COOPER MEDIATION INC

Friction at Mediation

Jonathan T. Cooper - Cooper Mediation Inc.

At the risk of stating the obvious, the essence of a civil action arises from disagreement which produces friction. It would be fanciful to come to mediation without considering the presence of friction and putting that friction to productive use.

Friction is defined as the resistance that one surface or object encounters when moving over another. In the mediation context, friction is the intellectual, emotional or economic resistance generated from one or more aspects or features of the dispute or disagreement.

Friction can be very productive. A rough piece of wood exposed to a rough piece of sandpaper with the proper amount of friction produces a smooth surface.

Friction generates heat. A welder uses extreme heat to combine two pieces of metal into a strong union. Mediation has the ability to convert the heated temperature of the dispute into an enduring settlement agreement.

1. It is important for everyone to come to the same place at the same time.

We all have busy lives and busy professional practices. When the litigants, their counsel and the mediator all attend the same place at the same time to discuss the same matter, there is an actual or implied buy in that everyone is committed to try to resolve the matter.

Everyone has or should have delivered a mediation memorandum. This is both

practically important and symbolic - people have devoted time to put their best foot forward, to analyze the material and to set the table for what is to come. The mediator starts the process much like a conductor signals the start of the piece to the orchestra.

Those present at the mediation have agreed to devote a number of hours to discuss, analyze and negotiate a particular matter. For that time, the matter to be mediated has the spotlight.

The importance of everyone attending in person cannot be understated. Everyone travels out of their way and makes space in their calendar for this particular matter. I believe there is an implicit expectation by those participating in the mediation that the effort made leading to the mediation should be rewarded by a settlement. This may be an application of the physics principle, "for every action, there is an equal and opposite reaction".

By comparison, mediation by telephone provides too many opportunities to undermine the process. If the mediation participant is in their office, they may be working on other tasks while seemingly participating in the mediation. They may have stopped listening. More importantly, it is easy for them to stop trying. The mediation can be ended with the click of a button, allowing the attendee to resume the balance of their work activities. If the mediation participant is in their home, distractions are obvious.

It would be naïve for me to suggest that simply because everyone attends an in-person mediation, settlement can be achieved. There are many cases not capable of settlement at the time of the mediation [whether by reason of timing, quality, quantity of proof/evidence or for many other reasons]. However, the presence of all participants at

the mediation allows for a fulsome, informed and detailed discussion to occur.

2. What is the appropriate amount of dialogue/discussion across the table during the plenary session?

As an example, let's assume we are mediating a slip and fall that occurs in a national grocery store. The store has excellent documentary records regarding the training of their personnel, their inspection and maintenance efforts. The plaintiff is faced with the usual predicament - if the slipping hazard should've been obvious to the defendant, it could have or perhaps should have been obvious to the plaintiff and may constitute contributory negligence [assuming there is negligence on the grocery store]. Liability is clearly very much in dispute. The plaintiff has a real injury with objective verification [a mid shaft fracture of an arm or leg which has healed without complications]. The plaintiff has a remote pre-accident health history. There is a clear past loss of income for a finite period, some medical expenses and OHIP has a subrogated claim. The nature of the plaintiff's recovery and their work makes any claim for future loss of income or loss of competitive advantage to be unrealistic.

Inadequate Friction: One side, the other or both deliver opening remarks of no substantive value. This is a wasted opportunity. There are areas of obvious or potential agreement [the range for non-pecuniary general damages, the quantum of past loss of income or the special damages]. The opening remarks could set the table for this agreement to materialize. As or more importantly, there are areas of obvious disagreement. There should be some consideration, discussion and analysis of the applicable facts, evidence, law and the risks associated with the matter which will allow for discussions and negotiation to occur. If the opening remarks are designed to create

the illusion of a superficial peace, the underlying issues in dispute remain in place. I suggest that the solution starts with disposing those underlying issues to the bright lights of mediation. In almost everything in life, if you cannot identify or diagnose the problem or reason for disagreement, you cannot go about finding the cure or resolution.

Excessive Friction: Many examples come to mind. Some lawyers concentrate on presenting all evidence in microscopic detail, a tactic better suited for trial. Some overly emphasize an item to the point that it is counterproductive. As a mediator, I find it helpful when lawyers are able to steer the conversation in a direction that allows for discussion and fact finding which creates a productive session.

In the above example, this kind of behaviour typically leads to pushing the envelope or picking a fight. Pushing the envelope involves expanding the real areas of disagreement [liability, if any, on the grocery store and contributory negligence, if any, on the plaintiff]. Counsel for the plaintiff may try to compensate for liability risks by pushing future loss of income or loss of competitive advantage. Counsel for the defendant may try to compensate for the real exposure on what I would call the "hard damages" by raising the plaintiff's pre-accident health history which has little to do with the damages in dispute in the lawsuit. If the plaintiff broke his or her right leg and couldn't drive for 8 weeks and if they worked as a cab driver, does it really matter that they suffered from headaches 7 years before the slip and fall accident? Picking a fight involves opening remarks which, by their content, tone, method of presentation or demeanour, are designed to attempt to intimidate the other side. They are overly aggressive in the extreme.

Appropriate Friction: There is no one-size-fits-all solution. Returning to my example,

there should be an honest, full and frank discussion of the liability evidence and the law applicable to the liability issue. This is probably the pivotal issue in the case. If you want to set the stage for settlement, it would be wise to acknowledge your risks and consider some form of conciliatory statement or suggestion as to how you envisage the negotiation going forward with a view toward achieving a settlement.

3. Identify key areas of agreement and disagreement - offer a rational, informed basis to discuss the areas of disagreement

An opening statement is not a platform for you to demonstrate your speech-making powers. It is not a platform for you to demonstrate that you have read and reviewed every document and every opinion in the matter. Your listener has limited capacity. Tell them what matters most.

Some participants at mediation open by identifying points of agreement or likely agreement. Examples of this may be the determination of liability in a straightforward motor vehicle accident, quantification of economic losses for a T4 employee or non-contentious future care costs. This can be quite effective as it starts the building block process which may lead to a comprehensive settlement agreement.

Some participants at mediation will focus on the points of disagreement but, at the same time, propose a framework or discussion and potential resolution. For example, there may be an acknowledged need for attendant care but the number of hours or the rate of payment may be in dispute. If this can be quantified in the opening remarks, it has the potential to create meaningful goal posts, which can be utilized by the mediator as the negotiation proceeds.

I have rarely heard or seen anyone at mediation score any meaningful points by attempting to elevate the profile or credentials of their expert or to discredit the credentials or qualifications of the opposing expert. Similarly, it is no surprise that counsel for the plaintiff will find an expert to support their theory of chronic pain. It is also no surprise that counsel for the defendant will find an expert to refute the theory of chronic pain.

That said, there may be valid reasons to discuss competing opinions from experts. One example is where an expert appears to have overlooked or ignored relevant evidence. If the medical expert did not have a full and complete history, whether from the patient or from the relevant medical records, their opinion may be open for questioning. If the expert has been criticized or commended by a judge or arbitrator, this may be worthy of some discussion. If the expert has been disciplined by their governing body, this is definitely worthy of some discussion. If there is a dramatic difference in the practical and practising experience of the experts, this may be worth discussion.

4. But for rare occasions, do not try to persuade the listener that you are right and they are wrong.

The opening remarks made during the plenary session of the mediation do not occur in a vacuum. Defence counsel has likely met the plaintiff at an examination for discovery and conducted a rigorous examination of the plaintiff. Very few plaintiffs enjoy the examination process. Counsel for the plaintiff has likely had prior dealings with defence counsel and/or the insurance representative. Those may or may not have gone smoothly. The point I'm trying to make is there is the potential for cognitive bias and animosity based on past experiences. This can lead to a reactive devaluation of the

facts presented by the other party.

The lesson to be learned remains: do not try to persuade your listener but try to open the mind of the listener as to how you will go about persuading the trier of fact. If the listener believes that the trier of fact may be persuaded on a particular point, the listener will most likely be motivated to make appropriate compromises. Some will say to a listener, "what you need to understand is..." Think about this sentence from the listener's perspective. The person opposed to my interest is telling me what I need to do. Why would I ever listen to what that person has to say to me? Sadly, the message may be important and it may be very accurate but it is likely to fall on deaf ears. My suggestions in this regard are twofold. First, don't tell the listener but ask the listener. "I would like you to consider the following..." "I would like you to put yourself in the position of the judge or juror who will hear or see the following..." I believe the listener will be more inclined to listen to what you have to say if you ask them, rather than tell them, to consider your submissions. Secondly, by framing your comments in this fashion, it does not require you to persuade the listener. You are asking the listener to put him or herself in the position of the judge or jury and consider whether the judge or jury may be persuaded by your submissions. This also allows you to follow up the comment with an invitation to ask the listener to discuss this issue with their own lawyer, the mediator or both.

5. Caucus

Friction present and palpable during the plenary session does not evaporate in caucus. It transforms into a different or unusual dynamic. The mediator may be involved in continuing the process of "to'ing and fro'ing" [the example of a tug-of-war is apt]. The

mediator will recap or reformat some of the arguments and engage counsel and/or their client in a more detailed discussion. The mediator may be called upon by counsel in one room or the other to assist in managing the expectations of their own clients [which the lawyer may find to be unrealistic or challenging]. Rest assured that if you are feeling pushback or friction from the mediator in your room, the same is occurring, to an equal and opposite effect, in the other room.

If there is no friction in caucus, your mediator may be open to criticism as being nothing more than a carrier pigeon. Caucus is the laboratory from which settlement is created. Inconsistent and conflicting elements are mixed, boiled and cooled to produce a chemical reaction which produces a bonding process.

That said, excessive friction in caucus perpetuates the disagreement and dispute. There is a temptation to continue the disagreement from the plenary session into caucus. The disputants or their lawyers may feel that if there is a further detailed discussion of the evidence or the law, the mediator will be better informed and better able to go to the other caucus room and prevail upon the other side. Just as it is illusory to believe that one lawyer will persuade the other lawyer or the opposing disputant during the plenary session, it is equally false to believe that the mediator can somehow do what you could not do in the plenary session. If you have strong points to make or to reinforce which were not made in the plenary session, provide them to the mediator in a clear and concise fashion. Arm the mediator with the ammunition necessary to be deployed in the other room. Don't argue for the sake of argument or for the sake of appearances in front of your client. Indeed, if it is appropriate to concede a point, do so in caucus and allow the mediator to help you utilize that weakness or concession as part of the negotiation

process. Move away from the friction of disagreement and focus on the ways and means for potential agreement to be achieved.

6. Settlement of a Personal Injury Claim at Mediation

There is obvious friction at almost every stage of litigation and in relation to almost every aspect of the claim. Some believe that mediation will eliminate all of the friction and produces agreement between all parties. My experience leads me to a very different conclusion. While the disputants and their lawyers may not agree on anything in particular, settlement occurs in the majority of the cases because the disputants will move to the same place for different reasons. I have described a settlement agreement as similar to the surface of a deep, fast flowing river. Beneath the surface of the river, there is *violence* and *turbulence* representative of all of the points of disagreement in the lawsuit and all of the friction generated as a result. While the underlying points of disagreement remain, the surface of the river represents the settlement agreement and appears to be flat and calm.