Don't Read This Paper [If You're Content with the Status Quo] - Re-Thinking Personal Injury and Insurance Mediation Processes

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I frequently encounter two problems at mediation: first, the content and style of opening remarks in the joint plenary session; second, positional and distributive bargaining process. These problems are the result of our longstanding traditions to mediate in the same way and our acceptance of the status quo. In this paper, I review these common mistakes and offer novel and constructive alternatives and solutions.

Before I ask you to join me on a trip down the rabbit hole, my solutions to these problems are predicated on an assumption that the parties and their lawyers are attending at mediation to make a serious attempt to resolve their dispute. The principles I discuss do not apply to mediations in which one side or both are looking to showcase their position, learn about their weaknesses or simply "kick the tires." Similarly, if the parties are attending the mediation to "tick a box," obtain a report from the mediator and set the action down for trial, what follows will not apply. If the parties and their lawyers are serious about attempting to resolve their matter, please read on.

A story, told to me as true, will illustrate this point. A fellow told me that he watched his wife prepare a brisket of beef before putting it into the oven. She carefully cut off slices at each end of the brisket of beef before putting it in the pan and into the oven. He asked her why she did

this and she told him that she did it this way because her mother always did it this way. The fellow approached his mother-in-law and asked her why she always cut off slices at each end of the brisket before putting it in the pan and into the oven. She told him that she did it this way because her mother always did it this way. He approached his wife's grandmother, who was alive and well, and asked her why she cut off slices at each end of the brisket before putting it in the oven. She explained, matter of factly, "otherwise, it wouldn't fit in the pan."

We have been mediating personal injury and insurance claims for almost 40 years in a very similar and traditional manner. There are alternatives that may offer the parties and counsel a better, less acrimonious and more productive and efficient path to resolution. Mediation of these claims is well established throughout the province and particularly so in Toronto, Windsor and Ottawa where mediation is mandated as a precondition to setting the action down for trial. I suspect we are all reluctant to try something new. This traditional approach may have outlived its utility.

Opening Remarks in the Plenary Session

I have been involved in personal injury and insurance mediations for almost 40 years. Until 2004, this was exclusively in the role of counsel, whether for a plaintiff or defendant, their insurance carrier, or a self-insured risk. Since then, I have spent most of my time at mediation at the head of the table as mediator [exclusively so since 2010]. Mediations have always started with a joint session. I have watched the evolution of opening remarks by counsel. Simply put, we have lost our way and lost an important opportunity for persuasion along the way.

Mediation memoranda have become increasingly lengthy. Counsel on all sides of the matter deliver comprehensive mediation memoranda which frequently review virtually all evidence that exists in the matter. Having written 20 or 30 pages (or sometimes as much as 50 pages), counsel feel the need to repeat the content of written briefs in opening remarks as part of the joint session. This is a missed opportunity.

If you are not going to give opposing counsel and the opposing party credit for reading your memorandum, why would you believe that they will listen to anything that you have to say? There is a natural predisposition on a party to disbelieve or reject anything opposing counsel says to them as they are viewed as the enemy. Logically, anything opposing counsel says must be good for them and bad for the recipient so the listener must reject it. This applies with equal force to anything that might be said by the plaintiff or by the defence or insurance representative.

One of my pet peeves is when counsel on one side of the case says to the client on the other side of the case, “what you need to know” or “what you need to understand.” Please stop and think about that expression for a moment. As a starting place, you are telling someone opposite in interest what to do. Why would anyone take instruction from someone opposite in interest? Moreover, why would they look to you, on the opposing side of the table, to gain knowledge or understanding of an issue in dispute. At minimum, the point should be made as a request; “what I would ask you to do is to consider the following…”

Frequently, opening remarks go on at great length and can be quite inflammatory. The plaintiff lawyer explains why they have mountains of evidence and why they will crush the defence like a bug. The defence lawyer explains why the plaintiff has no claim, no credibility, and no likeability such that the claim is almost worthless. These opening remarks can go on for upwards of an hour, particularly in multi-party cases. If I assume that people are attending mediation with a sincere desire to resolve the dispute, comments of this nature are completely antithetical to the objective. I suppose remarks of this nature are justified on the theory that litigation is not a tea party. I understand that, but I fail to see how or why anyone would want to start a process of seeking a mutually agreeable resolution by effectively adding gasoline to the fire. After this hour of inflammatory comments, I frequently spend the next 30 to 60 minutes talking people in from ledges and calming them down.

In my meetings with the parties and their lawyers in caucus, I work very hard to establish trust and build confidence. In the process, I gain insights as to the dynamics present in each room. I promise all who have read this far in this paper that I will deliver the important information and messages in the memorandum to the opposite party in an understandable format. There is an opportunity for dialogue and discussion in caucus which is not available to counsel making opening remarks. I encourage decision makers to engage in the process. I do my very best to explain the points they have made to the party opposite in interest in a digestible format.

If counsel would like their audience to listen, I suggest that they start with something with which their audience must agree. One of my favorite techniques is for counsel to identify three things for which there is agreement, three things for which there is disagreement and a methodology, pathway, or approach to address the points of disagreement.

I challenge all counsel to do the following with their opening remarks.

1. Counsel cannot repeat anything that is in their brief. They can provide new information that is not in the brief. They could also take information that is presented chronologically in the brief and make opening remarks based on themes of the matter. This should not give counsel license to repeat the content of their brief in a “shuffle and deal” format.

2. Counsel can and should respond to things written in the opposing brief or things said in opening remarks by opposing counsel. You should not repeat anything that is in your brief but you should respond to things said or written that matter. If opposing counsel comments on something peripheral to the resolution of the matter, leave it alone. You can make the point with me in caucus. To the extent that it has any material bearing on the discussions and negotiations, I will make the point on your behalf in the other room.

3. Counsel can and should make remarks that are conciliatory in nature. We are in the bridge-building business. Stop throwing bombs and extend olive branches

instead. Please offer thoughts or comments as a blueprint to help all those involved at mediation build the bridge of resolution.

Negotiations and Bargaining

The second problem arises from traditional opening demands and opening offers. There is a tendency on the part of most plaintiff lawyers to demand the moon and the stars. Sometimes there is evidence to support the demands; sometimes, there is not. To the extent there is evidence, it is typically predicated on assumptions which are very favourable to the plaintiff and improbable to ever be proven at trial. I have remarked to counsel for plaintiffs that even if defence counsel was to sleep through their alarm for the duration of the trial, it is still unlikely that any judge or jury would grant a judgment in the amount of this opening demand. There is a tendency on the part of most defence lawyers to respond to most opening demands with a defence offer that is equal and opposite in form and content. It is typically the “cold water” response. Once again, counsel for the defendant are unlikely to consider how their offer is received or considered in the opposing room.

The plaintiff lawyer, after hearing the defence offer, often immediately responds with something along the lines of how unreasonable the offer is and how the defence is clearly not interested in a reasonable resolution. The plaintiff lawyer forgets the magnitude of their opening demand and fails, refuses or is otherwise unable to appreciate that this is exactly how their first demand was received in the defence room. The plaintiff lawyer then makes a small move in the direction of settlement to test the waters and determine if the defence is really there to settle the case.

The defence lawyer and insurance representative, having now received two offers which are well outside of the realm of any realistic settlement, responds in kind for the second time.

After two rounds of insulting demands and insulting offers, once again consuming the better part of an hour or more, I spend the next 30 minutes or so talking people off of ledges, urging the parties not to give up and encouraging them to stay at mediation long enough to determine if settlement is possible. How does this make sense? How and why is this a good and productive use of our time together?

It's a mistake for counsel not to be sensitive to how settlement demands or offers are received or considered in the opposing room. The parties and their lawyers are involved in something like a partnered dance. Imagine what it would look like if you and your dance partner were listening to different music or one of you was listening to the music and the other wasn't listening at all. Your movement together would be uncoordinated and awkward. The same is true for an opening demand or an opening offer which are not mindful of how they will be received in the other room.

Breaking Free From the Status Quo? A New, Better Way to Mediate

For the last number of months, I have been doing something extraordinary as a mediator. I have been discouraging the parties from making offers at mediation. I am pleased to report that the parties who have accepted my recommendation have enjoyed nearly universal success in my initial trials.

My mediation agreement and my mediation opening both address the extreme confidentiality of caucus. For my approach to be successful, the parties must have faith and trust in my commitment to confidentiality. I explain in my opening remarks that in caucus, the parties will feel me push back on the assumptions and approaches taken by the parties and their counsel. This is not because I necessarily disagree but, rather, because it is part of the process. My job description requires me to challenge the thinking in each room. I promise each side that I will push in an equal and opposite direction in the other room.

In my first caucus visit to each of the rooms, I encourage the lawyer and the client to engage in a realistic discussion as to how they see the case, having regard for the current state of the evidence, anticipated future evidence and the skills and abilities of those on the other side of the case. I do not want the plaintiff's "bottom line" any more than I want the insurance representative's "final authority." I want to gain an understanding as to what a realistic settlement agreement looks like in each room and the reasons and rationale to support such a settlement agreement.

Typically, I start in the defence room(s) before visiting the plaintiff room. There is a rationale for this approach. Bear in mind that there is a fundamental difference between a defence offer and a plaintiff demand. A defence offer can be deposited into the bank and spent; a plaintiff demand, whether realistic or not, requires adjudication to prove to the other side that it is an appropriate basis for resolution.

After I have made one visit to each room, I normally need to make a second visit to each room to fine tune the analysis, views, and assessments in that room. At all times, I maintain complete confidentiality. The net result is that while the plaintiff's claim on paper has a value of 100X, the plaintiff lawyer's private and confidential view is that the case has a realistic settlement value in the range of 50-60X. The defence view on paper is that the case is virtually worthless and has a value of 0-10X. Not surprisingly, their private view is that a realistic settlement range is 40-50X.

If the parties and their lawyers are equally candid and forthcoming with me, the settlement agreement more or less reveals itself. If the gap in positions is modest, there are many things I can do. I can canvas the ways and means that the gap can be addressed. I can canvas the appetite on one side to move to the other side's position. This must be handled confidentially and delicately, but it certainly can be done. I can serve as a negotiation coach in either or both rooms.

The advantages to this approach are many. We avoid positional bargaining and distributive bargaining. We avoid the high - low auction. Real estate transactions serve as an apt example. If you are listing your house for sale and there are comparable homes which have recently sold in your neighborhood for $1 million, listing your home for $2.5 million may be aspirational but you are unlikely to get any serious offers. If you are out of touch with the value of your home, no serious buyer is inclined to look at your home or to make a serious offer. Conversely, when a buyer has walked through your $1,000,000 home during an open house and hires an agent to present an offer, you are unlikely to treat their offer of $250,000 as anything you would seriously entertain. In both cases, the listing price and the offering price are outside of the realm of reasonable.

My approach preserves bargaining positions should a settlement not materialize. The confidential views expressed by the participants to the mediator remain confidential. If one side or the other or both are not prepared to tell me on a confidential basis that they can enter the range of their negotiation partner, the mediation can be terminated or adjourned without engendering bad feelings.

Alternatively, the parties can resort to traditional bargaining to see if that can overcome the impasse. This will provide each side with an opportunity to test the other with a principled demand or offer which gives some insight into the thought process and analysis brought to bear.

How does the mediator create an environment that side steps or overcomes the traditional need for positional bargaining? At minimum, the parties and their lawyers must have sufficient trust and confidence in the mediator. This is not limited to the critical need for the mediator to maintain confidentiality. The parties and their counsel must have confidence that the mediator will not telegraph one negotiation partner's thoughts, views and analysis to the other. In addition, the mediator needs sufficient subject matter expertise to identify and call bluffing or posturing from either side. An extreme offer or demand tantamount to an invitation to capitulate is inimical to the process. Matters do not resolve because one side or the other gets

their way. Matters are resolved because each side recognizes their risks and takes a reasonable position in relation to those risks. While it probably helps to have a prior relationship with counsel and the insurance claims professional, I have utilized this approach with people I met for the first time at the mediation, the techniques were still effective and the results were the same.

Let me offer a few case studies to demonstrate this technique.

In one matter arising from a rear end motor vehicle accident with dash cam video which demonstrated the violence of the collision, there were senior lawyers on both sides of the case. The injured father and daughter had very significant and relevant pre-accident health histories. The plaintiff lawyer did his best in his mediation memorandum to demonstrate exposure at or above $2,000,000 which happened to be the defendant's insurance limit. The defence lawyer did his best in his mediation memorandum to demonstrate the challenges and obstacles each plaintiff would have presenting a claim for damages. Using my approach of strict confidentiality and discussion without presented offers per se, a settlement figure was reached with two visits to each room. The settlement was confirmed in less than three hours.

A subrogated property damage claim was recently mediated using this technique. The building in question, which was a multi-unit residential structure, required a fire suppression/sprinkler system. There were a host of liability issues arising from the fact that the owner of the building had effectively served as his own general contractor. There were professional liability claims against an architect, resolved before the mediation, and claims against a mechanical engineer and a municipality arising from building inspections. There were five parties in total. One was uninsured. I made two visits to each room and the settlement revealed itself in less than three hours.

The last case involved a violent head-on crash at highway speeds. A mother and her son and daughter sustained serious injuries. The mother's claim was conceded to be catastrophic, and

her accident benefit insurer was present at the mediation. The son had a non-catastrophic accident benefit claim arising from the subject accident and had been involved in a subsequent accident. All of these claims were mediated globally, and the settlement terms revealed themselves after about two hours at mediation (though it did take another 60-90 minutes to "paper" the settlement terms).

The point of these case studies is not to brag about my skills or acumen. Rather, it demonstrates that if the parties and their lawyers can negotiate confidently in the realm of a potential resolution, the terms of a settlement agreement will often reveal themselves. Frequently, I am asked to "work your magic." I do not perform magic tricks. Cases are settled because settlement demands and settlement offers are sufficiently close that the mediator can finesse the relatively small monetary gap or one side or the other can live with the amount being demanded or the amount being offered. The challenge I have experienced for many years is getting one side of the other to move into that realistic realm of what is probable rather than negotiating in the arena of what may be possible.

The Parties Must Attend Mediation With a Realistic Assessment of Their Case

My approach requires the people involved in the mediation to have the skills, abilities, and confidence to realistically evaluate the matter in dispute. For those representing plaintiffs, it requires an ability to realistically evaluate the settlement value of a claim at the time of the mediation, having regard for the state of the evidence, anticipated future evidence and the capabilities and tendencies of the people with whom you are bargaining. It also requires the ability to manage the expectations of their client. If the client needs "the process," which is frequently akin to bargaining over the price of fish at a market, this approach is probably not appropriate. If the plaintiff and/or plaintiff lawyer are fishing for the best defence offer, without regard for the intrinsic value of the claim, this approach is probably not appropriate. Conversely, if the insurance claims professional and defence counsel (or the authority granting body) have materially different views on the value of the claim, this approach may not be appropriate.

That said, the confidential nature of this process can allow the parties and their lawyers to “dip their toes in the water” and gauge the temperature of the water and appetite for settlement without potentially offending their negotiation dance partner.

Plan B – Escape Hatch – Pull the Chute

Let’s assume that I have made at least two visits to each room. Let’s assume that each of the participants at mediation has shared their realistic views with me with an equal level of candour. I have determined that the target figure shared by the plaintiff room will not work in the defence room(s) and that the target figure shared by the defence will not work in the plaintiff room. This process should take no more than 60-90 minutes after opening remarks have concluded. What next?

The parties are still free to negotiate in a traditional manner. Indeed, there is an enhanced opportunity to conduct negotiations as the mediator, while still protecting the confidentiality of discussions in caucus, can become a negotiation coach and encourage each side to present thoughtful, reasoned and substantiated demands and offers. There is no need for the participants to start at extreme positions. If the plaintiff target was 50-60X, the mediator can coach the plaintiff and their lawyer to present an offer in the 65-75X range. The mediator will have a better sense as to what may be well received in the other room. Similarly, if the defence target was 40-50X, the mediator can coach the defence to present an offer in the 25-35x range. The goal posts for settlement have been established without going through multiple rounds of insulting offers.

It is entirely possible that one side or the other or both have not been fully candid with the mediator. This exchange of offers could resuscitate settlement discussions and move one side or the other or both past what they told the mediator was their target during the earlier phase of the mediation. Since this information was shared only with the mediator in complete

confidence, neither side is painted into a corner. If the plaintiff wants to resolve the matter for less than the target of 50-60X, they are free to do so and there is no loss of face. The same is true if the defence wants to pay more than the target of 40-50X.

The offers which have been presented leave room for further negotiations, whether at mediation or as the litigation proceeds forward. Each side leaves with an understanding of what the other is seeking. Moreover, each side leaves with an understanding that their private and confidential end of day expectations do not align with the private and confidential end of day expectations of the other side.

Concluding Thoughts

If mediation is going to be a serious attempt to resolve a dispute, the steps taken in advance of and at mediation should be designed to dovetail with that objective. The approaches and thoughts which I have offered here are designed to put the parties and their lawyers in the best position to probe settlement prospects both confidently and confidentially. As a senior plaintiff lawyer said to me recently, “It is unsettling (pun intended) to share my private views on a realistic end of day outcome with the mediator before 12 noon.” Nevertheless, when the matter was resolved shortly thereafter, despite issues in relation to contributory negligence, a further issue in relation to the application of very substantial collateral benefit offsets and a very significant liability dispute amongst three defence participants, that lawyer became a convert.

To borrow from Winston Churchill, “Those who fail to learn from history are doomed to repeat it.” We are not limited by our prior experiences and approaches. We have an opportunity to craft a more productive, efficient and less acrimonious way to conduct mediations. Let's seize the opportunity and make the most of it.

ABOUT THE AUTHOR

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To schedule a mediation with Vance, visit: https://coopermediation.ca/vances-online-calendar/.