not be disclosed by the parties or the mediator in any subsequent adjudicatory proceeding.

The court held that this should be construed broadly, and that the "any subsequent adjudicatory proceeding" language in the law should apply in legal malpractice actions. The Court also noted that legal malpractice actions were notably absent from the two exceptions to the law already provided for.

Available at Westlaw or for free as a .PDF at:
Fehr v. Kennedy

What would have been the result if there had been no statutory provision? Is this a "fair" result? Should a lawyer be able to insulate him or herself from liability in these circumstances? In Ontario, without any statute covering mediation confidentiality, it might have been quite different or maybe not!

If you have any questions or comments, please contact me.

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