Effective Mediation Through Shuttle Communication of Potentially Viable Proposals:

After a Long Journey, Still Just a Beginner

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Effective Mediation Through Shuttle Communication of Potentially Viable Proposals: After a Long Journey, Still Just a Beginner

The Honourable Associate Chief Justice John D. Rooke

My assignment for this Forum is: "the mediator as a negotiator: how and when to use individual sessions to improve the process of mediation". However, before I attempt to answer that, I need to step back 20 years.

In this paper I describe how, after a long journey of over 20 years of doing some 150+ judicial mediations (Judicial Dispute Resolution (JDR)), I have learned what I consider to be the most effective way for doing them. This is on either a facilitative (non-evaluative – effectively chairing a discussion between the parties and their counsel) or evaluative basis (providing risk analysis of strengths and weaknesses, reality checks[2], and perhaps even opinions on appropriate ranges of reasonableness in relation to positions of the parties[3]). It also relates to some variations thereof – mini-trials, early neutral evaluation (very few done) and binding mediations (med/arb, or Binding JDRs). However, it is my view that whatever the form I use, the process is equally adaptable to non-judicial mediation.

Yet, after having written this paper, I look back and realize that I have not completely, or conclusively, described all that I have brought, or can bring, to a judicial mediation, nor have I articulated all the nuances of how my judicial mediation practices work. Thus, this is just a beginning of my description of judicial mediation, as I conduct it.

In addition to my judicial mediation experience, I have conducted formal research on judicial mediation and have obtained a Master of Laws in Dispute Resolution at the University of Alberta, Faculty of Law, in 2010. A substantial and significant, but largely unedited, report - the Evaluation Report of the Court of Queen's Bench of Alberta's (QB) JDR Process (Evaluation Report) - was the product of the research, both empirical and legal/ethical, on judicial mediation. Thereafter, I converted the Evaluation Report into my Master of Laws thesis (Master's Thesis). They are available online as and at:

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[2] Anderson et al (*infra*), at 56, note that "listing reasons why one might be wrong … [may have a serious effect] in reducing overconfidence", allowing the over confident party to refocus on what is sure and what is at risk.

[3] Welsh (*infra*) identifies the choices and characteristics (at 846), and says (p. 788 and fn. 5) that mediation of civil lawsuits in practice is more evaluative than facilitative, and yields more distributive outcomes.

Improving Excellence: Evaluation of the Judicial Dispute Resolution Program in the Court of Queen's Bench of Alberta (Evaluation Report), available online: http://cfcj-fcjc.org/clearinghouse/hosted/22338-improving_excellence.pdf.

The Multi-Door Courthouse is Open in Alberta: Judicial Dispute Resolution is Institutionalized in the Court of Queen's Bench (Thesis), available online: http://cfcj-fcjc.org/clearinghouse/publication.php?id=22471.

The Thesis is also available in an author approved abridgment in Sourdin & Zariski, Editors, *The Multi-Tasking Judge: Comparative Judicial Dispute Resolution* (Lawbook Co. 2013 Thomson Reuters (Professional) Australia Limited), Chapter 9.

These documents provide a background to my experience (although completed after 10+ years of that experience), as an aid to what I present in this paper, although there is a much different focus to this paper. The Thesis demonstrates that mediation, at least in our Court, is not an alternative to litigation[4], but a real part of the litigation "multi-door" resolution process[5] – although it has faltered somewhat since published in 2010, because of our Court's increasing lack of adequate judicial resources.

For the purposes of this paper, I have relied extensively on two legal research articles, and will briefly reference another[6], that I believe help ground the points that I wish to make, namely:

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

Barry Anderson, Les Swanson, and Sam Imperati, "Veils and Cloaks of Ignorance: Under-used tools for Conflict Resolution", 2014-15, 30 Ohio St. J. on Disp. Resol. 45 (Anderson et al); and

Honourable John C. Cratsley, "Judicial Ethics and Judicial Settlement Practices: Time for Two Strangers to Meet", 2006, 2 Ohio St. J. on Disp. Resol. 569 (Cratsley).

Each of these deserves a brief introduction as to their relevance and purpose.

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[4] Welsh (*infra*), at p. 800, and fn. 69.

[5] Welsh (*infra*), (p. 789 and fn. 11), referencing other authors, calls this "litigotiation", where litigation and negotiation are "inseparably entwined" through the mediation process.

[6] Throughout the use of these valuable resources, I shall seldom, if ever, reference secondary sources therein, but rather give the reader the page and footnote locations and allow the reader to pursue any issues further as appropriate.

I can do no better, by way of introduction of Welsh, than to use the words of Anderson et al:

> Professor of Law Nancy A. Welsh argues that citizens – 'want the courts to resolve their disputes in a manner that *feels like justice is being done'*, and that a perception of fairness contributes to a perception of the legitimacy of the institution providing or sponsoring the process and compliance with the outcome of the dispute resolution process. Ultimately, insuring that mediation comes within a procedural justice[7] paradigm serves some of the courts' most important goals – delivering justice, delivering resolution, and fostering respect for the important institution of the judiciary".[8] (emphasis in the original)

Barry Anderson, Les Swanson, and Sam Imperati (Anderson et al), in the abstract to their article refer to John Rawls, *A Theory of Justice* (1971) wherein they say he introduced the notion of a "veil of ignorance" as a conceptual device for promoting just choices, and add: "[o]n the premise that getting conflicting parties to think more fairly is a good first step toward achieving agreement, we develop Rawls' notion as a set of mediator tools"[9]. They go on to explain it further this way:

> Potentially biasing information can be excluded from consideration by means of thin veils, thick veils, or cloaks. A thin veil consists of instructions to disregard information that is known and already in consciousness. A thick veil makes it more difficult for information that is known but not in consciousness to be brought to consciousness. A cloak withholds information that is not yet known[10].

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[7] Anderson et al, at 49-50, also discuss the importance of procedural justice and fairness in conflict resolution, saying that the features of each include neutrality and freedom from bias.

[8] Anderson et al, at 50-1, and fns. 27 and 28, relying on Welsh at 791 – 2.

[9] Later, Anderson et al elaborate and explain, at 46, that "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".

[10] Anderson et al, at 45. To understand these metaphors, first think in the context of a judge determining the admissibility of evidence in a jury trial (see Anderson et al, at 66 – 7, and 81):
- sometimes evidence is blurted out before a ruling can be made and the judge tells the jury to disregard what they heard (which is often difficult to accomplish - indeed, draws attention to it Anderson et al, at 55) - and thus it is better to start a mediation with a cloak, and then slowly release the information through veils to full disclosure - the latter required for any legitimate settlement (Anderson et al, at 51) that is a thin veil;
- more frequently, the judge conducts a *voir dire* and determines whether the evidence is admissible – if s/he finds it inadmissible, the jury does not hear it – thus, a cloak; and, in between
- some evidence may be admissible for some purposes, but not for other purposes and thus the judge gives an instruction on how that evidence can be used – thus a thick veil. Sometimes the latter also refers to inferences that may be drawn, by astute observers, from admissible evidence, without direct evidence of whether the inference is true.

> Opportunities to apply cloaks and veils of ignorance arise in fact conflicts, value conflicts, and interest conflicts. To maximize effectiveness, preference should be given to cloaks over thick veils and to thick veils over thin veils.

They end their abstract by saying that they too "explore the ethical considerations facing the mediator when using cloaks and veils."[11]

Speaking of ethics, that is almost the exclusive focus of Judge Cratsley, of the Massachusetts Superior Court, who deals with situations in the United States where a judge is assigned a case and takes it from the beginning to the final judgment – cradle to grave[12]. The issue he primarily raises is whether, if that judge attempts a judicial mediation and it is unsuccessful, can the judge remain impartial to decide the case, or to preside over the case to be determined by a jury? This does not arise in Alberta, because by the Rules (*infra*), a justice who does a mediation, cannot, without the parties express consent, preside over the trial, if the mediation was unsuccessful. Also, in Alberta, if, in the context of trial, it appears that an immediate mediation is a better alternative than continuing the trial, the practice is for the trial justice to refer the mediation to another justice – which, if successful, ends the trial, and, if not, the trial continues.

Moreover, to the extent that any points in his article are broader than this, Cratsley relies heavily on the changes proposed in the 2005 – 2006 American Bar Association Model Codes of Judicial Conduct, in reference to judicial mediation. He also talked about the need for training and skills development of judges in the art of mediation, equal to any private mediator certified for mediation, all with which I agree. He also discussed the need for disclosure by the judicial mediator of the settlement techniques to be used by the judge, with specific concerns about "coercive opinion" emanating from the judge – "a modicum of arm twisting"[13]. I also agree with these observations and discussed these aspects of his article in some depth in my Evaluation Report. However, his article is now 10 years old and there has been significant movement on the ethics of judicial mediation. Thus, I will not reference the Cratsley article further, even though it forms an early point of departure for the basic ethical conduct of judicial mediations which all judicial mediators must always keep firmly in mind, as they conduct judicial mediations.

With these basic concepts in place, Anderson et al use the principles to discuss how a judicial mediator, especially a shuttle judicial mediator, may, with caution for ethics, withhold or release information that assists in successful mediations.

[11] Anderson et al, at 45, focusing in a later section on achieving "informed consent" to the use of cloaks and veils – at 78 – 9. I will leave this discussion to a future occasion.

[12] Cratsley, at 588, and fn. 67.

[13] Cratsley, at 576, and fn. 22.

I wish to circle back to Anderson et al for some comments as to how their work figures into this paper. First, the concepts they use are not easily understood - indeed, it "does not seem to have been recognized in the literature"[14]. Nor are their methods and their application easily followed to be put into practice in a mediation – "[i]t is a big step from understanding cloaks and veils in the abstract to recognizing opportunities to apply them amidst the passion and particularity of real conflicts"[15]. Yet, it appears that many of the principles they employ appear regularly (but disguised) in my own judicial mediations (without me, and many of us, actually identifying them as containing these characteristics), and, particularly, in shuttle judicial mediation that I, and many of us, use. In the result, the articulation of what they say in relation to how I conduct judicial mediations will require more analysis than possible in the time before release, and length of, this paper – indeed, "wider knowledge of the concepts of cloaks and veils of ignorance and the ways in which they can be applied to resolving conflicts will stimulate … application…"[16]. Nevertheless, I will try to touch on some of the points they make in the context of how I conduct judicial mediations, with a plan to expand on this discussion in the future – thus, I am just at the "beginning".

The process of mediation has many aspects, on which much has been written. Much of those writings focus on the legal theory, or the legal ethics, but not much focus on the practical sense of helping parties resolve disputes in which they don't want to be involved, but in which, through mediation, they have the ultimate control of whether or not to settle, and, with a wise judicial mediator, some control of the process, unlike any other judicial proceeding[17]. I tend to concentrate on the merits of the legal theory, while keeping an eye on the ethics. As to the legal theory, there is much focus on the "procedural justice paradigm [which] serves some of the courts' most important goals - delivering justice, delivering resolution and fostering respect for the important public institution of the judiciary". In this context, procedural fairness refers to the fairness of the procedures used to achieve distributive justice – the substantive fairness of the settlement, although the presence or absence of procedural fairness may affect the feeling of the latter, as well as promote settlement itself[18], and the respect for the judicial mediator and the court institution s/he represents.

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[14] Anderson et al, at 67.
[15] Anderson et al, at 73.
[16] Anderson et al, at 76.
[17] Welsh, at 838.
[18] Welsh, at p. 792, and fn. 22, and again, in somewhat different words, at 837, relying on a United States JDR legend, then Judge, Wayne Brazil, and his co-author, Jennifer Smith, who said: "The business of the courts is not business, it is justice, and particularly protection of respect-worthy procedural guarantees. In other words, a court-connected ADR program must be designed to achieve justice and to foster respect for the judicial system as a whole".
Also, see Welsh at 817 for these definitions, and 818, and fn. 150 (as well as fn. 196) for the inter-relationship, and 819 and fn. 155, for the promotion of settlement, and 820, and fns. 158 – 160, for respect for the institution.
There are many other references to "procedural justice" raised in the Welsh article (see Welsh, at *inter alia*, 816 - 846). However, while I believe in the process, and I try to practice it, because the literature

While avoiding getting into the trap of discussions about procedural justice that gets away from the real focus of this paper, some reference is useful. It is suggested that realizing the achievement of the fairness implicit in procedural justice promotes compliance with agreements reached in mediation[19]. Moreover, procedural justice often focuses on procedures that allow the litigants to tell their relevant[20] story, for the other side to actively hear these stories[21], for the mediator to treat them as being recognized and important[22], while being impartial and even-handed[23].

Judicial mediation in our Court is regulated by Subdivision 2, Division 1, Part 4, of our Rules – Rules 4.17 – 4.21, which provide, in summary, as follows:

4.17 – a party-initiated framework for a judge to "actively facilitate a process" for judicial mediation to resolve claims

4.18 – requires

- consent to the process by all parties, (unless an exception is granted for good reason) and agreement on
  - the nature of the process

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suggests that litigants expect it from judicial mediators, I am of the view that it should not be the focus for this paper.

[19] Welsh, at 816, and fn. 157.

[20] "Relevant" is my word, because the "story" must be focused on the issues in dispute. Anderson et al, at 51, say, and I agree, that "[i]relevant information (a) biases judgment, (b) weakens the impact of relevant information on judgment, and (c) takes up cognitive capacity for judgment". It also causes others in the proceeding to lose intellectual focus (see Anderson et al, at 54) and respect, in face of limited time constraints. A good mediator will allow some latitude (very little) and then "rein in" the "story", all with a good "bedside manner", that does not cause the story teller to lose face. Anderson et al add (at 54) that "[r]emoving irrelevant information should make it easier for each party to understand the other party's perspective and incorporate it into his or her thinking".
Supportive of this, Anderson et al note (at 61) that this may assist in removing the "*fundamental attribution error*", where the decision maker falsely concludes that the reason for a person's behavior has to do with the kind of person s/he is, rather than the kind of situation s/he is in. If the other side can, through the relevant and sincere story, come to learn the latter that may affect a resolution. A number of examples come to mind to bring truth to this – e.g. the person who doesn't pay a debt does not do so because s/he is a jerk, but because s/he does not have the funds, which leads to a resolution that might provide a source of funds or terms of payment, with interest and security. Thus, as Anderson et al say, at 62, "… if mediators wish to change parties' behavior in mediation, in addition to trying to motivate the conflicting parties to be open to new thoughts and approaches, they would do well to consider alternatives that focus on *changing the context in which the behavior takes place*."(emphasis in the original)

[21] Both telling and hearing allows 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: Welsh, at 834. Hearing the response side may also give an opportunity for the plaintiff to find out why some misfortune happened to him/her leading to potential emotional healing: Welsh, at fn. 323

[22] Welsh, at 817 and 820.

[23] Welsh, at 821.

- the subject matters in the process
- the manner of the process
- scheduling, logistical and documentation exchange details
- the role of the justice (with his or her approval), who may be requested as the judicial mediator by the parties under Rule 4.18(3)
- who may participate – those who agree are "entitled to participate", and which <u>must include persons who have authority to agree on a resolution of the dispute</u>, unless otherwise agreed[24]

4.19 - the only documents coming out of a JDR are a settlement agreement or a consent court order or judgment

4.20 - confidentiality and use of information – the process is confidential

4.21 - the judicial mediator

- "must not hear or decide any subsequent application, proceeding or trial in the action without the written agreement of every party and agreement of the judge"
- "must treat the … process as confidential", and
- is not competent or compellable to give evidence, regarding the JDR

I. Commencement and Pre-Mediation Conference

With the above background and understanding, when I receive a request for mediation (through a regular scheduling process where parties can "bid" on a JDR before me, or on a more direct request), my first step is to review the most recently available pleadings (if the matter is a court sponsored JDR, it must be the subject of formal litigation). That gives me an idea of the issues between the parties, subject to the receipt of any further information that might indicate that some of the original issues or claims have been settled, or abandoned, or amended.

After I have reviewed the most recent pleadings, it is my practice, as a rule, to hold a pre-mediation conference (Pre-JDR), so that I and the parties can set the procedures we agree to follow, but most importantly, so I can understand what are the "real" issues between the parties, and so as to try to commence my exploration for early positions and, to the extent possible, any real interests[25].

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[24] I never otherwise agree, after too many problems in the past.

[25] Welsh (at p. 790-1, and fn.17) referenced this as identifying disputants' unique underlying interests and creating solutions therefor, where, in answer to limited remedial imagination of courts, the ADR movement arose, to provide not only more flexible processes, but also more party-sensitive and complex solutions to the traditional available litigation outcomes.

As to procedures, my first step is to determine what type of mediation the parties want – simply facilitative, or more evaluative, or some other variety – a mini-trial, an early neutral evaluation, or a med/arb (what we call a "Binding JDR", where the judicial mediator, at the end of the case, gives an opinion, which the parties contract in advance to accept). Subject to any advice I might give in any particular case, it is my view that the parties and their counsel should determine the process because, as noted in Rule 4.17, it is a "party initiated" process. Indeed, under Rule 4.18(1)(b), agreements are anticipated as to "the nature of the process", and the "manner in which the process will be conducted", and even "the role" of the judicial mediator. Moreover, as the parties are the ultimate decision maker in any mediation, the parties, not just counsel, should have a voice in the process selected.[26]

It is also important at this stage to determine if there are any "nuances" of which I should be aware. Are they any personality clashes, or "bad blood", between the parties that require a "code of conduct" to be established, as discussed *infra* under "caucusing". Additionally, especially when the parties are not at the Pre-JDR, the counsel may advise me of issues that suggest I need to adopt a specific tone in mediation – for example, one counsel might advise that his/her client has too high a goal, in spite of the counsel trying to "rein in" his/her expectations – requiring me to be extra diligent is raising risks that they may encounter before a decision maker – sometimes, what I call the "shock and awe" persona. Or, both counsel might advise me that cultural issues are very much in the forefront and need to be understood. Or, that there are underlying trust issues and/or lack of sincerity. Or, some other matter(s) that may be the "elephant in the room" that can adversely affect the mediation, unless the mediator is aware of them.

I also enquire as to who else the parties need to be (or wish to be) at the JDR – spouses, support people, security, experts, etc.

Then we get into the issues, positions and interests of the parties, although, sometimes, the positions and interests are the same - merely $s to win or lose and there is no long-term interest or relationship to explore for solutions – thus, rather, it is a distributive

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Moreover, as Welsh references at fn. 229, a mediator, as a third party outsider to the dispute "in order to understand the dispute, needs to have the disputants review and clarify their perceptions of facts, events, commitments, obligations, demands and disagreements". In practice much of the relevant information in this regard is obtained by the subsequent JDR brief, but both substance and process require that the litigant provide (preferably directly, not through counsel) the nuances sought by wise and perceptive judicial mediator questions, which not only provide the further, often crucial, information, but, equally important, helps with the trust factor that is so essential in the litigant buying into the process and the ultimate settlement, if the latter is possible.

[26] Welsh, at fn. 261.

paradigm[27]. An example of this would be a car crash, or other tort action – there are others. However, many (matrimonial/family, employment, and contract) may have other implications that create true interests and potential longer term relationships that allow the mediator to mine for resolution. Often it is not just a distributive $ process, and there is more than $ at play – often emotions, feelings and even apologies are important[28].

The Pre-JDR also allows me to learn (even if, through Counsel[29]) something about the parties and their profiles, so I can gauge my approach to them. I also pursue the roles that the parties are to have directly, or through their counsel, recognizing, as noted above, that one of the methods to get resolution is to allow the parties to "tell their story" – most often directly (so there is disputant participation), or through their counsel (if the disputant is "shy")[30].

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[27] Welsh, (at p. 799, and fn. 61 and 813 - 814, and fns. 125 - 129, and fns. 136 – 138, (especially fn. 137)) suggests that, while mediation is hailed as a place for creative, nonmonetary settlements, for unique and complex cases, as many mediators seek, communicate and encourage, counsel rarely go for such creative solutions, but rather choose "traditional, distributive outcomes".

[28] Welsh, at fn. 339.

[29] For this paper I assume that all parties are represented by Counsel and are not self-represented litigants (SRLs), which represent additional challenges for a different discussion and focus at another time.

[30] I don't accept the view expressed by Welsh (at p.801) that "disputants' role (and even the need for their presence) has diminished substantially". The absence of disputants (that is those who have a "real personal legal interest") never happens in any JDR in which I have been involved, or to my knowledge, any in my Court.

That said, the role of disputants is as much as they and their counsel agree for it to be. It is not the role (or usually within the knowledge) of a judicial mediator to raise any issues between counsel and his/her client, who decide that role between themselves – including whether the counsel or the client or both will do the talking (Welsh, at p. 802-802, fn. 80; at p. 804, fn., and fn. 88; at 843 and fn. 377). However, it is nevertheless the proper role of the judicial mediator to make the party disputants feel that they have the full right to be involved and invite them to speak and be heard, demonstrating the explicit inclusion of the parties in the process (Welsh, fn. 80 and 845), albeit in a judicial efficient way (see these limits as discussed by Welsh at p. 805, and through fn. 90).

I say a "real personal legal interest", because defendants who are fully insured (see Welsh, at p. 801, fn. 73) have no real legal interest, although they would be welcome to attend if their interest were, or were to become, impacted – e.g. claims not covered by insurance. Otherwise, I agree they may be a distraction (Welsh, p. 803), when adjusters most often bring expertise, detachment and tactical flexibility to the mediation process on behalf of insurers (Walsh, at pp. 802-3). In these cases, insurance companies control these funds (Welsh, at pp. 801-2, fn. 74) as they should. However, it is essential that a case controlled by an insurance funded defendant have an adjuster present with sufficient authority to settle at any level that s/he is of the belief, during negotiations, is appropriate – they have to "smell the grease paint", not just translate it to some other adjuster over the phone, and I will not do a JDR without such authority – all of which is poignantly supported by Welsh at fn. 81. It is important that a judicial mediator take his/her time to participate in a mediation, it is equally important that a person with full authority to settle also be present.

While the litigants telling their own story (at least as to the impact of the dispute upon them) is very important for a number of reasons, counsel also usually do an effective job in representing their clients' stories in mediation, both in joint sessions and in caucus: Welsh, at 841.

Throughout all of this, it is important to remember that the primary goal of mediation is to resolve a dispute – "the goal of mediation within the bargaining paradigm is settlement, not the achievement of a

This latter point can be the subject of much analysis, as Welsh points out at numerous locations in her paper. At p. 792, Welsh stated:

> Procedural justice research indicates clearly that disputants want and need the opportunity to tell their story and control the telling of that story[31]; 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[32].

Telling one's "story" has more value than just a process that gets in the way of "more likely produc[ing] prompt resolution if the process is structured to enhance decision making". In my view it leads to – indeed, in many cases compels - decision making[33].

This creates a lot of expectations for a mediator to manage – especially a judicial mediator, when time and resources are limited. It includes the mediator giving a disputant, and, perhaps his/her counsel, a meaningful opportunity to express themselves, while not "hijacking" the process[34].

Once I have all the information I can glean in the Pre-JDR, I formally write to counsel, commenting on any outcomes of the Pre-JDR and requesting that they provide me with a relatively short (usually less than 10 – and never more than 25 - pages) brief, with attached (and highlighted) materials that are relevant. They are each required to do that, on a staggered/sequential basis with the applicant/plaintiff first, the defendant/respondent second and a reply by the applicant/plaintiff, all on deadlines, the last of which is normally approximately 10 days or two weeks before the mediation.

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sense of just treatment for the disputants" (Welsh, at p. 805, and 807, and fns. 99 and 100), and away from emotional "digressions" (Welsh, at 808, and fn. 103) – although, in parenting cases, and some others, emotional values are very important – and powerful - to be recognized.

[31] Welsh say, at p. 792, that this is so that the disputant can influence the final outcome of the dispute resolution process. This is another reason to give disputants, not just their counsel, a real voice in the dispute resolution process, rather than the domination of their counsel: Welsh, at p. 797. Nevertheless, it is argued (Welsh, at p. 792) that the dominant presence of counsel and the reduced role of the disputants, the use of evaluative mediations and the prevalence of monetary (noncreative) outcomes, may be inconsistent with procedural justice.

[32] Welsh at 852. Moreover, at the end of the mediation, it is not just the "deal" that is important, but the validity of the process getting there – both are important and can be powerful if worked together: Welsh, at 854. They help ensure the staying power of the settlement.

[33] Welsh, at 803, fn.81.

[34] Welsh, at p. 795, fn. 42; and at 852.

Upon reviewing this material, I briefly determine whether there is anything missing. Then I take the next step, which is to prepare a Scott Schedule comparing the claims and positions.

II. Scott Schedule

In my view, a Scott Schedule[35] 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 try to put all the parties' positions on one comparative page so I can quickly understand where are the differences between the parties and where there may be agreement (early on or throughout the mediation process). However, one criticism, is that this emphasizes a "common dimension, thus enhancing the rationality of sequential offers and counter-offers that characterize distributive negotiation"[36]. Nevertheless, I am not sure this criticism is valid, or, to the extent that it has some validity, it should not be prohibited because it "facilitate[s] these comparisons" and promotes settlement[37].

I try to give the Scott Schedule to the parties a few days before the mediation so that they may use it for their own purposes and that we can work from the same "score sheet" – that is, Scott Schedule - although, of course, the ultimate intent is to try and get an agreement on all of the issues, or as many as possible. Some examples of Scott Schedules I have used are attached as Appendices A, B, C, D, and E.

Later, I will use the same document - the Scott Schedule - 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 a partial) settlement is reached. I have all of the parties and counsel execute it so that it becomes a memorandum from which they cannot retreat. Too often mediation in good faith results in a settlement and then one of the parties retracts but this process usually prevents them from doing that. I will, for the same reason, often go into a courtroom and put the terms of the settlement agreed on the record, and have the parties and counsel orally confirm the settlement. While this process is preliminary and rudimentary, it may be a binding written agreement in itself

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[35] Arising out of litigation originally in Great Britain: see *Guarantee Co. of North America et al v. Beasse* (1992), 124 A.R. 161 (Q.B. - Rooke J.), wherein at 17, and fn. 6, I said: "used to bring together in one place a summary of the positions of the parties on each issue and amount in dispute – see Alberta Law Reform Institute, *Report on Referees* (Research Paper No. 18)(February 1990) at 22 and Appendix C; the Supreme Court Practice 1988 (London: Sweet & Maxwell, 987), Vol. 1, Part 1, 18/12/29; and I.N.D. Wallace, Hudson's Building and Engineering Contracts, 10th ed. (London: Sweet & Maxwell, 1970) at 859. See also: *Parkridge Homes Ltd. v. Anglin*, [1996] A.J. No. 768, at 48 (Q.B. - Rooke J.); and *Phillips v. 707739 Alberta Ltd.* (2000), 77 Alta. L.R. (3d) 302, at 37 (Q.B. - Rooke J.)

[36] Welsh, at fn. 130 – 132.

[37] Welsh, at fn. 814.

and it can be the basis for a more formal written agreement, if the parties wish to have a more sophisticated document for ongoing use, as pertinent.

III. Final Preparation

While I have done a significant amount of preparation in the process of assembling the Scott Schedule a few days in advance of the mediation, my final and detailed preparation is, in fact, done a day or two before the mediation so that I can concentrate on it, without being distracted by other matters, and so that I can have it fairly firmly in my memory (in addition to being in my paper notes), and thus be very “up to speed and current” at the time of the actual mediation. This requires me, of course, to do an even more detailed review of the briefs and material provided.

IV. Joint Session - Opening of the Mediation

By this stage, either at the Pre-JDR or afterwards, it is necessary for me to be assured that the parties and their counsel are agreed to what is the process for the mediation and that there is no misunderstanding of how the mediation is going to proceed – and to make sure the parties agree as we take each new step – e.g. consent to caucus and communicate offers to the other side, etc.

A. Parties/Decision Makers to be Present

As noted above, it is essential for all parties, with the ability to give final instructions, be present at the mediation. That includes parties who are personal decision makers, or insurers who have the ability to “cut a cheque”. After some bad experiences, mediation without these parties is not something that I will countenance. More fundamentally, the parties with “skin in the game” have a very important and vested interest in making the mediation work. I don’t ever let someone negotiate (including counsel acting alone, without their client being present, even if “on instructions”) who does not have authority to settle, or to allow that person to be “available by telephone”. The decision makers need to be in the “ring” to understand the dynamics of the mediation, not artificially in another location. Moreover, to improve the chances of success, each party should have a real role – as important as s/he wants, as long as they are not negative to the process[38].

Often in cases, as discussed at the Pre-JDR, there is a need for experts (e.g. accountants, valuators, tax experts, and others) to assist with the values (and, sometimes, facts) and, sometimes to be actually present at the mediation, to give opinions on these matters, or variants of them, as they arise. Sometimes a tax expert is

[38] Welsh argued (p. 789) that counsel too often dominate mediations, without their clients playing any effective role, often to the detriment of the settlement.

helpful to determine how assets can be transferred with minimum tax consequences, or where there are consequences, to help measure them as a component of the settlement. Additionally, a structured settlement expert is often necessary to determine what funds would need to be placed to generate a particular result, if that is a potentially viable method of settlement. There are many options to be examined in this regard which are case dependent[39], and are beyond the discussion for this paper, but the principles and factors, must be recognized.

B. Knowledge of the Parties and the Mediator

1. Alternatives to Settlement

The parties need to know the alternatives (and limits) to settlement – as Fisher & Ury said[40], the BATNA or WATNA, namely, what are the place, purpose and, again, the limits, of mediation within the civil litigation process[41].

2. Facts, Values and Interests

The parties also need to appreciate the difference in facts and values that affect their dispute. Generally, in most litigation based disputes the facts are what happened (and what caused them to happen), and the values are the consequences of what happened. The parties may agree on one or both, or disagree on both. In a simple car crash case, the facts may be that plaintiff's vehicle was struck by a vehicle approaching him that turned left in front of him. If that is all that there is to it, the parties may agree on the facts, and the defendant's liability, and then argue about the damages. In this example, the values are the legal values attributed to liability as well as the quantum of damages. However, these values may be changed if the defendant argues that the facts include the fact that the plaintiff was signaling that he too was going to turn left at the same time. There are many much more complicated examples, and the "facts" may not be just what happened, but what caused what happened – e.g. a bridge collapsed, but experts may be needed to investigate and opine as to the cause of the fact.

Anderson et al discuss this[42] in the context of separating facts and values, facts and facts, and values and values. As to separating facts from values, in the above simple example, the parties themselves may be able to determine the facts, but will likely need

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[39] A mediator must be creative, not sedentary, in suggesting options for the parties – drawing out options that the parties may have identified or to advance others that have not been identified but are part of being a creative mediator: Welsh, at p. 797. However, not all "roads lead to Rome" – that is, not all creative solutions are necessary, or, indeed, helpful, in resolving a dispute that is otherwise destined for court, even more often by parties that don't know each other: Welsh at p. 798, and fns. 58 and 60.

[40] Roger Fisher, and William Ury, with Bruce Patton, ed. *Getting to Yes: Negotiating Agreement Without Giving In.* 2d. ed. (New York: Penguin Books, 1991).

[41] Welsh, at p. 799, and fn. 61.

[42] Anderson et al, at 69 – 71.

legal experts to help them with the values, before the two can be combined to achieve a settlement.

In terms of fact – fact separation, the alternative fact scenario of the plaintiff signaling a left turn, can result in a dispute over the facts that may need mediation, and, indeed, promote settlement in that there is a risk by this set of facts – a form of cloak has been interjected that will require adjudication unless the parties can resolve the risks.

In terms of value – value separation, there may be different values ascribed to the injuries that the plaintiff has suffered - including the proper description of the injury, whether it was caused by the collision or merely exacerbated an earlier condition, and what damages may be appropriate in each situation.

These are only simple examples. More complex cases will be even more challenging. However, it is relevant for the mediator to understand these factors, and introduce them to the parties and their counsel, as appropriate, all as relevant to decomposition of the problem into its component issues, as a means to complete the analysis, as ultimately relevant and helpful to settlement.

Returning to facts, values and interest separations, Anderson et al, in trying to apply the theory to the mediation at hand, suggest that the mediator use these different separations of facts and values to classify the conflict between the parties – "mediators may find it helpful to classify conflicts into three kinds [fact, value and interest conflicts] and then consider particular opportunities for applying cloaks and veils that tend to present themselves in each"[43]. According to Anderson et al[44]: "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".

Anderson et al opine[45] that in "fact conflicts, there are at least three kinds of opportunities to apply cloaks and veils of ignorance": third party involvement, await data and apply judgment. In the first – e.g. the bridge collapse – it may be necessary to seek the opinions of expert(s) as to the cause – a cloak of ignorance would be to select a single renown expert in bridge collapses, without knowing what opinion s/he may advance. In the second, an opinion – say a real estate appraisal may need to be sought – again a cloak of ignorance as to the value. A variant of this is to come to alternative settlements dependent on different values – hidden behind the cloak of ignorance of the

[43] Anderson et al, at 73.
[44] Ibid.
[45] Anderson et al, at 74.

upcoming appraisal. If the value is X or less, the settlement is Y, but if it is more than X, the settlement is Z. In the third, there is no alternative but to try to resolve/compromise the conflict on the best judgments of the parties, weighing the real or perceived risks, with the values of such risks by each party being made behind a cloak or veil of ignorance (i.e. they don't know all or some aspects of the risks).

In value conflicts, Anderson et al[46] state that there are at least two kinds of opportunities to apply cloaks and veils: (1) make value judgments without knowing the facts – for example, agree to the least cost alternative, consistent with/based on prudent specifications, such as tendering for a new bridge on this basis; and (2) applying "value asymmetry" to make tradeoff judgments, trying to create a win-win alternative – the classic example is the two young girls fight over an orange, where, applying their own values, one got to use the fruit and the other the peel.

In interest conflicts, Anderson et al state[47] that there are at least two opportunities to use cloaks and veils: (1) a fairness model – "one cuts, and the other chooses", perhaps flipping a coin to see who gets the opportunity to choose – the result hidden in a cloak or thick veil; and (2) the final offer resolution, where each party sets a value for settlement and an independent mediator (or arbitrator) picks the one (without modification) that s/he believes better represents a wise settlement, on all of the factors known to him/her. I used the latter method at least once - one in a Binding JDR comes to mind, where neither party would compromise to a settlement, but agreed to put their fairest[48] proposal forward – for which I selected one, with dramatic results (different than if I had taken the two and then set what I thought would be the best solution).

C. The "Warm Up"

Recognizing that in mediation (especially judicial mediation), the personality and the trust[49] factors that the parties place in the mediator are so important, I spend some early

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[46] Anderson et al, at 74 – 5.
[47] Anderson et al, at 75 – 6.
[48] In such circumstances it is wise for each party not to put forward an extreme proposal, as it will surely not be accepted: see Anderson et al, at 76.
[49] Trust is key, because the mediator must learn to see the situation as each disputant perceives it, with compassion and respect that lead to resolution: Welsh, at p. 795, and fn. 40. S/he must: engage in active listening; seek clarification and understanding; recognize, reflect and acknowledge the hurt 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 paradigm's that evolve in the process; all to try to solve the problems in the dispute: Welsh, at fn. 44. Throughout, the judicial mediator must have a positive interpersonal interaction during the mediation process – treating them politely and in a dignified fashion, and being even-handed – in other words, creating a joint problem solving atmosphere and approach.

time in the mediation trying to better[50] get to know, and communicate with, the individual parties, some details of which may be provided in the Pre-JDR. I also like to talk about the process that we are going to go through, based on my discussion at the Pre-JDR and confirm that they are all in agreement with the process. It is what I refer to as the "warm up" and focusing part of the mediation (not dissimilar to what professional athletes do prior to the commencement of a game).

Then, there are a number of methods following mediation principles that I use with the parties, including these set out below.

I like to 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 $s can be distributed. In an appropriate case I will make reference to analogies in mediation literature - such as the aforementioned example of two children sharing an orange, one for the purpose of eating its fruit and the other for the purpose of using the peel to make a case, therefore creating a win-win situation. Examples of the Israel and Egypt dispute in the Sinai Desert can be another example where one focuses on the true interests of the parties to see, in the appropriate non-distributive case, where interests can have a real value. The concept of putting one party in the "shoes" of the other is also helpful to understanding the other's position[51], in a way that promotes creative trade-offs and settlements[52]. To elaborate and explain, I try to get the parties to place themselves in the other's position so that they understand the other's motivations and what they might have sought had the roles been reversed. This helps them to craft appropriate proposals and responses in the right situation and to have a better understanding of how the other party will respond to a proposal they make in their own right. When explored in caucus, this may require rejoining the joint session as reasonable or necessary to achieve results from these principles[53].

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[50] If the parties come to the Pre-JDR, as I often try to have them do, I'll get to know them somewhat. Now I need to bond.

[51] Anderson et al, at 47 – 8, fn. 9, use Adam Smith to describe this process of trying to achieve greater objectivity by evaluating one's self and the other: ". . . with regard to my own conduct, I endeavor to enter into, by placing myself in his situation, and by considering how it would appear to me, when seen from that particular point of view" – the judge and the judged. This is what a good mediator will invite – indeed, implore - each side to do, because by truly understanding the other's perspective that may lead to compromise from otherwise inflexible positions.
Anderson et al, at 48, also explain this by reference to Philosopher Thomas Nagel's reference to "gradual detachment", where we "step back from ourselves". I might describe this, in this era, as the "view from 30,000 feet" – how does the situation look from that detached view? Nevertheless, it is often hard to explain this to disputants.

[52] Indeed, it is the creative ability of a judicial mediator to provide a win-win situation that is the really hard work and key importance of a good judicial mediator: Welsh, fn. 343.

[53] Welsh, at fn. 121, and 815 and fn. 139.

Let me give a couple of examples of interests and each party's analysis of their and the other's interest.

In a family situation it may be that one parent is very keen to carry on the principle parenting role but the other parent is more concerned about "access" time, rather than hardcore parenting. Alternatively, it may be that the parents can separate roles and responsibilities so that one parent is involved in recreation and the other parent is involved in education, and one or both of them are involved in the medical/dental aspects of the children's upbringing. In some cases the primary caregiver may use the other's access as respite time.

In each case, I try and have each party, no matter the subject, focus on what is their real interest, to see if both can be accommodated.

Also in family cases, a win-win can be achieved by being creative and "thinking outside the box". Why have both or all the several children in non-single child cases visit a parent at the same time – why not have special one child-one parent, and other child/children-other parent, visits, for special child-parent bonding?

Another example might be in an employment dismissal situation where there are some unhappy differences. It may be that a meaningful reference by the employer for the employee for a new position is a very useful matter that can assist in resolution.

In an estate dispute, it may be that one beneficiary wants a specific asset, regardless of its commercial value (say, the family cottage), whereas another merely wants the $s. Perhaps this can result in both being winners.

There are many other examples.

Sometimes it's not the liability or the damages that are the real issues, but often it is a more intangible result that wins the day - an apology may be sufficient, or, alternatively, a recognition that some state of affairs was in existence – an example of the latter in my personal experience is an admission by an insurance company that a sudden death of a young person has not been established as a suicide although that was the position that the insurance company took in the first instance. This is often of great benefit to a grieving parent.

There are other "tricks of the trade" that I use in this process – stay tuned.

1. Risk Assessment

Emphasis on the risks of litigation is a very, very important matter in the opening. Often it is the first step in a reality check for one or more of the parties. One or more of the parties may think that they have a very good case because their lawyer has told them so, or, all too often, they have taken the position that they have a very good case on their own and the lawyer hasn't disabused them of it, notwithstanding that, if pushed s/he might temper their client's expectations. In this context, sometimes a reality check through an independent judicial mediation process is important.

It is important that, before any caucusing, both sides present their best case to the other, getting as many issues on the table as possible in a joint session – it can represent the adversarial nature of the dispute that they are likely to face if they don't settle, which allows them to hear and understand the other's perspective, and thus emphasizes the risks each party faces[54]. Thereafter, in the caucus the judicial mediator can raise the risks apparent in each party's position.

2. Principled Positions – "The Shadow of the Law"

As part of this risk analysis, I encourage the parties in this process to take what I refer to as "principled positions", that is, what is the decision maker likely to decide, on the basis of the facts and the law, if the parties don't settle – thus, negotiating in the "shadow of the law." Throughout this process, it is important to make the parties and their counsel realize that it is not just taking two extreme, opposite, positions and cutting them in half to try and get to a resolution, because one party may be more amenable to moving a more substantial distance than the other and, in the process, one focuses on principled negotiations as discussed above, and what the decision maker might do, if the matter is not settled. This too is commonly referred to as "negotiating in the shadow of the law". It is important, however, not to offset this reality with an enthusiastic rush toward bargaining and settlement[55].

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[54] Welsh, at fn. 42, and p. 796, and fn. 46.

[55] The importance of the judiciary being involved in the dispute resolution process is thus closely related to 'reality testing' of litigation risks, often referred to as 'bargaining in the shadow of the law'. It is a significant part of the rights based evaluation in the JDR process, as discussed in, *inter alia*: Graeme A. Barry, "In the Shadow of the Rule of Law: Alternative Dispute Resolution and Provincial Superior Courts" *News and Views on Civil Justice Reform* 2 (Fall 1999), online: Canadian Forum on Civil Justice http://cfcj-fcjc.org/publications/newsviews-02/n2-shad.php>; R Mnookin and L Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 *Yale Law Journal* 950; and my Thesis, including at p.47 *et seq*. See also Welsh, at 851. However, parties to a mediation are free to come to an agreement that is not bound by the law (e.g. compromising a dispute that the law could only decide in one direction). See also: Welsh at p. 794, and at 848.

As noted, in some cases, the decision maker will not have all of the options that are open to the parties to be creative during mediation. For example, in an insurance coverage case (e.g. disability insurance or death benefits) the decision maker may only have one decision, black or white, whereas the parties, having regard to the risks, can compromise those risks and come up with another alternative (a grey position) that's not open to the decision maker.[56]

Creativity for new solutions often has to be balanced with $ - the balance will be different in each case and with each litigant, but all aspects of this balance can be accommodated, if the judicial mediator manages the settlement process appropriately.[57] Moreover, $ are not necessarily a measure of fairness.[58]

3. Presumption: Damages Before Liability

In addition to a principled approach, a mediator needs to understand the best way to separate liability and damages. Often this will depend on the case, but as a generalization, I find that it is better to consider damages first and liability later. In such cases, mediation should encourage the determination of damages hypothetically, on a 100% basis, as to what the case is worth[59], before considering liability. Then the final step in this context is to figure out what the liability may be and what impact it will be on the distribution of the damages. Sometimes both of those are negotiable to get to the correct answer with which each party can live. However, if one is following a "principled approach", the damages determined are the damages that are caused, no matter who caused them, and liability becomes a process of determining how responsibility for those damages will be shared. In other words, if there is contributory negligence, for example, the claimant may bear part of the damages through his or her percentage of the liability. That can often best be concluded at the end of the mediation, as the Scott Schedule example provides.

V. Joint Session - Parties Opening Positions

Once the parties have been "warmed up", I like them each to provide their opening statements, not to the mediator (who makes no decisions) but to each other (who are the only decision makers). All too often the litigation to this point, and the positions of the parties, have been worked out between each party and their counsel separately, without a true appreciation of the other party's position. If the matter is not settled, it will end up in trial and the positions will be very strong and very adversarial, so it's important

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[56] Welsh, at 855, and fn. 341.
[57] Welsh, at 856 - 7.
[58] Welsh, at 855.
[59] In an injury case, the injury usually has a definitive value. It is only who is responsible for that damage – the defendant, the plaintiff (in whole or in part – contributory role) or others (sharing of liability). Thus, determination of damage tells what the injury is worth in totality and liability determines how the parties are going to share those damages (100% - 0%, or anywhere in between).

to me that each party hears the other party to learn how bad it might be in a trial situation and what the risks may be. In other words, in these opening statements each party needs to see how forcefully the other side will be if the matter goes to trial and this will give them a better appreciation of the potential risks.

As noted above, while most often in these cases it is the lawyers, in their adversarial role, that present the position on behalf of the parties, it's important for the mediator to give an opportunity to each litigant to have his or her time to briefly "tell their story". In many cases the litigants will not wish to do this and are content to rely upon the lawyer who is better versed in the legal niceties of the matter and whose lack of nervousness, and advocacy and communication skills, may be better suited to the role. However, at the end of the day, as I found in Evaluation Report research, the opportunity to tell one's story is very important for many litigants and it often sets a tone for the mediation. In my experience sometimes a more conciliatory tone can be conveyed by a party than a lawyer will provide, and the conveyance of how the other party's conduct has affected them, will allow the other side to come off his or her "high horse" and be more moderate in their position. Sometimes, as I said, the parties do not wish to exercise the opportunity, but it's important for them to know that they have such opportunity.

At the end of this process, I invite the parties to give some consideration to what they "really need" to settle the case – not what the positions are but what they "need" to move on, because sometimes merely "moving on" is a valuable result in itself – sometimes, "life is too short", otherwise. Moreover, the saving of fees and stress and time in a trial process is worth something, even for a plaintiff who may be on a contingency.

VI. Joint Session – "Caucusing Lite"

I ask the parties at the end of the opening statements to look at the position they've taken, as documented on the Scott Schedule, and then to make a real opening offer for compromise to the other side, following from their opening positions. I usually give them a few minutes to caucus by themselves for this purpose and to call upon me for any risk analysis or "evaluative views" that they might seek. However, as discussed below, I try and give final evaluations only at the very end of the process, rather focusing on the "risks" in the earlier stages, notwithstanding that some counsel urge opinions earlier[60]. In my experience a good mediation should let the parties find their own bottom lines,

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[60] Welsh, at 805, and fns. 92 and 93.
The timing and method of delivery of evaluative opinions can have a significant impact on a party's perceptions of their role in the process: Welsh 851. It is often better if evaluation is not offered too early – it is often better to delay the offer, and, better still, to await a request for an opinion from a party or their counsel, than volunteer it, and, even then, to couch it as a range of results that expresses the opinion of the mediator, but one which the parties are free to either reject or accept: Welsh, at 849 – 50 and 858 and fn. 50.

with only some expressions of risk by the evaluative mediator, not formal opinions. It is only at the end of what would be an otherwise unsettled mediation, in my view, that the evaluative mediator should give harder opinions for the parties on the liability merits and value of damages[61], but even then, only if such an opinion is sought,[62] and, if given, on which to consider as they travel to trial[63].

Indeed, in Binding JDRs (med/arbs), it is only at this "end of the day" time that the mediator's opinion and evaluation becomes binding on the parties, not by the force of the judicial mediator, but because, absent settlement, they have agreed, as a matter of contract, to accept such an opinion.

In this way, absent a Binding JDR, evaluative mediators help parties – and their counsel (it also gives the party a second opinion on what their counsel recommends[64]) – become more realistic and understand the possibilities – and risks – as they go to trial[65].

My Evaluation Report established quite conclusively that, at the end, it was ultimately the judicial evaluation that parties and their counsel wanted the most – as part of their measure of their BATNA and WHATNA – thus, the preference for evaluative interventions for this very reason[66].

The motivation behind this is often the counsel's view of the need for a reality check to his/her over confident party or other side[67].

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[61] Welsh, at 806, and fns. 94 and 95, where, at 807, Welsh recognized "such evaluative interventions can be very effective in generating movement and ultimately producing a settlement".

[62] In my JDR practice, a JDR remains a facilitative process, unless the parties or their counsel seek my opinion to make it an evaluative mediation process. The more complex the case, with the more absence of evidence for a judicial mediator or a decision maker, the tougher it is for an evaluating mediator to opine on the liability and damages – as recognized by Welsh at the end of fn. 95, and 808 - 9, and fn. 104 – the latter referencing that "valuation of cases is an imprecise science" – and fns. 105 - 109. In my view this also means that the mediator can continue to sow the risks – the last one being the risk of the decision maker.

[63] Recognizing that, on the way to trial, this will influence their advancement of, or assessment of, offers with the other side as the trial approaches, when settlements often actually occur: Welsh, at 807 and fns. 97 and 98.

[64] Welsh, fn. 108.

[65] Welsh, at 808.

[66] Welsh, at 805 – 9. Welsh at 807 and fns. 97 and 98, as to Fisher et al's BATNA and WHATNA – i.e. whether deadlock at the mediation is acceptable. All of this is, I believe, also mediating in the "shadow of the law".

[67] Welsh, at 805, and fn. 91.

The opening positions allow the parties to review what they've sought before, and may do so again, at trial, if the mediation is unsuccessful. Thereafter, for the rest of the mediation, the focus is what they are prepared to do for the purposes of settling today.

I find that this sets the parameters for further discussion leading to final settlement and constitutes kind of an opening round of negotiations. If the parties don't show some significant movement, it may be a short mediation. If they do, ultimate settlement may be possible – the parties' strategies will determine this, under the mindful watching, and gentle prodding,[68] of the mediator.

Depending upon how far the parties are apart and my assessment of whether they are really serious about their opening settlement offers or whether they are merely grandstanding, I often then turn to a more interactive caucus in which I participate with the parties and their counsel, separate from the other side[69]. This begins the shuttle communication phase.

VII. Real Caucusing/Shuttle Diplomacy

It is has been my experience that, most often, 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. Additionally, often the emotions of the parties, depending on the case, 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. Usually, at this stage I move to real caucusing.

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[68] Not prodding to a specific result, but to keep the negotiations/mediation open and progressing.

[69] However, as Welsh chides (pp. 789 and 810, and fn. 112 - 3), too often the mediator bypasses or minimizes the joint session to move quickly to caucuses, missing an important step that seldom provides a creative non-monetary settlement, or uses joint sessions only for venting.
Venting is quite appropriate in the right case (and can even be accomplished in caucusing – Welsh, at the bottom of fn. 114), but it is not the only, or, indeed, the primary purpose for a joint submission.
It is, hopefully, listening actively to the other side and asking them to do likewise – if perceived productive, even if it is adversarial posturing, which each party should observe in a joint session, not just at trial.
I am not one that abandons the joint session too quickly – indeed, sometime not at all - but only when it is potentially useful to do so and there is nothing productive coming out of the joint session.
Nevertheless, quickness to caucus is often promoted for the very benefits of caucusing, and avoiding the failures (settlement impasse) of joint sessions: Welsh, at 812, and fn. 120; 813, and fn. 123.
However, never say "never" – sometimes the hostility (and/or lack of a safe, level playing field) is so high or lacking that the only potential way to possibly reach a settlement is through caucuses (Welsh, 810, and at fn. 114). In all cases, it depends upon the case – I have done both or only one on occasion - this should be explored at the Pre-JDR. Other steps (e.g. presence of a security guard, etc.) may be necessary to ease the hostility or feelings of inequality.

By removing the emotions (by the terms of Anderson et al, a "cloak") that arise in joint session, by, rather, using caucusing and the mediator taking the role of the shuttle communicator, the emotional (and barbs) baggage can be left behind and constructive positions can be better communicated (through the mediator) and better evaluated by the parties[70]. Moreover, serious/serial caucusing often allows the parties and their counsel to be candid with the mediator[71], which, without betraying confidences, can allow the judicial mediator to get a better understanding as to where the "sweet spot" for settlement may lie, and how to frame and transmit proposals.

As well, 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"[72]. This may allow the mediator to either use a hypothetical as a way of conveying an actual offer, or "fly a kite" for a mediator created option not proposed by the other side, but which the mediator believes may be viable[73]. In this way, a credible mediator can effectively – and, if properly done, ethically – influence the acceptance and value of an offer s/he presents.

As part of the caucuses, I will meet with each party and their counsel[74], after the initial presentations in joint session and opening real offers (99% of the time not resulting in settlement), to invite them to "sharpen their pencils" with respect to their positions, and, more importantly, where possible, to enquire more deeply into their *true* needs and interests. In either event (some mediations may have components of both positions and separate interests), I try to get each party and their counsel to not only focus on their next offer, but to give some 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

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[70] Welsh, fn. 114.
[71] Welsh, at 811, and the positive aspects of fns. 115 – 117, and 121.
[72] Welsh, at 812, and fns. 118 and 122. Anderson et al elaborate on this thought by saying (at 52): "In negotiation, the knowledge that an offer or concession has come from an adversary can diminish its apparent value (reactive devaluation) in the eyes of the recipient". A good mediator can create a veil (perhaps a "thick veil", in the first instance) that raises a question as to whether the offer was made by the other side, or is, rather, a suggestion for compromise from the mediator. This may raise the "hypothetical" role, which presents itself something like this: "What would you say to an offer such as …?"
[73] Welsh, at fn. 122.
[74] I say "party and their counsel" because almost never do I meet with either a counsel or their party alone. Moreover, I almost never meet with counsel for both/all parties without their parties present: (Welsh at p. 801, fn. 79). An exception may be when there is an apparent argument between counsel on some legal issue for which it is better – and more frank – for the lawyers to debate it before the mediator than before the parties. Additionally, when impasse arises it might be useful for the mediator and counsel to meet to see if they can be more frank, in the absence of their parties, as to whether there is a way to move the mediation forward. However, if any client seeks to be present, I would always support such a request, even if I did not believe that it would be the best strategy to resolving a case – after all, it is their dispute.

an ultimate possible settlement might be. Often it takes several "dances" (see below) to get there.

In this process, while not giving a final evaluation, I try to use my position and experience to evaluate (only where evaluation is sought by the parties or their counsel – one of the highest reasons for a JDR, my Evaluation Report found) and assess, the strengths and weaknesses (usually expressed as "risks") of the positions and interests of the parties[75].

Quite often in these cases everyone purports to have a "bottom line" beyond which they cannot go, and, while I need to respect that, I need to let them know that their bottom line may not be the basis for the ultimate settlement, and they (likely both parties) may need to move that bottom line if they want to achieve resolution.

In the individual caucuses I again raise the issues of the risks that may be faced, including the identity of the ultimate decision maker in a trial (who is most often unknown): 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. These need to be evaluated and positions of superiority discounted on all sides to find out what might be a reasonable compromise, trying to obtain as many "win-wins" as possible for each side from a basis of true interests. Again, I try and focus on what they really need to get out of the dispute in question (their real interests) and to move on with their lives, with resolution of their dispute, which is often a relief to many parties in itself.

In this process, I also try to help the parties evaluate what might – or might not – be acceptable to the other side. Without communicating any confidential information, I often express this as "my sense" of the matter. In this process, however, I am content, when asked or to the extent authorized, to take one party's position to the other and present it, in a way that minimizes advocacy and promotes the reasons (expressed, or "my sense" of the matter) behind the position. As I do so, I gauge the reaction of the recipient party/counsel and, again, use "my sense" of that to take back a counter offer.

A. Special Techniques

In presenting subsequent offers it's necessary to determine whether one will go to a form of, or close to, a final offer early on or whether there will be a number of steps (a number of "dances", as I like to refer to it) before resolution appears moving in the right direction or has hit a barrier. In this process one (each party and counsel, and the mediator) needs to consider in each case what the final offers might look like and how

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[75] Welsh, at 797.

close one can get to that “sweet spot”. Sometimes the process, depending upon the parties and their views, takes a “number of dances” to get to a settlement, and often only a few to realize impasse is approaching. However, never let either party back out too soon, as I have seen many stay and settle, notwithstanding a near breaking point earlier in the mediation.

In this process, in the right cases, there are techniques which Anderson et al identify in this way:

> Mainstream approaches to conflict resolution include several practices for changing the environment so as to veil or cloak information that might otherwise impede conflict resolution. Four of these practices are: 1) the use of a code of conduct; 2) the single-text approach; 3) caucusing/shuttle diplomacy; and 4) the use of hypotheticals[76].

As to a code of conduct to regulate the behavior of the parties – Anderson et al saying it is often referred to as “Operating or Collaboration Principles”[77] – for example, the parties, at the suggestion of the mediator, might agree in advance to refrain from personal attacks, and to listen to the other person talking. Although Roberts Rules of Order, or other procedural rules, may be useful in some mediations (say, in a dispute in a community context), it is usually not necessary in a legal dispute – where the mediator sets his/her own rules – in advance (voluntary or on request), or as the mediation progresses. All of this is usually set-up in the Pre-JDR meeting, if unproductive behavior is anticipated, or if not anticipated, when it arises in the mediation.

A single-text approach is one in which, rather than focusing on individual demands, the parties focus on the same draft text of an agreement. Anderson et al[78] say that this “creates a thick veil because the distractions and processing demands of working on the single text render unavailable information that would otherwise be available”. It starts with the mediator or a party suggesting it as a way to work to agreement. It can start with a slow process, with “low hanging fruit” and working up to a final draft with more complex issues, or alternatively can start with full demands, which are whittled down to what both parties can compromise. Usually it starts, after some significant negotiation in joint session, or individual caucuses, by the mediator’s suggestion, and contains that which the mediator believes the parties <u>may</u> agree. The process is to work on the text of the written agreement until an acceptable compromise is reached. Anderson et al say[79] that the process allows the mediator to ”act as a buffer if tensions have escalated” between the parties, while keeping the parties focused on implementing and detailing

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[76] Anderson et al at 63, relying on Rawls at 199-200.
[77] Anderson et al, at 63.
[78] Anderson et al, at 63 – 4.
[79] Ibid.

concepts to which they may agree, in principle, based on shared values. It also facilitates a "neutral memory" of common or shared interests, and, when it is negotiated over some time, with the parties focusing on the agreement, authorship becomes difficult to track and allows the parties to take credit or ownership of the good ideas in the final product. Thus, it is a form of a thick veil, focusing on substance, undistracted by ownership or personalities, and, all around, makes it easier to achieve a compromise agreement. One example is in negotiating/mediating a family parenting plan, especially when the parents are in agreement that both should have a meaningful role in the child's/children's interest. Another place is where a number of individual items have been negotiated to agreement, but an overall framework is needed to get final agreement – say a comprehensive family law settlement.

As to caucusing and shuttle diplomacy, which is the process I am now in at this stage of the mediation, Anderson et al distinguishes them as being "a private session with the mediator" and "a negotiation process in which the parties are in separate spaces and the mediator travels back and forth", respectively. I believe the processes are the same, except that in the former, the parties are in the same location, whereas the parties may be – but need not be – in separate locations. To me, the real distinguishing feature is that in the former, it is just a meeting between the mediator and the parties separately, whereas the latter actively conveys the shuttle mediator carrying proposals back and forth as generated by one side or the other, or the mediator him/herself. Anderson et al argue[80] that both, in keeping the parties separate, "establishes secure cloaks of ignorance that can be used to screen out distracting information [such] as the source of ideas and judgmental anchors that distort judgments" of common interests.

Hypotheticals are frequently used. For example, instead of saying that the other side offers a settlement at "x", the mediator might look for a possible workable solution, whether suggested by the other side or not (indeed the mediator may use a cloak to mask the author), that asks "What would you think about a settlement at x?" Indeed, they can get more sophisticated than that. Anderson et al say[81] that "hypotheticals are equivalent to veils whose thickness/thinness can be controlled".

B. Move from Cloaks and Veils to Transparency

Using these, and other, cloaks and veils, must, ethically, however, move to ultimate transparency – information withheld or restrained, more gradually revealed. Anderson et al put it this way[82]: "veiling generally becomes thinner and eventually transparent as mediation proceeds, since, in the end, all parties should have access to all relevant

[80] Anderson, et al, at 64.
[81] Anderson et al, at 65.
[82] Ibid.

information. [This involves] … mediator ethics in deciding what is to be cloaked or veiled” – and the timing and extent to which information is restricted or revealed.

As noted, Anderson et al recognize[83] that “the use of cloaks and veils of ignorance raises important ethical concerns. Cloaks and veils reduce transparency, and transparency of facts, values, and interests is an acknowledged [I would add “ultimate”] goal of mediation”. However, if these means lead to sound ends, with full transparency before any settlement is finalized, as Anderson et al[84] and I agree, what is the harm in using the means? Anderson et al purport to answer this[85] by noting that “[t]he central ethical issue is whether the disputants arrive at a resolution by their own self-determination or by the control of the mediator. The hallmarks of mediation are the self-determination of the parties and the impartiality of the mediator.” 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 the will take in an adjudication - their BATNA or WHATNA. In the end, I believe that Anderson et al put it correctly in stating[86]:

> … 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.

C. Mediator’s “My Sense”

In the course of drafting and presenting offers from one side to the other, 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. Thus, the mediator’s focus is not only on the substance (which should primarily remain the domain of the party and his/her counsel) or the strategy (which must remain confidential), but the stance and approach – what I have called “my sense”. In this way, the mediator can be helpful to the party in crafting an offer in the most successful way. For example, it may be important in some cases to reflect that this is not the party’s final position but is rather a step in the process. Alternatively, in some case it may be important to flag to the other party that this is the final position or close to the final position, so that the receiving party understands that there may not be many more “dances”.

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[83] Anderson et al, at 76 – 78.
[84] Anderson et al, at, *inter alia*, 78.
[85] Anderson et al, at 77.
[86] Anderson et al, at 78.

Throughout the caucusing/shuttle phase, it is 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, and possibly veils of ignorance to the extent that hypotheticals are used in the shuttle phases.[87]

In this process one always tries to come to resolution on the easiest issues first, so as to try and get them fully resolved and off the table, in the right-hand column of the Scott Schedule, and completed. In this way, the subsequent concentration can be on the next most important issue(s) until the most crucial one, and the total, are resolved. Small and growing successes can be a good way pace the settlement.

As one goes through a number of proposals back and forth there is often an impasse looming or reached. Sometimes there is a need to retreat for clarification of the facts or the law being relied upon by each party so as to allow the matter to move forward and the mediator can often provide a proposed legal resolution on which they can proceed to take the next step. Sometimes, the risks aren't recognized by one or both parties and it's necessary for them to get together on a more specific point to reinforce (from an advocacy point of view) the real strength of the position of the parties. That sometimes can allow the parties again to focus on the risks in coming – or not coming - to a compromise. Sometimes in this context, it is a legal issue, on which the counsel can meet, absent parties, to try to resolve (with, of course, their client's instruction and reporting to their client). Sometimes, it is a more human approach where the parties are of a sufficient level playing field that they can by-pass their counsel and try a direct approach with the other side – I have seen that on more than one occasion, especially where the parties know each other well.

D. Final Offers

As we get to the very final positions on the last outstanding, often substantial, issue(s), and the whole of the mediation, it is often important for the mediator then to try and determine whether he can craft a final settlement that compromises, in an appropriate position on the spectrum, a final solution. In that context, I often go to the parties individually and ask them for their final positions, knowing (and usually telling them, that they may not be final in fact) - but I want them to concentrate on that to see how close we can get. I then go to the other party and do the same and ask them to give me their final positon on this last barrier to settlement – on a specific issue, or the total package. Obviously if the final positions of both of them match, that becomes the settlement. If they don't match, I then go back to each of them and say their "final" position isn't sufficient and they need to compromise further. Sometimes I will say to them, even though it's beyond what they have expressed as their "final, final" position, that I believe that I can get them a settlement at some other number and often I need to do that with

[87] Anderson et al, at 79.

both parties. I then say to them, hypothetically, could you live with this (the "final, final, final" position) which is a compromise of the numbers that I believe they can come to accept. Quite often they "hold their nose" and say "yes", indeed, that they could accept that result. That then achieves settlement. However, the ethics of judicial mediation require that the judicial mediator never be involved, or be perceived to be involved in coercion to a result – rather it is the mediator pushing each party to the limit of their comfort zone. This is even more prevalent when the judicial mediator is "perceived as a representative of the courts and an authority figure"[88].

VIII. Other Less Than Full Settlements Options

If settlement is acceptable on some matters but not on others, a number of options may be possible. First, in that the mediator may have learned a lot about both the parties' positions, and interests, the parties may feel content to hand the decision over to the mediator – a med/arb or Binding JDR on that/those unsettled issues(s). Less than a full binding opinion from the mediator, the parties may agree to propose and implement a "final offer" resolution.

Second, it may be possible to arrange a partial settlement, with the other remaining issues to be determined later by further negotiations, of a further mediation (in our Court, usually a JDR is, due to resources, a one shot only process), or to go to trial. For example, in a matrimonial case it may be that the financial matters can be resolved but the parenting schedule cannot be and experts may be required in that regard. Therefore, in that context, the parenting, if not negotiated to a settlement, could go onto trial with the financial matters being resolved in the mediation.

However, the disputes are not truly resolved until . . . the settlement is documented.

At noted above, 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. Indeed, in a judicial context, I often (also as noted above), after signatures of the parties on the Scott Schedule in question, go into a courtroom on the record and have them declare (both client and lawyer) that the settlement that I have just read out onto the record is the settlement that they have agreed to and that they are prepared to have judgment issued in that amount and on those terms, should that be the case.

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[88] Welsh, at: 833, and fns. 229 – 231; and 850-1.

Where there is money outstanding, or matters of substance to perform, time to pay and perform before the settlement is finalized, or after settlement, it's important to determine those terms of payment, including interest and timing (or a discount for an early lump sum), and security for the performance, with contingent consequences (all as agreed by the parties).

IX. Conclusion

Mediation, especially judicial mediation, is not for the faint of heart. It requires education and experience. Neither is ever fully accomplished, although both should increase and improve over time. Indeed, the two are inter-related – more of one leads to more of the other. Moreover, as new strategies arise, and, as education expands, one often finds, as I have in writing this paper, that the methods one has used, have mediation theory to support and enhance them. At all times along the way, all methods and strategies must be based on, and proceed on, sound ethics.

In the end result, in my experience, 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. Nevertheless, 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. However, if ethical resolution of disputes is achieved, the judicial mediator has his/her rewards.

Appendix "A"

May 7, 2015

***** et al v.**
*****, ***, ***, ***, ***, and *** ...**
Action No. 1101-*****

JUDICIAL DISPUTE RESOLUTION - DAMAGE ASSESSMENT[1] OF THE PLAINTIFF

ITEM	PLTIFF	DFDNTS	NEGOTIATE					AGREED
NON- PECUN. - General[2]	$359,200	$358,100[3]						$358,500?
PECUNIARY								
Loss of Income - Past (with interest)	$160,300	$41,300						
Loss of Income - Future Earning Capacity	$761,200	$761,200						$761,200
Loss of Shared Family Income	$251,700	$0						
Future Cost of Care	$10,413,500	$1,105,300						
New Home Build	$440,600	$0						
Attendant Care (with interest)	$139,300	$0						
Financial Management Fee	$1,022,800	$117,000[4]						
Special Damages	$498,300	$497,000						$497,500?
Tax Gross-up	$2,198,100	$724,000[5]						
SUB-TOTAL - PECUNIARY	$15,885,800	$3,245,800						
SUB-TOTAL - PECUN & NON-PECUN	$16,245,000	$3,603,900						
INTEREST - Non-Pecuniary - Generals	$83,800	See above						

SUB-TOTAL	$16,328,800	$3,603,900						
SUBROGATED	$309,700[6]	$309,700						$309,700
SUB-TOTAL	$16,638,500	$3,913,600						
COSTS	$166,100	$?						
TOTAL	$16,804,600	$3,913,600 +						
LIABILITY	Defendants = 100 %	Plaintiff = 50% Defendants = 50%						

ENDNOTES:

1. All numbers have been rounded to the closest $100.

2. The Plaintiff says the trilogy limit, with inflation, is $359,200, whereas the Defendants say the trilogy limit, with inflation, is $358,100.

3. Claimed to be inclusive of interest, whereas the Plaintiff has calculated interest separately, below. I have not tried to rationalize the differences.

4. Roughly mid-point, rounded.

5. *Mid-point*, rounded.

6. The Plaintiff claims $319,500 (AUD), which the Defendants accept as $309,700 (CAD) - I have assumed this is the same in Canadian funds.

Appendix "B"

February 12, 2015

MR. * v. MS. *****

"SCOTT SCHEDULE" IN PREPARATION FOR TRIAL[1] OF MATRIMONIAL PROPERTY, SPOUSAL AND CHILD SUPPORT ISSUES

ITEM	MS'S POSITION		MR'S POSITION				DECISION	
Item	Ms.[2]	Mr.	Ms.	Mr.			Ms.	Mr.
MATRIMONIAL PROPERTY								
ASSETS								
Real Estate Matrimonial Home - current - Market Value - Exemption to Mr. - Mortgage - Secured Line of Credit - Net value	 $435,000[3] - ? -137,000 -101,000 $197,000							
BUSINESS LICENCE		$150,000						
BANK ACCOUNTS - Mr. - HSBC - Mr. - PNB - Mr. - TD - Mr. Sub-Total - Ms. - CIBC	 $0	 $3,000 $1,000 $5,000 $9,000						
CHATTELS - VEHICLES[4] - 2006 Toyota Corolla		 $2,500						
TOTAL ASSETS	$197,000	$161,500						

2

DEBTS								
CREDIT CARD DEBT - Mr. - TD Visa - Mr. - RBC Visa - Mr. - Sub-Total - Ms. - CIBC Visa - Ms. - PC Fin MC - Ms. - Sub-Total	$29,200 $ 1,200 $30,400	-1,000 -1,000 $2,000						
NET ASSETS	$166,600	$159,500						
EQUALIZATION TO BE PAID BY MS. TO MR. BEFORE ANY OTHER LIABILITIES DETERMINED	-$3,550	$3,.550						
TOTAL AFTER EQUALIZATION BEFORE ANY OTHER LIABILITIES	$163,050	$163,050						
SPOUSAL SUPPORT LIABILITY[5]								
- Entitlement								
- Quantum - Periodic - Lump Sum								
- Duration								
TOTAL AFTER EQUALIZATION IF/AFTER SPOUSAL SUPPORT LIABILITY								

COSTS								

End-Notes:

1. The parties separated on or about September 18,2009, after 12 1/2 years of marriage.

2. The designation here indicates who currently has the asset (or its equivalent value) and the assigned value. **All numbers (except where noted and final totals) have been rounded to the closest $100.**

3. Ms. claims the property is worth $420,000 - 450,000 - I have taken the mid-point.

4. Based on values attributed to assets by the parties, or based on appraisals by Mr., in some cases.

5. 18 year marriage and 1 year cohabitation prior to marriage.

Appendix “C” September 5, 2012

***** v. *** and *****
(Plaintiff/Defendant by Counterclaim) v. (Defendants/Plaintiff by Counterclaim)

SCOTT SCHEDULE OF CLAIM/COUNTERCLAIM[1]

ITEM	PLAINTIFF POSITION[2]	DEFENDANT POSITION	Negotiation	Negotiation	Negotiation	Negotiation	AGREED
CLAIM - DAMAGES							
Loss in Walk-In Sales	$56,600	$0					
Loss in Staff Time - Const. Clean-Up - Design & Reno. - Design & Install. - Sub-Total	 $20,400 $12,500 $10,000 $42,900	 $0 $0 $0 $0					
Cost of Materials & Out of Pocket - BMR. - Other Sub-Trades - *Entry Wall Materials* - Sub-Total	 $4,900 $5,400 $10,400 $20,700	 $0 $0 $0 $0					
Sub-Total	$120,2000	$0					
Punitive Damages[3]	$10,000	$0					
Sub-Total	$130,200	$0					
Unspecified[4] - Interest &/or Costs	$44,900	$0					
Total	$175,100	$0					

COUNTERCLAIM - DEBT & DAMAGES							
Debt - Rent	$0	$32,000					
Damages - Loss of Rent - Leasing Costs - Sub-Total	 $0 $0 $0	 $35,200 $3,100 $38,300					
Sub-Total	$0	$70,300					
INTEREST - Debt - Damages - Sub-Total	 $0 $0 $0	 $3,600 $3,100 $6,700					
Sub-Total	$0	$77,000					
COSTS	$0	$9,100					
TOTAL	$0	$86,100					

END-NOTES:

1. It is assumed that the **opening** position of the opposite party is to deny the other's claim, although little, if any, discussion is provided on the specific debt and damage amounts.

2. All numbers, unless otherwise stated, are rounded to the nearest $100.

3. It is presumed that this relates to the alleged unlawful distress.

4. This difference between the specifics claimed and the total claimed is not specified. It is assumed it is interest and/or costs.

Appendix "D"

May 9, 2012

***** v. ***, ***, ***, ***, et al**

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LIABILITY AND DAMAGE ASSESSMENT

DAMAGES - WRONGFUL DISMISSAL CLAIM	PLAINTIFF	DEFENDANTS	NEGOTIAT-ATIONS	NEGOTIAT-ATIONS	NEGOTIAT-ATIONS	NEGOTIAT-ATIONS	AGREED
GENERAL	$662,000[1]	$175,000					
AGGRAVATED	$30,000	$0					
PUNITIVE	$100,000	$0					
TOTAL	$792,000	$175,000					
LIABILITY - %	100%	0%					
TOTAL CLAIM	$792,000	$0					

DAMAGES - DEFAMATION CLAIM	PLAINTIFF	DEFENDANTS	NEGOTIAT-ATIONS	NEGOTIAT-ATIONS	NEGOTIAT-ATIONS	NEGOTIAT-ATIONS	AGREED
GENERAL	$300,000	<$20,000					
AGGRAVATED	$300,000	$0					
PUNITIVE	$400,000	$0					
TOTAL	$1,000,000	<$20,000					
LIABILITY - %	100%	0%					
TOTAL CLAIM	$1,000,000	$0					

INTEREST	$?	?					

COSTS							
FEES	$45,000	$?					
DISBURS.	$32,300	$?					
GST	$4,100	$?					
TOTAL	$81,400	$?					

Endnotes:

1. All numbers, except where noted, are rounded to the closest $1,000, as to damages, and $100 as to costs.

Appendix "E"

June 26 & 27, 2008

***** v. ***, ***, ***, *** & *** ET AL**

CLAIMS & LIABILITY

CLAIMS[1]		POSITIONS/AGREEMENT ON LIABILITY[2]					
PLAINTIFF #1		**PLAINTIFF #1**	**PLAINTIFF #2 & DEFENDANT #1**	**PLAINTIFF #3 & DEFENDANT #2**	**DEFENDANT #3**	**DEFENDANT #4**	**DEFENDANT #5**
CLAIM	**AMOUNT[3]**						
- Property Damage	$3,288,00						- Dispute[4]
- Business Interruption	$645,000[5]						- Disputed
Sub-Total	$3,933,000						- Disputed
- Interest	$1,658,000						
TOTAL (plus costs)	$5,591,000						
PLAINTIFF #2							
- Firefight & Clean	$316,000						
- Interest[6]	$133,300						
TOTAL (plus costs)	$449,300						
PLAINTIFF #3							
- Property Damage	$120,000						
- Interest	$50,600						
TOTAL (plus costs)	$170,600						

TOTAL CLAIMS	$6,210,900						

END-NOTES:

1. There is not significance, except general chronologic in the order of the claims made. The same is the case with the parties, except that Plaintiff #1 and Plaintiff #2 seem to be the primary claimants.
2. The intent is that each party will volunteer and then negotiate as to their responsibility for liability and, ultimately, the parties will agree - thus each of these blanks should be regarded as % Volunteered or Negoitiatied / % Agreed.
3. Amounts, unless specified are rounded to closest $1,000.
4. Disputes quantification and suggests it should only be & claims it should be no more than $2,583,000 for property loss based on *** Report, $292,000 based on ***, for a total of $2,875,000.
5. Does not take into account (deduct) 54 days of spring breakup in the calculations from March 14 - June 13, 1999 (91 days total).
6. Interest not derived in briefs has been based on the implicit % of Tplaintiff #1 claim of 42.17%, rounded.