

The Mediation Introduction – Off to a Good Start, Onto a Good Settlement

Although the mediation introduction only represents a small fraction of the conversation that occurs between the mediator and the parties, it is arguably the piece that carries the most weight on the success of the mediation.

By: Rachel Frydman, BHSc, Q.Med

YorkStreet Dispute Resolution's Peter Braund and Fred Sampliner, both mediators, shared personal anecdotes as well as best practices for conducting an effective mediation introduction.

The first step in mediation actually occurs before the meeting of the parties. Reviewing materials is a vital activity that allows the mediator to achieve better foresight into the mediation issues and the dynamics of both the counsel and the parties involved. Even the few minutes prior to the mediation are critical, according to Peter. Personally, he enjoys arriving early and taking some time to himself on the day of the mediation. He also urges the mediator to strike casual conversation with the parties as a way to both "set the tone" as well as learn tidbits about the parties that may end up helping move the session forward. Peter and Fred agree upon three essential ingredients that must be gained by the mediator during this short window of time: trust, credibility, and empathy. Without these, it is extremely difficult to convince the parties that settlement based on compromise is in their best interest at that moment in time. Peter recounted a story of mediating a claim that he knew was fraudulent. Empathy is not the natural feeling that would be evoked in this situation, however it is a mediator's "job not to judge, it is (their) job to be empathetic..." perceived empathy for' is a phrase that gives meaning to that."



Peter R. Braund, B.A. (Hons.), LL.B., LL.M.

Peter Braund is a mediator, arbitrator, appraiser and neutral evaluator with YorkStreet Dispute Resolution Group Inc. Peter was called to the Ontario Bar in 1971 and obtained his LL.M. from York University / Osgoode Hall Law School in 1977. Peter attended the Advocates' Society Harvard Mediation Course in 1997, and completed the University of Windsor ADR and Advanced ADR Mediation Courses with Stitt Feld Handy in Toronto in April and July of 2010. Peter has practiced Civil Litigation at Borden Ladner Gervais LLP for over forty-one years.

One of the best weapons that a mediator has to use with the parties in order to help a settlement be reached is the truth about the legal system. This includes discussion of the negative aspects of trial as well as the positive aspects of resolution at that point in time. Fred always approaches his clients by having them realize that they have the "proper information to analyze things, proper people here, and we've got the time, we've got all day, we won't have this opportunity again..."

The next step in the mediation introduction is the establishment of ground rules. While Peter admits that he may be one of few,



Fred Sampliner, B.S. (fin), J.D.

Fred Sampliner is a lawyer who served 20 years as an arbitrator at the Financial Services Commission of Ontario (formerly the Ontario Insurance Commission). He is well-known for his ability to direct parties towards an amicable resolution of personal injury claims. Fred's extensive knowledge of the various Accident Benefits Schedules, the Insurance Act and tort law have assisted parties settle thousands of complex cases. He has issued over 200 reasoned decisions on insurance claims, trained the Commission's arbitration and mediation staff and has spoken at many practice seminars.

he values the use of a flip chart to provide a common focal point to share the following 7 C's: confidentiality, civility, convincing, caucusing, clients come first, compromise, and concluding settlement. This provides order and structure at the outset of the mediation. Also on the flip chart, the main issues to be discussed should be outlined. Peter finds that this keeps the clients focused and engaged. In reference to confidentiality, Fred adds another 'C' to the conversation: control. He explains to his clients that the spirit of mediation is not to win the case, but to have the most control over its outcome, and this usually requires compromise.

It is never too early in a mediation to anticipate the hurdles that will ultimately cause its demise. A common potential “ticking time bomb” that can occur in mediation is when a party admits to not having the authority to settle the

strategies such as taking breaks or grabbing a refreshment. People tend to be much more willing to continue the process once they are comfortable. Another tip to generating successful mediations is to structure the order of issues

als involved in the mediation to ensure their understanding of the process. If there are questions at any point in the mediation, Fred asks his clients to write them down rather than interrupt. This way, the mediation can continue in a respectful manner where all parties have the opportunity to both speak and be heard.

Fred likes to do “spot checks” on the individuals involved in the mediation to ensure their understanding of the process.

logically. Peter and Fred suggest beginning with non-contentious issues and then moving towards contentious ones. In cases of insurance mediation, liability issues are often dealt with before issues of damages.

Peter and Fred spoke to the social and emotional aspects of mediation, even in the cases of corporate and insurance settlements. This was reiterated when a question was asked towards the end of the session about mediating through the phone. The general feeling around this is that it is much preferable to be able to interact with clients face-to-face in order to be able to achieve all that the mediation introduction, and subsequent negotiations, set out to accomplish. 🌱

case under any other conditions than what was discussed with the proper authority. It is therefore important to ensure that all parties present do have the authority to negotiate beyond boundaries that were provided by higher authorities. Other time bombs can be diffused by seemingly simple

The mediation introduction can often be an overwhelming experience for the clients and counsel. This is made apparent by the looks on people’s faces, their overall engagement levels, and their use of eye contact. The mediator should be cognizant of these reactions, and react appropriately. Fred likes to do “spot checks” on the individu-



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