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Stop Compromising at Mediation

By Vance Cooper - Cooper Mediation Inc.

I have been mulling over this paper in my mind for some time. One of my colleagues is very much opposed to the expression “compromise” as she believes it has negative connotations. This led me to go to the source of all wisdom, the Internet, to seek out the definition of “compromise”.

The Oxford Online Dictionary defines “compromise” as a noun as follows:

1. An agreement or settlement of a dispute that is reached by each side making concessions. *Eventually they reached a compromise*

1.1 An intermediate state between conflicting alternatives reached by mutual concession. *A compromise between the freedom of the individual and the need to ensure orderly government.*

2. The expedient acceptance of standards that are lower than is desirable. *Sexism should be tackled without compromise.*

Things get more challenging when one examines the definition of “compromise” as a verb.

1. Settle a dispute by mutual concession. *In the end we compromised and deferred the issue.*

2. Expediently accept standards that are lower than is desirable. *We were not prepared to compromise on safety.*

2.1 Weaken or harm by accepting standards that are lower than is desirable. *He won't accept any decisions which compromise his principles.*

3 Bring into disrepute or danger by indiscreet, foolish, or reckless behaviour. *Situations in which his troops could be compromised.*

3.1 Cause to become vulnerable or function less effectively. *Yo-yo dieting can compromise your immune system. Last month's leak of source code will not compromise your IT security*.

I propose that we consider substituting the phrase “thoughtful negotiations” for “compromise” as an attainable goal and a worthy objective at mediation. Thoughtful negotiations should lead the participants to a mediation to consider their words and actions, both before and at mediation, from a variety of perspectives and having regard for the impact and effect those words and actions will have on those involved at mediation. This should create the best opportunity to resolve the dispute at mediation. Failing that, it should identify the realistic barriers to resolution at mediation and identify options or solutions to tackle those barriers going forward. Thoughtful negotiations should minimize the risk of escalating or exacerbating the underlying dispute.

I will provide a couple of war stories demonstrating what I would describe as the antithesis of thoughtful negotiations and one example of what I would describe as a textbook approach to thoughtful negotiations.

Later in the paper, I provide what some may view as a recitation of the usual “do’s and don’ts” applicable to mediation. For those who react this way, I say to you that you are probably already conducting thoughtful negotiations, in whole or in part, and that my comments should be viewed as an affirmation of what you do well or a refresher course. For others, I say to you that this is a call to arms - you should approach each and every step in the mediation process in a thoughtful, considered and considerate fashion. The effort you put in should be returned with the result you take from the process.

War Stories

Many years ago, I was defending a claim for statutory accident benefits arising from a pedestrian - motor vehicle accident which occurred in Thunder Bay. The plaintiff had sustained very serious injuries. There was a companion tort claim which was being defended by local defence counsel in Thunder Bay. A global mediation involving both the accident benefits and tort claims was scheduled to take place in Thunder Bay. I received the plaintiff’s brief which enumerated all of the claims for benefits. All claims were calculated on a straight-line basis over the projected lifetime of the plaintiff. No effort whatsoever was made to perform any sort of present value calculation.

When I arrived at the mediation, I took local defence counsel aside, referenced the calculations and the plaintiff’s mediation memorandum and asked the question, “Are

counsel for the plaintiff stupid or do they think I'm stupid?" He responded candidly, "Probably a bit of both."

More recently, I was acting as mediator in a personal injury claim. The plaintiff, who was in her late 70s, suffered serious injuries. Her accident benefit insurer found her to be catastrophically impaired. She had suffered a number of orthopedic injuries, a mild head injury and emotional sequelae. Counsel for the plaintiff opted to put monetary demands in the brief and put forward a demand for nonpecuniary general damages which was twice the cap established by the Supreme Court of Canada in 1978. Counsel for the plaintiff said nothing about this demand in their opening remarks but defence counsel made reference to this issue in their opening remarks.

In my first private caucus meeting with the plaintiff and counsel, which followed a private meeting between the plaintiff and their lawyer, I was provided with a traditional "shopping list" of demands with reference to the various heads of damages. Despite the fact that defence counsel made it known to counsel for the plaintiff that they had not "fallen off the turnip truck", counsel for the plaintiff included a demand for nonpecuniary general damages exactly as set out in their brief i.e. twice the cap. I looked at counsel for the plaintiff, undoubtedly raised an eyebrow and asked if they knew something that had escaped defence counsel and me. Counsel for the plaintiff smiled and suggested that "this was a negotiation".

The point I am attempting to illustrate is that it is disingenuous to calculate damages in a fanciful manner. When counsel for the two plaintiffs in my examples moved from the numbers in their brief to other numbers, they were not negotiating in a thoughtful manner because the starting place for the negotiation was imaginary bordering on the absurd. It created ill will and bad feelings. Moreover, the initial phases of the negotiation were not actually negotiation as they purported to reduce their demands from numbers which were fictitious or illusory. Finally, counsel who behave in this manner undermine their own credibility as negotiators. Those responding to such demands are apt to devalue all of the demands [even though some may be evidence-based or closer to a realistic valuation].

There is an unintended consequence which I see frequently. Later in the negotiation, plaintiffs will invariably point out to me, as the mediator, that they moved hundreds of thousands of dollars from their starting place whereas the defendant has only moved in $10,000 increments. Even though I believe plaintiffs have been told by their lawyers to pay no particular attention to the opening demands during the early stages of mediation, there is potential for an expectation management problem to surface later in the negotiation.

Recently, I was mediating a personal injury claim involving a motorcyclist and two pickup trucks. The accident occurred on a two-lane rural road at an intersection which

was uncontrolled from the perspective of the motorcyclist and the pickup trucks. Very simply, the motorcyclist was following a pickup truck with both vehicles travelling in a northerly direction. The northbound pickup truck activated its turn signal with a view toward turning left and began to slow for the turn. Unbeknownst to the motorcyclist, there was a southbound pickup truck approaching the same intersection with a view toward turning left. The motorcyclist moved to the right with a view toward overtaking the pickup truck he had been following. The motorcyclist crashed into the rear passenger side wheel of the southbound pickup truck. The motorcyclist had no memory of the accident by reason of his injuries. The southbound pickup truck driver did not see the motorcyclist until it was too late. Reports have been obtained from accident reconstruction experts on both sides of the case and liability was heavily contested.

Counsel for the plaintiff motorcyclist made a bold move and acknowledged 50% responsibility on the part of his client in the initial demand. This concession came with a message - counsel for the plaintiff indicated that this was both his starting and concluding position on liability such that the defence should not expect any further concessions in this regard. This turned out to be accurate but deserves some further explanation and analysis.

Counsel for the plaintiff provided me with the same traditional “shopping list” of demands with reference to the various heads of damages. While the demands were certainly on the high side of reasonable, they were supported by evidence. Subsequent demands were presented as an all-inclusive figure, net of the 50% reduction by reason of the plaintiff motorcyclist’s contributory negligence. Counsel for the plaintiff did not enumerate or explain the basis for these demands. While it was arguable that counsel was only moving on damages [maintaining their position of 50% contributory negligence], it was also possible or plausible that some of the negotiation movement was attributable to a softening of their liability position.

In this example, counsel for the plaintiff acknowledged a very real and prominent issue in the case and, rather than starting with a fanciful or unrealistic position, moved immediately to a sensible and realistic position. Indeed, the plaintiff could well have been faced with an argument that 50% contributory negligence represented the plaintiff’s best case; however, the defence was so pleasantly surprised and disarmed by the apparent candour of the plaintiff’s starting position that they adopted the same approach in their responding offers. Thus, a hotly contested liability dispute was diffused by reason of a thoughtful approach taken by counsel for the plaintiff.

At the risk of alienating a portion of those who have read to this point in the paper, I will resort to a sports analogy. I am a diehard Blue Jays fan. I enjoy attending the games and I also enjoy watching the games on TV. When I watch games on TV, there is a computer animation feature known as Pitch Tracker which depicts the strike zone, the position of thrown balls as they cross the plate and whether the pitch was called as a

ball or strike by the umpire, swung at and missed or fouled off by the batter. The job performed by the umpire is an art and not a science. Frequently, there will be pitches which appear to be strikes but which are called as balls and vice versa. Similarly, batters will swing at pitches which are outside the technical parameters of the strike zone. However, even the worst MLB batters, struggling to reach the Mendoza Line, are unlikely to swing at a pitch which lands 10 feet in front of the plate or which sails 5 feet over their head.

This approach applies to thoughtful negotiations. I submit that all steps taken leading to and at mediation, including opening demands and opening offers, should have some realistic connection to the negotiation "strike zone". This will enhance your credibility as counsel generally and as a negotiator specifically and has the potential to engender similar behaviour by those with whom you are negotiating. If your efforts as a thoughtful negotiator are not reciprocated, then you should proceed cautiously throughout the balance of the negotiation. If the realistic upper end of the settlement value of the claim is $100,000, counsel for plaintiffs should consider starting at $200,000 rather than $400,000. Counsel for the defence should consider starting at $50,000 rather than $10,000. If your tempered demand or offer is not reciprocated, move in small increments to allow the other side to "get with the program". If they are not prepared to get there, then consider suspending negotiations.

Thoughtful Negotiation Primer

Thoughtful negotiations at mediation should lead each participant to the mediation to consider many factors. Some of these factors occur long before the mediation begins; others occur at and during the mediation proper.

1. In jurisdictions where mediation is mandatory, propose a mediator whose skill set, price and availability are commensurate with the matter to be mediated. If your client has no intentions of engaging in a thoughtful negotiation and views mediation as a rite of passage, then you should make this clear to other counsel and seek out a lower-priced mediator. On some occasions, mediation in these jurisdictions occurs two or more years before the anticipated trial date such that meaningful negotiations are premature.

This is not to say that a lower-priced mediator will not do their best to try to resolve the matter but, given the anticipated intransigence of one or more of the parties, it seems wasteful of time to wait for one year or more for a more popular mediator and it seems wasteful of resources to spend thousands of dollars on mediation that, barring miracles, is not anticipated to produce a settlement agreement. That said, there can be exceptions to this approach. I have been retained on matters where little to no money changes hands but where a deft touch is required to explain sensitive matters or positions.

2. In jurisdictions where mediation is optional, propose a mediator whose skill set, price and availability are commensurate with the matter to be mediated. My previous comments apply with necessary modification.

TAKE AWAY - The thoughtful negotiator proposes or retains a mediator appropriate to the unique aspects and circumstances of a particular matter. There is no "one-size-fits-all" mediator. Moreover, you may have a favourite mediator or a list of favourite mediators but that does not mean that one or all are suitable to the specific matter you are considering for mediation.

3. Plan for the mediation. Each participant should realistically consider the timeline for events, documents and reports of experts which need to be completed in advance of the mediation and to allow the other participants to the mediation to review and consider those events, documents and reports of experts. This is a classic example of time management and working backwards from due dates. The fact that I ask for mediation memoranda to be delivered two days in advance of the mediation is irrelevant if your mediation memorandum contains, for the first time, the report of an expert or documents or information not yet seen by other participants to the mediation. If you expect this information or documentation to have an impact on other participants to the mediation, you should know, by asking others involved in the mediation, or realistically estimate how much time it will take for this information or documentation to filter through a process and have a bearing on negotiations and the outcome at mediation.

TAKE AWAY - The thoughtful negotiator does not schedule mediation and then determine what needs to be done. The thoughtful negotiator determines what needs to be done on behalf of his or her client and ascertains what needs to be done by others involved in the matter. If this timeline is considered realistically, it will inform the thoughtful negotiator as to whether the mediation can be scheduled in the immediate future, subject to the availability of an appropriate mediator, or whether it should be scheduled further into the future.

4. Prepare for the mediation. Spend the time that is necessary with your client, before the day of the mediation, to explain the process, manage expectations and ascertain other interests which may be outside of the four corners of the litigation but germane to decision-making. If you represent an unsophisticated litigant, this process should be undertaken days or perhaps weeks in advance of the mediation. If you represent a sophisticated litigant, particularly an insurer or self-insured entity which may be called upon to fund a settlement, this process should be undertaken weeks or perhaps one or two months in advance of mediation so that appropriate settlement authority is in place.

TAKE AWAY – The thoughtful negotiator conducts expectation management early and often. I encourage those who act for the anticipated payor at mediation to inform others

involved in the mediation of the realistic timelines applicable to consideration of written materials and applicable to securing settlement authority at mediation.

5. Prepare a mediation memorandum which is user-friendly. As the mediator, I will read everything you put in front of me since it is my responsibility and I am paid to do so. I do not believe you can expect the same consideration from opposing counsel or from an opposing party.

That said, I shudder when I receive a mediation memorandum that goes on for 30 – 40 pages or more [one memorandum recently came in at 100 pages]. If you feel it necessary to summarize each and every document in your file, please do so in an appendix or tab to your mediation memorandum. Similarly, if you feel it necessary to summarize the evidence of each and every party who has given evidence on an examination for discovery, please do so in an appendix or tab to your mediation memorandum. The memorandum should be relatively brief, focused and thematic.

TAKE AWAY - The thoughtful negotiator prepares a mediation memorandum designed to explain and persuade. This is opportunity to carefully review all that matters and put your written advocacy skills to the test. If it is appropriate, this is the place for aggressive language.

6. To borrow from an old advertising campaign for Holiday Inn, "the best surprise is no surprise". **Mediation memoranda should not contain documents produced for the first time.** This applies to reports from experts, surveillance and the like. If the plaintiff has recently been granted CPP disability benefits, counsel for the plaintiff should disclose this fact. It is highly unlikely that defence counsel or the insurance representative will forget to ask this question if this information is germane to the assessment and resolution of the claim. Similarly but from an opposite perspective, if the defence has evidence which will seriously impact upon the evaluation of the plaintiff's claim [investigation and surveillance being an obvious example], produce the evidence in a timely fashion if it is the subject of an undertaking and, in any event, sufficiently far in advance of mediation so that counsel for the plaintiff can evaluate the evidence, manage their client's expectations and obtain informed instructions.

TAKE AWAY - The thoughtful negotiator delivers a mediation memorandum which provides as much of the evidence, documentation and information as is realistically necessary to allow the participants at mediation to realistically evaluate and negotiate the matter in question.

7. Opening comments in the plenary session should be user-friendly. One of my colleagues mediates primarily in the area of employment law. He is very much opposed to the opening or plenary session as he believes there is very little to no constructive commentary which occurs at this time. Sadly, this is true in my experience in an

appreciable percentage of my mediations. However, I believe opening comments are potentially very helpful and useful but frequently are misspent opportunities.

If you feel compelled to reiterate any portion of your own mediation memorandum, you should restrict yourself to making the three most important points and only do so to the extent that you believe, based on your review of the memoranda of the other participants to the mediation, that they have misunderstood your written submissions or misapprehended the evidence or the law or both. If none of those conditions exist, you are unlikely to persuade the other participants to the mediation to change their view by reason of your oral submissions which merely reiterate points you have made in your written mediation memorandum.

My preference would be for you to say very little about your own memorandum but address the points made in the memoranda of the other participants to the mediation. You could indicate those points with which you agree. You should indicate those points with which you disagree and explain why, on the facts, evidence or law, your view is likely to be preferred. You should indicate how the disagreement may be capable of resolution. I recommend that you limit your comments to the three most important things with which you agree and the three most important things with which you disagree.

TAKE AWAY - The thoughtful negotiator tells the listener what they are about to say. The thoughtful negotiator gives the listener a roadmap as to what is coming. Keep it short and keep it simple. Borrow from the Hippocratic Oath and “do no harm”. Better yet, adopt the advice of Thumper in Bambi, “If you can't say something nice, don't say nothing at all”. As an example, you might simply say that the matter to be mediated has been contested vigorously and there are numerous challenges facing the participants at mediation. Your commitment is that you and your client have carefully read the arguments made in the mediation memoranda, you and your client will listen carefully to any further arguments or comments to be made by counsel, the parties and the mediator and that you and your client will work hard to conduct thoughtful negotiations to determine if the matter can be resolved.

8. Opening remarks should be thoughtful both in terms of content and tone. If your client is expecting you to grandstand, please speak to your client in advance of the mediation and set them straight. There should be no place for blowhards at the mediation table. Your comments should be directed to the opposing decision-maker and be polite, respectful and understandable, having regard for what you know about the opposing decision-maker. If you have something to say to me, as the mediator, you should do so before the mediation begins or in caucus. There is really no point for submissions to the mediator as part of the opening or plenary session. If you have a technical point to make which is not already made in your mediation memorandum, make the point to other counsel involved or affected by the point.

TAKE AWAY - The thoughtful negotiator steers clear of aggressive language. This is the time and place for conciliatory language. That said, if you have a tough message to deliver, do so in a firm, fair and polite manner.

9. Opening demands and offers should be based on the facts, evidence and law. In a straightforward rear end motor vehicle accident, it borders on the absurd for defence counsel to contest liability. In a straightforward personal injury claim involving soft tissue / chronic pain where the plaintiff has returned to work, it borders on the absurd for counsel for the plaintiff to cite the highest award ever given for chronic pain. I rather doubt that the defence intends to negotiate to a point of capitulation any more than the plaintiff intends to do likewise but from an opposite perspective.

It is typical that the plaintiff commences the negotiation with an opening demand. That said, I have encouraged defence counsel to make the initial offer in certain cases. On some occasions, defence counsel have done such a good job of taking a hard-line stance in their memorandum to persuade counsel for the plaintiff that they are attending the mediation to settle the matter for a dismissal with costs. Counsel for the plaintiff are disinclined to make any sort of realistic offer as they believe the mediation is doomed from the outset. An opening defence offer can strike the right chord and encourage a realistic responding demand.

On other occasions, I have encouraged defence counsel to make the first offer to try to eliminate what I anticipate to be an unrealistic plaintiff demand. I believe this is an example of anchoring, which is the cognitive bias that influences us to give much greater weight to the first information received. In my experience, if the defence offer is viewed as low but realistic, the responding plaintiff demand is more likely to be high but realistic rather than “pie-in-the-sky.”

TAKE AWAY - The thoughtful negotiator constructs demands and offers, having regard for the realistic settlement strike zone applicable to the matter.

10. Negotiations should progress with a thoughtful pace or cadence. As a starting place, it should not take any meaningful time to construct or formulate your initial demand or offer. This could have and should have been done in advance of the mediation. It is hardly shocking that the plaintiff will be expected to make the first demand in most cases and that the defence will be expected to respond.

Some like to negotiate from their opening demand or offer, having regard for the magnitude of the dollar value movement or percentage of movement. Typically, this involves movements which are large, medium and small. Others may try to mimic the movement on the other side of the matter. There are no right and wrong negotiation patterns unless there has been an absence of thought devoted to the series of demands or offers which you present and the message which you are conveying through the

series of demands or offers. I believe that demands and offers may be the purest form of communication at mediation.

TAKE AWAY - The thoughtful negotiator attends mediation with a negotiation plan designed to project a negotiation target. Tactics without an overarching strategy is simply noise and distraction.

11. Negotiations should not continue indefinitely. Put your mind to what represents a realistic conclusion for the negotiation, having regard for the facts, evidence and law and having regard for your client's interests, be they solely within the litigation or outside the litigation. If you are sufficiently confident that the other participants to the mediation will not get to or near your realistic assessment, you should let the mediator know and, ultimately, let the other participants to the mediation know. Negotiations should not continue simply to reach an agreement if the agreement is not acceptable to your client. This should be trite and obvious but it is sometimes lost in the heat of seeking that agreement.

TAKE AWAY - The thoughtful negotiator has identified the negotiation target and "keeps their eye on the prize". To borrow from Kenny Rogers:

You got to know when to hold 'em, know when to fold 'em
Know when to walk away and know when to run
You never count your money when you're sittin' at the table
There'll be time enough for countin' when the dealing's done

12. A settlement agreement is, by definition, always acceptable to both sides. If it was not acceptable, there would be no agreement. A good settlement agreement is one that the participants may not like but can live with. If a participant is likely to have buyer's or seller's remorse on the day after the mediation, then it is wise to avoid entering into the agreement on the day of the mediation.

TAKE AWAY - The thoughtful negotiator should never pressure their client to settle a matter [even if the settlement is eminently reasonable]. There are ways and means to revisit negotiations after the mediation session ends. The thoughtful negotiator should ensure that their client has a full understanding of their choices and the costs and consequences of those choices.

13. Don't let the mediator off the hook if the matter does not resolve at mediation. Each participant at a mediation which does not result in a settlement should leave the mediation with a list of things to do - undertakings to answer, holes to plug, experts to retain, witnesses to locate and interview, etc. The mediator should be no different; he or

she should have a series of diary dates, whether supplied by counsel or created by the mediator, to follow up with counsel to facilitate ongoing settlement discussions.

TAKE AWAY - The thoughtful negotiator should view a mediation which ends without a settlement not as a failure but as part of the journey. If the desired destination is settlement, this destination cannot be reached at the time of the mediation. Steps taken before and at mediation, the dialogue, discussions and the offers exchanged at mediation should be carefully considered with a view toward continuing the journey and, ultimately, reaching the desired settlement destination at a later date.

Concluding Thoughts

To negotiate thoughtfully, you have to understand the arguments on the other side of the table. Know what the other side wants, know [to the extent you can] what they will agree to and, if possible, know these things better than they do.

A negotiation is not an event but part of a process. The party with the most and best information usually receives the better outcome. This means understanding the evidence, applicable precedents, prevailing trends and results in court and the negotiation tendencies on the part of others involved in the negotiation. You want to develop a thorough understanding of what the other side is looking for and thinking. This requires you to try to imagine what's involved in "walking a mile in their shoes".

Talk less and listen more. We all love the sound of our own voice. The best negotiators are almost always the best listeners. The best listeners listen interactively — clarifying and verifying, reflecting deeply on new information, forming thoughtful responses. Listen for content, tone and emphasis. Listen for what is said and for what is missing. My late grandfather said many wise things, two of which are particularly applicable to this point "You have two ears and one mouth; use them in those proportions" and "You can never listen yourself into trouble". To these words of wisdom, I would add, "You learn by listening, not by talking".

Negotiations in a personal injury or insurance claim are predominantly about money. Some would argue these negotiations are a zero-sum game in which each participant's gain or loss is exactly balanced by the losses or gains of the other participants. Is it possible to achieve a win-win result in a personal injury or insurance claim driven by dollars? I suggest this is challenging but possible.

If we return to my war story of thoughtful negotiations in the motorcycle / pickup truck collision, counsel for the plaintiff "gave" the defence what it wanted when 50% contributory negligence was immediately conceded. Counsel for the plaintiff appeased the defence interest and, at the same time, secured predictability in the balance of the negotiation as the plaintiff offers were predicated, actually or theoretically, on the same 50% reduction for contributory negligence. Perhaps fortuitously or perhaps by reason of

thoughtful negotiations, the plaintiff concession was reciprocated and productive negotiations ensued.

The thoughtful negotiator finds a solution that allows them to get what they want and satisfy the interests and needs of the other parties to the negotiation. The best way to achieve this result is to try to determine what the other party to the negotiation requires and, where possible, give it to them.

If you and your client put thought into all phases and stages of the negotiation process, I expect you will have a more fulfilling and, ultimately, more rewarding experience and outcome.

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