Effective Mediation Through Shuttle Communication of Potentially Viable Proposals:

After a Long Journey, Still Just a Beginner

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Court of Queen's Bench of Alberta

with the assistance of
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My assignment:

"The mediator as a negotiator: how and when to use individual sessions to improve the process of mediation"

However, I need to step back 20 years…

Introduction

- this is just a beginning of my description of judicial mediation, as I conduct it
- I will describe how—after a long journey of over 20 years of doing 150+ judicial mediations—I have learned what I consider to be the most effective way of doing them

Introduction

- Judicial Dispute Resolutions (JDR) are either:
  1. facilitative; or
  2. evaluative (providing risk analysis of strengths/weaknesses, reality checks, opinion on appropriate ranges of reasonableness in relation to the parties' positions); or
  3. some variations: mini-trials; early neutral evaluation; binding mediations (med/arb, or binding JDR)
- **whichever form I use, the process is equally adaptable to non-judicial mediation**

Introduction

- experience (since 1996), significant judicial education on mediation, and formal research on judicial mediation (2008–2010)
- LL.M. in Dispute Resolution (Univ. of Alberta, 2010)
  - Evaluation Report of the Court of Queen's Bench of Alberta's JDR Process (product of empirical and legal/ethical research on judicial mediation)
  - converted into an LL.M. Thesis

Introduction

- my research is a background to my experience and as an aid to what I present here
- my LL.M. Thesis demonstrates that mediation, at least in our Court, is not an alternative to litigation, but a real part of the litigation "multi-door" resolution process

Introduction

- for this current presentation, I have relied extensively on two legal research articles:

  1. Nancy A Welsh, "Making Deals in Court-Connected Mediation: What's Justice Got to Do With It" (2001) 79 Wash ULQ 787

  2. Barry Anderson, Les Swanson & Sam Imperati, "Veils and Cloaks of Ignorance: Under-used Tools for Conflict Resolution" (2014–15) 30 Ohio St J Disp Resol 45

Welsh

- Prof. Welsh argues: insuring that mediation comes within a procedural justice paradigm serves some of the courts' most important goals—delivering justice, delivering resolution, and fostering respect for the important institution of the judiciary

Anderson *et al.*

- John Rawls introduced the notion of a "veil of ignorance" as a conceptual device for promoting just choices, and Anderson *et al.* picked up the concept as a tool for mediations
- potentially biasing information can be excluded from consideration by means of thin veils, thick veils, or cloaks

Anderson *et al.*

- a **thin veil** consists of instructions to disregard information that is known and already in consciousness (e.g. telling a jury to disregard what they heard)
- a **thick veil** makes it difficult for information that is known but not in consciousness to be brought to consciousness (e.g. telling a jury to use information only for one purpose and not another)
- a **cloak** withholds information that is not yet known (e.g. after a *voir dire*, the trial justice finds the evidence inadmissible)

Anderson *et al.*

- opportunities to apply forms of cloaks and veils of ignorance arise in fact conflicts, value conflicts, and interest conflicts, and can be applied to mediation
- veils can be very effective to encourage the parties to a conflict to think more fairly and thus to move more rapidly toward a satisfactory solution

Anderson *et al.*

- how does this research figure into this presentation?
- their concepts are not easily understood
- their methods and application are not easily followed to be put into practice in a mediation
- yet, many of the principles Anderson *et al.* address appear regularly (but disguised) in my own judicial mediations

Anderson *et al.*

- the articulation of what Anderson *et al.* say in relation to how I conduct judicial mediations will require more analysis than possible in the time before release, and length of, my paper
- I will touch on some of the points Anderson *et al.* make in the context of how I conduct judicial mediations

Judicial Mediation

- the process of mediation has many aspects, on which much has been written
  - focus has mostly been on legal theory or legal ethics
  - not much focus on the practical sense of helping parties resolve disputes
- through mediation, the parties have ultimate control of whether or not to settle and, with a wise judicial mediator, some control of the process, unlike any other judicial proceeding

Judicial Mediation

- I will concentrate on the merits of the theory, while keeping an eye on the ethics
- in the theoretical mediation literature, there is much focus on the procedural justice paradigm
- procedural justice, in turn, often focuses on procedures that allow litigants to tell their relevant story, for the other side to hear these stories, and for the mediator to treat them as being recognized and important, while being impartial and even-handed
- both telling and hearing allow the parties to move from often entrenched positions to a mutual resolution, with the judicial mediator being perceptive of the parties and responsive to new proposals

Judicial Mediation

- judicial mediation is regulated by the *Rules of Court*:
  - **4.17:** a party-initiated framework
  - **4.18:** requires consent to the process and agreement on:
    - the nature of, subject matters in, and the manner of the process;
    - scheduling, logistical, and documentation exchange details;
    - the role of the justice who may be requested as the judicial mediator by the parties; and
    - who may participate

Judicial Mediation

- **4.19:** the only documents coming out of a JDR are a settlement agreement, consent order, or judgment
- **4.20:** confidentiality and use of information
- **4.21:** the judicial mediator:
  - must not hear or decide any subsequent application;
  - must treat the process as confidential;
  - is not competent or compellable to give evidence

Commencement and Pre-Mediation Conference

- review the most recently available pleadings
- hold a pre-mediation conference (pre-JDR):
  - set procedures
  - understand what are the "real" issues
  - determine which type of mediation the parties want—simply facilitative, or more evaluative, or some other variety
  - note Rule 4.17: it is a "party initiated" process

Commencement and Pre-Mediation Conference

- determine if there are any "nuances" (i.e., personality clashes, or "bad blood" requiring a "code of conduct" to be established)
- adopt a specific tone in mediation (e.g. sometimes, what I call the "shock and awe" persona, to provide a reality check on risks of adjudication)
- cultural issues, underlying trust issues and/or lack of sincerity
- other "elephants in the room"
- who else needs to be (or wishes to be) at the JDR? (e.g. spouses, support people, security, experts)

Commencement and Pre-Mediation Conference

- get into the issues, positions, and interests of the parties—although, sometimes, the positions and interests are the same—$ (thus, it is a distributive paradigm)
- many causes of action may have other implications that create true interests and potential longer term relationships that allow the mediator to mine for resolution
- often, emotions, feelings, and even apologies are important

Commencement and Pre-Mediation Conference

Welsh:

> *"Procedural justice research indicates clearly that disputants want and need the opportunity to tell their story and control the telling of that story; disputants want and need to feel that the mediator has considered their story and is trying to be fair; and disputants want and need to feel that they have been treated with dignity and respect."*

Commencement and Pre-Mediation Conference

- I formally write to counsel, commenting on any outcomes of the pre-JDR, and requesting that they provide me with a relatively short brief

Scott Schedule

- a Scott Schedule is very useful
- its purpose is to chart the matters in issue and to compare the "positions" of the parties with respect to those issues—they may be merely $ amounts or, in some cases they may be more detailed positions (e.g. parenting positions)
- I put all the parties' positions on one comparative page
- some examples attached to my paper as Appendices A–E

Scott Schedule

- later, I will use the same document, as revised and updated during the course of the mediation, to form the memorandum of agreement between the parties if a full and complete (or even partial) settlement is reached

Final Preparation

- a few days in advance of the mediation, my final and detailed preparation is done a day or two before the mediation, so that I can concentrate on it

Joint Session
Opening of the Mediation

- parties and counsel need to be agreed as to what the process is for the mediation
- there can be no misunderstanding of how the mediation is going to proceed
- parties/decision-makers **must** be present at the mediation
- often, there is a need for experts

Joint Session
Opening of the Mediation

- knowledge of the parties and the mediator
  - alternatives to settlement: parties need to know the alternatives (and limits) to settlement—per Fisher and Ury, the BATNA and WATNA, namely, what are the place, purpose, and the limits, of mediation within the civil litigation process

Joint Session
Opening of the Mediation

- facts, values, and interests: parties need to appreciate the difference in facts and values that affect their dispute
- Anderson *et al.*: as to separating facts from values, the parties themselves may be able to determine the facts, but will likely need legal experts to help them with the values, before the two can be combined to achieve a settlement

Joint Session
Opening of the Mediation

- Anderson *et al.* on fact, value, and interest conflicts:
  - "a fact conflict, is one in which there is disagreement about the consequences of alternate facts; in a value conflict, the parties disagree about what is important; and in an interest conflict, the parties disagree about distribution of the consequences"
  - in "fact conflicts", there are at least three kinds of opportunities to apply cloaks and veils of ignorance: (1) third party involvement, (2) await data, and (3) apply judgment

Joint Session
Opening of the Mediation

- In "value conflicts", there are at least two kinds of opportunities to apply cloaks and veils: (1) make value judgments without knowing the facts (e.g. agree to the least cost alternative); and (2) apply "value asymmetry" to make tradeoff judgments, trying to create a win-win alternative (e.g., two girls fighting over an orange)

Joint Session
Opening of the Mediation

- in “interest conflicts”, there are at least two opportunities to use cloaks and veils: (1) a fairness model (“one cuts, and the other chooses”); and (2) the final offer resolution

Joint Session
Opening of the Mediation

- **the "warm up"**
  - trust is key: the mediator must learn to see the situation as each disputant perceives it, with compassion and respect that lead to resolution

Joint Session
Opening of the Mediation

- the mediator must:
  - engage in active listening;
  - seek clarification and understanding;
  - recognize, reflect, and acknowledge the hut feelings and emotions of the parties;
  - probe for underlying issues;
  - translate positions into interests and needs (and implore the parties to continue to contemplate and identify them);
  - find/explore options;
  - do reality checks on the viability of alternatives;
  - and move to new paradigms that evolve in the process—all to solve the problems in the dispute (Welsh)

Joint Session
Opening of the Mediation

- I spend some early time in the mediation trying to get to know better, and communicate with, the individual parties, some details of which may be provided in the pre-JDR
- talk about the process, confirm procedural and conduct agreements

Joint Session
Opening of the Mediation

- have the parties focus on what, in addition to their positions, are their true interests, beyond the determination of the $ amount of the claims and how the $ can be distributed
- analogies: Israel and Egypt dispute; putting one party in the "shoes" of the other—promotes creative trade-offs and settlements

Joint Session
Opening of the Mediation

- examples of interests and each party's analysis of his and the other's interests, with the ability to share or divide responsibilities
  - one parent is very keen to carry on the principle parenting role but the other parent is more concerned about "access" time—alternatively, separate roles and responsibilities by parenting activity
    - focus on what are the real interests, to see if both parties can be accommodated
    - win–win can be achieved by being creative and "thinking outside the box" (e.g. special one child–one parent visits)

Joint Session
Opening of the Mediation

- employment dismissal: meaning job reference
- estate dispute: family cottage versus the $
- often, more intangible result (e.g. an apology) may be sufficient, or, alternatively, some recognition that some state of affairs was in existence

Joint Session
Opening of the Mediation

- risk assessment: emphasis on the risks of litigation is very, very important in the opening
- before any caucusing, both sides should present their best cases, getting as many issues on the table as possible—it can represent the adversarial nature of the dispute that they are likely to face if they do not settle, allowing them to hear and understand the other's perspective, and thus emphasizes the risks each party faces
- "reality testing" of litigation risks—often referred to as "bargaining in the shadow of the law"
- the decision-maker may not have all of the options that are open to the parties to be creative during a mediation

Joint Session
Opening of the Mediation

- presumption: damages before liability

Joint Session
Parties' Opening Positions

- Opening Positions
  - once the parties have "warmed up", I like them each to provide his/her opening statements
  - in these opening statements, each party needs to demonstrate the forcefulness of their arguments and see how forcefully the other side will be if the matter goes to trial—this will give them a better appreciation of the potential risks
  - I invite the parties to give some consideration to what they "really need" to settle the case to move on with life

Joint Session "Caucusing Lite"

- make a **real** opening new offer for compromise to the other side
- few minutes to caucus to call upon me for any risk analysis or "evaluative views"
- again, focus on the "risks" in the early stages
- it is only at the end of what would be an otherwise unsettled mediation that the evaluative mediator should give harder opinions for the parties on the liability merits and value of damages

Joint Session
"Caucusing Lite"

- focus is on what the parties are prepared to do for the purposes of settling **today**
- if the parties do not show some significant movement, it may be a short mediation
- begin the shuttle communication phase

Real Caucusing / Shuttle Diplomacy

- having negotiations in joint session, or with private caucuses and then the parties and/or their counsel coming back and declaring positions is often not too helpful
- often, the emotions of the parties reach their maximum in the cut and thrust of proposals and the views of the other as to the veracity of the other's proposal, in a way that get "out of check" and are not conducive to settlement
- I move to real caucusing—remove the emotions and improve the effectiveness of strategic communication

Real Caucusing / Shuttle Diplomacy

- proposals communicated by the mediator may be more acceptable, without any improper process, by virtue of the very reason that they are not communicated by an "adversary"
- meet with each party and their counsel
- invite them to "sharpen their pencils"
- parties should not only focus on their next offer, but give careful consideration to where the other side really is, and will be, as the shuttle communication continues, and to try and look forward to see what an ultimate possible settlement might be

Real Caucusing / Shuttle Diplomacy

- continue to raise the issues of the risks that may be faced, including:
  - the identity of the ultimate decision-maker in a trial;
  - a poor performance by a witness, a party, or counsel (i.e., a "poor" game); and
  - all of the other risks that go along with trial advocacy
- what they **really** need to get out of the dispute in question
- help the parties evaluate what might—or might not—be acceptable to the other side (e.g. "my sense" of the matter)

Real Caucusing / Shuttle Diplomacy Special Techniques

- determine chance of a final offer early on or whether there will be a number of steps before resolution appears to be moving in the right direction or has hit a barrier
- this might take a "number of dances"
- mainstream approaches to conflict resolution include veiling or cloaking information: using a code of conduct; the single-text approach; caucusing/shuttle diplomacy; and the use of hypotheticals (Anderson *et al.*)

Real Caucusing / Shuttle Diplomacy
Move from Cloaks and Veils to Transparency

- cloaks and veils must, ethically, move to ultimate transparency—information withheld or restrained must be more gradually revealed
- the hallmarks of mediation are the self-determination of the parties and the impartiality of the mediator (Anderson *et al.*)
- **Key: in this process, I find that the true value of a good, but ethical, mediator is to push the parties beyond their entrenched position to a place where they, even begrudgingly, recognize is better than the risks they will take in an adjudication—their BATNA or WATNA**

Real Caucusing / Shuttle Diplomacy
Move from Cloaks and Veils to Transparency

Anderson *et al.*:

> *"a skilled and experienced mediator can use cloaks and veils so as to keep the mediation from starting out in unproductive directions and to stimulate thought 'outside the box' during the mediation, and then, by gradually removing cloaks and veils, to reach a state of transparency prior to any final settlement"*

Real Caucusing / Shuttle Diplomacy Mediator's "My Sense"

- it's always important for the mediator to get his "hands dirty" in helping to craft an offer in a way that maximizes the opportunity for acceptance (e.g., conciliation rather than hostility)
- I call this "my sense"—the mediator can be helpful to the parties in crafting an offer in the most successful way
- imperative that the parties' positions not be revealed to the other side except insofar as specifically authorized—this creates a cloak of ignorance as to what is the other party's real position

Real Caucusing / Shuttle Diplomacy Mediator's "My Sense"

- there is often an impasse looming or reached—where that results, retreat for clarification of the facts or the law being relied upon by each party so as to allow the matter to move forward—sometimes the issue is a legal one and the mediator can often provide a proposed legal resolution on which they can proceed to take the next step
- sometimes it is a more human approach where parties can try a different approach

Real Caucusing / Shuttle Diplomacy Final Offers

- hypothetically, could you live with this (the "final, final, final" position)?—this is a compromise of the numbers that I believe the parties can come to accept

Other Less Than Full Settlement Options—When Settlement Impasse Results

- a mediation/arbitration (binding JDR)
- parties may agree to a "final offer" resolution
- arrange a partial settlement, with the other remaining issues to be determined later by: further negotiations; a further mediation; or at trial/arbitration

Documenting Settlement

- it's extremely important that, once there is an agreement on any or all the issues in dispute, the settlement is fully documented on the Scott Schedule, as a written memorandum in which it is clear to the parties that it is able to be used by the parties to enforce a settlement if something falls apart after the mediation, and before it's fully documented or put into a formal judgment
- in a judicial context, I often go into a courtroom on the record and have them declare (both client and lawyer) that the settlement on the record is the settlement that they have agreed to

Post-Settlement

- where there is $ outstanding, or matters of substance to perform, time to pay and perform before the settlement is finalized, or after settlement, it is important to determine those terms of payment, including interest, timing, security, and discounts

Conclusion

- mediation, especially judicial mediation, is not for the faint of heart—it requires education and experience
- at all times along the way, all methods and strategies must be based on, and proceed on, sound ethics

Conclusion

- **in the end result, it is usually the detailed caucusing and shuttle communication that allows a judicial mediator to know how and when to use a number of mediation tools to improve the process of mediation to lead to settlement**
- the best and most final process is seldom achieved, because even after a long journey using mediation theory, it is often seen as just a beginning
- **if ethical resolution of disputes is achieved, the judicial mediator has his/her rewards, as do the disputants**

Thank you!

Comments?