

Making Mediation Effective: Models for Best Practice

Julie MACFARLANE*

I am very happy to be here this afternoon and I hope that what I have to say will focus on issues that are important to you. It is sometimes difficult when I am asked to speak about mediation because this is a broad and diverse topic. I hope that the focus I have adopted today in my remarks will suit the interests and preoccupations of my audience today—namely, where have we come to with mediation (especially in the court setting), where do we need to go next if we are going to start enhancing models of best practice, and what does our experience tell us about that? I hope that I am hitting the right points here. I am also very happy to take questions.

What I am going to do is try to sketch out where we have come to with court connected mediation and why. I am going to give you a sense of the “big picture” of what the research (which is increasingly accumulating) on these court-based programs is telling us. There are as yet few certainties, unfortunately. I shall also talk about what my own practice as a mediator tells me about what how we might think about building towards a better practice model of mediation.

I want to preface everything I say by acknowledging that there are many different forms of mediation. My definition for the purposes of this presentation is a very simple one. By “mediation” I mean, a process in which there is no decision maker other than the parties as represented by the counsel themselves. In other words, it is a consensus building process in some form or fashion. Mediation is only a decision making process in so far as the decision remains in the hands of the parties themselves. Therein lies the essential complexity and endless challenge of the mediation process.

In Canada we now have established court-connected mediation programs in a range of different jurisdictions. In Saskatchewan and Ontario we have had court-connected mediation for more than a decade. I

* Professor, Faculty of Law, University of Windsor, Windsor, Ontario.

always feel that it is important to emphasize that Saskatchewan was the first. They are often forgotten beside Ontario's much larger court-connected mediation program, but in fact, Saskatchewan was the first Canadian province to introduce court-connected mediation and both their program and the Ontario program are what we would call mandatory opt-out programs. In other words, you have to go to mediation unless you can come up with a really good excuse for not going. The form that making a "really good excuse" takes has varying degrees of difficulty, but the bottom line is that you need a sound reason to avoid mediation in these jurisdictions. I appreciate that there are programs elsewhere including here in Nova Scotia. Just to give a sense of the diversity of court-connected mediation, in Alberta, both parties can request mediation in the Provincial civil court and in British Columbia there is a notice to mediation process by which one party can trigger a mandatory mediation that both parties have to participate in. So there are structural differences, but I think the important point is that mediation is now entrenched in the court structures of the provinces, and also to some extent in the federal court system.

This is, of course, a trend that we are seeing across North America. There are literally hundreds and hundreds of programs now across the U.S. and Canada, some of which are subject to reasonably intense evaluation. I am focusing here today on civil non-family cases which are where we tend to most often see mandatory programs. There are, however, many mediation programs in the family courts. They tend to come in with a less mandatory flavor to them because of some of the political sensitivities of making a face-to-face mediation process mandatory in a family matter. Nonetheless, I did a review recently for the Canadian Justice Department of ADR programming in our family courts and found that this is both widespread and highly diverse. There are many different forms of ADR programming out there for family conflict—some of it takes the form of counseling, some of it is assessment, some of it is mediation. All these programs are opt-in, but nonetheless there is an enormous amount of development going on in those areas as well.

What has been the impetus for the development of mediation in the courts—how and why did we get here? This may be very familiar to some people so I am not going to take a lot of time on this. There is plenty of writing out there and I am sure that I don't need to belabor the point to the Canadian Institute for the Administration of Justice that suggests that the court system in the last 20 to 30 years has become

somewhat dysfunctional. There are problems with the process, the timing, the costs, the delays, which are increasingly encouraging people to look elsewhere for solutions. So just to take a few of these examples: the timing of settlement. One of the things that lawyers say a lot, and I do a lot of training with lawyers in this area, is that they are really great at settling cases: because 98% of cases settle, so we must be really good at settlement? Which, of course, is true to some extent. But the really interesting question is, where do cases settle in the system? 98.2% of cases now settle—that is a figure from the U.S. but if you look at the comparable jurisdictions in Canada you will see the same kind of rates of settlement. But where, is what is most important. Cases settle in two places in the system. Neither of those places is after discoveries, which is what lawyers would often suggest. The first is that action isn't joined. That is where cases leave the system. They leave the system after the filing of a statement of claim where no defence is filed. The other major place in the system where cases leave is between pre-trial and the final trial event. So those are the two main places the cases are leaving and that means, of course, an awful lot of cases, yes 98.2% settle, but many of these are there until the bitter end. That means that there are very serious system costs simply keeping a case in the system and having it moving along in some fashion. We know that for individual litigants the cost of trial are becoming often out of their reach. In 1994 the Civil Justice Review in Ontario estimated that a 5 day trial in what was then the Ontario General Division, it is now the Superior Court, would cost on average \$45,000 in legal costs. This is obviously beyond the reach of many people.

Access to justice issues are also important here. In many ways the mediation movement during the 1970's and 1980's presented mediation as a democratization or as a citizen participation phenomena, a way in which ordinary people could get more involved, more hands-on involved in the handling and the resolution, hopefully, of their own cases. When provincial governments establish mediation programs in the courts we tend to hear a lot more about reducing system costs than we do about the access to justice issues (although again, I think Saskatchewan took a somewhat different approach to this question).

Finally, it is important to acknowledge that there has been terrific leadership from both the Bench and the Bar that has pressed for these kinds of changes and supported them on a local level, seeing them as an important way to expand the kinds of services that the courts can provide. To just pick up on the previous speaker's point (Joel), if people can come

to the courts for something that gives them a faster, speedier, more hands-on, more pragmatic way of resolving their dispute, then they are less likely to go outside to other private forms of service that are outside of the courts themselves.

I have conducted a number of research studies over the last ten years with lawyers and their clients which have examined how they are adjusting to court-connected mediation and other forms of alternative dispute resolution. I have just completed a book, “The New Lawyer: How Settlement is Transforming the Practice of Law”¹ and a lot of that work is collected and analyzed there. I have collected data on the reactions and responses to new forms of dispute resolution from both lawyers and their clients. This first one I am calling the “pushback.” Here are some of the classic anti-mediation arguments that we hear out there. “We are big people, we can settle the darn thing.” “What do we need a third party for?” “Why do our clients have to be there?” This is a little reminiscent of “We settle everything anyway, what more do you want?”

The second reaction I have seen is an unspoken sentiment that runs through many cases. As one lawyer said “Early settlement, in other words settlement using court-connected mediation, perhaps kicks me squarely in the pocket book. If you are being entirely selfish just looking at the lawyers’ interests, then why do I want this?” This statement—anonymous of course—is one which reflects the anxiety that many lawyers have looking at the phenomenon of the court-connected mediation, especially where it is mandatory and especially where it takes place early in the litigation process.

The third reaction—another “pushback” against mediation—is that mediation will produce a “watered-down legal system.” This sentiment expresses the view that because mediation is not decided by a decision maker according to recognized principles of law, legal principles are not imposed and required, and this is watering-down what we think of as a justice system. Certainly there is a tension here between a rights-based model of justice, a formal model of justice—and justice which mediation advocates would say is created in the negotiation between the parties and represents what they feel they can live with.

¹ Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (Vancouver: UBC Press, 2008); the quotes that follow are drawn from my research and appear in this book.

Two more statements from lawyers: “I am personally concerned that if only 3% of the cases actually go to trial, that means 97% of the time all of the pre-trial stuff is wasted to a large extent, so...” says this lawyer, “97% of the money that I make is from wasted time?” Now that maybe a little hard, but it does reflect, I think, the mismatch between the amount of time and effort that goes into developing settlement as opposed to getting ready for going to trial, when settlement is far more likely to occur than going to trial. And then the next statement reflects what I think is a change in the consumer values around what they expect to get from both lawyers and the courts in the 21st century. This lawyer says “when I started practicing back in the mid-60’s, there was a terrible arrogance in our profession. We thought all clients were not necessarily idiots but they didn’t know what was best for them and they had no idea what was going on in the legal system.” Here is the change: people are 100% more sophisticated now, they know what goes on in the system generally. They have access to information on the Internet. And they are much more conscious of where their buck is going than they used to be. Commercial and institutional clients are more assertive now than they used to be about what they want, and demand that this represents value for money. There is no longer a willingness to simply hand the file over to a lawyer and allow them to conduct discoveries for as long as they want. Instead commercial clients want to know what their money is going to, where the settlement opportunities are, and they are interested in early settlement because it makes sense to them on a financial basis. You can see this change as well in the huge growth of in-house counsel.

Another factor in assessing the landscape of court-connected mediation is the passage of time. Some of these programs are more than 10 years old now. People in Saskatchewan and Ontario who swore they would fall on their swords rather than accept mandatory mediation have become remarkably accommodating and accepting of it now. For example: “I was certainly skeptical of mediation but that skepticism has now been removed and I have developed the skill.” Connecting experience in mediation with the development of new skills is important, which I will talk about in a minute. Again, “I always go to (mediation) with a view that I can learn something anyway, whether or not it settles” said one counsel; we can see that mediation is an opportunity for some disclosure, some information exchange; that this is a productive thing to do early in the life of a case. “I am no longer offended by the earlier process” says the next lawyer. This is actually an Ontario lawyer where we have mandatory mediation before discoveries. He continues: “It is an

antidote to the almost fetishistic obsession with knowing everything about a file before you can say anything about it.” I think this quote is very revealing of the change that is happening as a result of early mediation. One of the things that has started to happen is that lawyers are starting to question just what information they need and why, and what for, in order to at least begin a settlement discussion. I think that that is a really important consequence of some of the earlier mandatory mediation programs.

There is also in my presentation materials an excerpt from an article that I wrote a little while ago for the *Louisiana Law Review* (“Will Changing the Process Change the Outcome? The Relationship between Procedural and Systemic Change” 65 *Louisiana Law Review* (2005) 1487) which talks in specific terms about some of the ways in which counsel are changed by the impact of using mediation over a period of time, and some of my own and others research.

What do we know so far from evaluation of court-connected programs? I said at the outset that maybe we have fewer certainties than we would like. I think that the reason for that lays in the fact that mediation is a process which cannot be labeled as always being appropriate under certain conditions. This is because there is so much about the context of individual cases and litigants, procedures and third parties that makes a difference to how effective mediation can be. So I am afraid that the picture is not a straightforward one, as though it would be simple if you put the following pieces in place into your court design then you will get an effective program. I think the picture is a more complicated than that. Before looking at those complexities, here are a few things that we do pretty clearly know because they have been confirmed now by numerous studies in the U.S. and Canada.

The first is that mediation shortens the time to case disposition. If you take a group of cases that are referred to mandatory mediation and a group of cases that are not and you compare their time lines to case disposition (that is, when they leave the system), what you consistently find is the cases that were referred to earlier mediation, whether or not they settled in mediation, nonetheless, will settle and leave the system in a shorter period of time than cases that are not mediated. In other words, mediation is a trigger to earlier settlement. I think that is an important piece. We do have a lot of research data to back that up now.

The second is that voluntary programming has a low take up. This shouldn't really surprise us. It is the reason that Ontario and

Saskatchewan make people opt-*out*, not in. There have been consistent studies across the U.S. that show that when people are offered mediation they often find a reason to say “I think mediation is a great idea but not in this case.” If I could have a dollar for every lawyer who has told me over the years, “mediation is great, I really love it, but not in this case,” I would be wealthy now. This perception needs to be addressed in education and training for both the parties themselves and counsel, many of whom come into practice still with the barest dusting of A.D.R. knowledge that we give them in law school. I think that sometimes people outside the law schools imagine that we are all thoroughly educating our graduates these days on how to use A.D.R. processes. We are not. These are elective courses that are taken by a small number of students. It is also, I think, a reason why you might consider a mandatory program. Because a mandatory program, at least, exposes people and exposure, we see in the research, is connected to better and better experiences of mediation.

The final issue that we can say at this stage that we know with some degree of certainty and consistency is that client satisfaction with mediation is generally high, in fact, very high, and in particular, what clients talk about consistently is how they feel the process was fair; that they felt included in the process, that it felt like a good process, it felt like an inclusive process. This stands in stark contrast to some of the stories that litigants tell about their experience of being included or not being included in the litigation process, and especially, a trial. I did a study about ten years ago where I compared a group of litigants in a court-connected mediation program with another group with similar types of cases that went to trial and what was the most shocking about that was how disappointed the litigants, even those who were successful at trial, were with their experience, and how little they actually had felt that they had had their mythical and much anticipated “day in court.” This is an extraordinary phrase—we really have no idea what it means—I would love someone to write a PhD and figure out what lawyer and clients (separately) really mean by it.

Client satisfaction is consistently high whether or not the original referral was voluntary or mandatory. Clients who are ordered into mandatory mediation programs do not record lower levels of satisfaction with the fairness of the process itself. I think that is a really interesting result.

What do we know about the impact on counsel so far? We know that counsels' attitudes toward mediation tend to improve with experience. Experience with mediation leads to greater awareness of the need for new skills. It is very interesting if you watch the progression of counsel through their mediation experience, at first they are saying, "Ah, it's a waste of time." Or, "I just went in there and did my shtick." Or even, "If my client opened their mouth I gave them a good kick under the table to keep them quiet." People are very frank about these things. And then gradually over time counsel discovers that when her client speaks up it is not a disaster, in fact it may be quite useful, and in addition her client felt very happy about the fact that they could participate directly in this way, and speak to their issue. The lawyer begins to realize that mediation is also an opportunity to evaluate the credibility of the client on the other side and that is helpful too. Gradually counsel begins to become aware that there are new, not completely different, but new skills that lawyers need to learn in terms of advocating for their clients in settlement building processes.

I am British, and one of the things about the Brits is our absolutely innate belief that everybody speaks our language, everywhere in the world. So, we don't need to learn any other languages because we assume that everybody speaks English the way we do. So you quite often see British people on holiday overseas in Europe especially and they are trying to have a conversation with someone who doesn't understand English and generally what they do is that they just say the same thing but in a louder, and a louder, and a louder voice, right? Well, that is what counsel sometimes does at the beginning of using mediation. They figure that if they just sit there and say the same thing, reiterate the same position, louder and louder, then eventually, something will happen. But, of course, just like the person trying to communicate with the waiter in the Spanish resort, it doesn't work. As counsel are more exposed to and experienced in participating in mediation they realize that they need different kinds of persuasion techniques. Their objective is to get the other side to settle on their best terms and perhaps, just repeating themselves and being positional isn't the best way to get there. So there is a correlation between experience with mediation in the research data and a greater awareness of the need for different skills. My book (*The New Lawyer*) looks more closely at these issues and how lawyers are developing best practices to be more effective as representatives in mediation. With greater experience, counsel tends to give more time and attention to settlement strategizing, recognizing that mediation is

something that you should prepare for, and you should work with your client to prepare for. You should give time to thinking about what the potential option and outcomes might be. Not something that is simply an annoying thing that you have to walk through.

While this research tells us what the potential of court-connected mediation is—and the realized potential in many places—they are of course not the whole story. Not all court programs achieve that level of satisfaction and efficacy. Not all experiences of mediation are positive. Here are some of the continued concerns and critiques that I think exist and that I think are very important. One is timing, and I have alluded to this a couple of times already. At the moment, programs that go early tend to save parties the most money because they have expended the least on legal costs. They are less entrapped by the idea that having spent \$5,000 or \$10,000 or \$20,000 already, why wouldn't they just spend a little bit more by going a little bit further? If the costs are lower, we all know as mediators, that it is easier to settle the matter. But at the same time, certain cases need to go further. They may need to go through discoveries. And there always needs to be some reasonable exchange of information for there to be a realizable settlement process.

Another concern is voluntariness and I am not actually talking now about entering into the mediation process, but about voluntariness in the outcome. One of the things that comes up quite often in mediation evaluation data but gets relatively little attention is that the parties sometimes feel that they are pressured into a final settlement. Sometimes they feel pressured by the mediator, but more often they talk about feeling pressured by their counsel or a combination of the two. So one of the things that I think that we have to be aware of as we try to build best practice models for mediation is being clear that this is a process in which the parties are the decision makers. Between counsel and client, we all know, that in theory at least, the client should be the decision maker—but there are some important adjustments here for lawyers who have not been accustomed to having clients right there with them at the negotiation table. There is a delicate balancing act that happens in terms of advice on whether or not to settle, in order that a client can feel that they truly and voluntarily accede to the settlement. I am not suggesting that this is a problem in a lot of cases but there is enough data there that when clients talk about pressure, we should be aware of this and thinking about how to build in safeguards—principally in the education and training of mediators and of counsel.

And while we are on the topic of education and training, there is a continuing concern about lack of preparation and appropriate skills for counsel and others participating in these relatively new and unfamiliar processes. There are now studies that show that even where clients are invited to participate in mediation, many say very little and that the show is still run by their counsel. Now for some clients this may be what they want, what they prefer. But in other cases counsel are clearly constraining their clients from talking, which may exclude important conversations and is ultimately counter-productive (many clients express dissatisfaction about this). From my own research I have constructed a lengthy inventory of techniques that counsel have described to me that they use to make their clients shut up. They include telling them in advance of mediation not to speak, and if they do kicking them under the table, or to taking them outside to tell them to shut up. Less experienced counsel sometimes have a problem with giving their client the space to say something. Part of the problem here is a lack of preparation. Before going to mediation with a client, a lawyer needs to ask “What is it you are going to talk about, what is it I am going to talk about? How do we make sure you don’t give away the farm, so that I can feel comfortable but you can put your piece on the table as well?”

In Toronto there is an expression (it may exist in other cities), “the 20 minute mediation.” These are the mandatory mediations that counsel shows up to, says “okay, I am here, I have fulfilled my obligations under the rules, Mr. Mediator, Ms. Mediator, will you sign this paper here to say that I attended.” That kind of “going through the motions” piece is a continuing problem in some centres where the professional culture does not support making mediation a serious effort at settlement.

I am going to spend the last part of my talk speaking from my own experience as a mediator. I want to say something about some of the conditions for an effective mediation process that I have seen in my own practice as well as in research. And here I am not going to be talking about system characteristics. I have tried to draw your attention to some of the system issues; voluntariness, timing, participation of clients and so forth. Certainly I see some important threshold issues, such as thorough and effective training for counsel and mediators, effective and thoughtful preparation, adequate exchange of information, and informed consent by clients. But what I think really makes a mediation process effective, or not, in any one case are its particular characteristics, the context of the conflict, and the influence of the mediator. This means that although we can aim for models of best practice which systems can support, we cannot

predict with any degree of certainty that any one case will or will not settle in mediation, or be suitable for mediation, no matter how good the system, until we know more about its particular characteristics.

So what do cases that are more likely to settle look like? First, they will have reached or got close to what theorists call a “hurting stalemate.” For those of you who have studied conflict theory or perhaps international relations, this expression may be familiar to you. The issue here is whether a conflict is ready for negotiation, ready for some kind of discussion with or without a resolution. What a hurting stalemate implies is that for both sides, or for all sides, it has now become important for some reason to resolve the case sooner rather than later—and that in the process of doing so each party to the conflict has both something to gain, and something to lose. A hurting stalemate might mean, for example, that one side needs a resolution in a very short period of time and the other side has a financial issue that they need to resolve also—so that there is a way in which everybody around the table needs something decided sooner rather than later. By this stage in a legal dispute they will probably have bashed to death their legal arguments in such a way that only a decision maker can finally resolve them. So this is partly about both sides being willing to say, if we want this sooner than a legal decision maker can give us a decision, how can we build a tradeoff here that we can all live with? How can we make some kind of a compromise, because this is hurting us all? We need to be able to move on.

Second, for a mediation to work both or all sides need to be approximately—and I say approximately, with lots of lines underneath it—equally committed to making the process productive. If everybody who said “I don’t trust the other side” was immediately ruled out as a possible candidate for mediation, we would hardly do any mediation. There is almost always some mistrust between people when they are in conflict. That should be accepted as an almost inevitable part of the process. But all sides need to be committed to dialogue in a couple of important ways. They need to be willing to exchange information. If they need information to discuss that might lead to a without prejudice settlement discussion, that needs to be put on the table. They need to be willing to participate in good faith and with open-mindedness about a potential outcome—this generally means that they have already reached that hurting stalemate point when they recognize that, sooner or later and sooner would be better than later, they need to settle this particular problem. It also means that they probably also need to be willing to listen to the other side. That is not to say that listening to the other side put its

case won't really aggravate them, and they may need a lot of coaching from their counsel and/or the mediator in order to get through it, but they need at least to be willing to listen, not so that they will change their mind but just so that they are willing to listen. Then, finally, all of the parties need to be at the table and have their input. Mediation is a little different from litigation in the sense that you have to always be thinking about other individuals or organizations out there that might be able to undermine the final outcome. The answer is not simply those with legal standing. There may be others—third parties or those with important relationships to the parties—who are critical to making the proposed outcome work. So my rule of thumb is always “have we heard from everybody who might potentially derail the outcome here”?

There are some more conditions that I believe to be necessary for an effective mediation process which I shall mention only briefly. Counsel needs to have prepared her client to participate and consider options, and this includes reality checking. The serious buy-in of counsel to the process—which begins with preparing their client—is very important. Those of you who are from centres where there is resistance among lawyers to using mediation will be painfully aware of how much this affects how well these processes work.

Also critical to an effective mediation process is a mediator who is not only capable and knowledgeable, but also hardworking and pro-active in encouraging the parties to work towards settlement. There seems to be a misapprehension in some quarters that because mediators are charged with enabling parties to reach their own decisions, the role they play is essentially to roll over and play dead. That they are like big, blobby squishy people, that they don't really do anything. I think that one of the things that we are starting to see in the research data—and this certainly fits with my own experience as a mediator—is that parties want mediators who are not “blobby.” That doesn't necessarily mean that they tell them what to do or take away their decision making power but they are not blobby and do not duck out of their responsibilities in helping them think through their options, and the consequences of adopting an option, in any one case. A big part of being a mediator is being a coach for both sides; helping them to realize their own negotiation potential and maximize their effectiveness as negotiators. We had some very interesting data when I evaluated the Saskatchewan program a few years ago which showed that clients really wanted more pro-activity from the mediators, and in particular they wanted mediators who would stand up to counsel if counsel was “going negative” or undermining the process. I think that we

have to start thinking about mediators as tough people who will stand up to the parties—lawyers, laypeople, business people, whomever—and help them work through their alternatives in their own language and terms.

A critical element of effective mediation is enabling the parties to interact face to face. It may not be comfortable, but it is almost always essential to finding common ground. I can't tell you how often this comes up in the research. People talk endlessly about the difference that it makes to sit across the table and see the other person that they are fighting with. This is the case in commercial and corporate institutional conflicts as well and not just (as we might imagine) with personal conflicts. Of course, what often happens is that the people are sitting across the table from one another haven't seen each other perhaps in months or years—or maybe ever, if they are dealing through organizations. I did a case last week between a principal and a teacher; the principal had fired the teacher but they hadn't met for ten months. Since the day of the firing they had not sat down and discussed what had happened. Bringing them together face to face made a huge difference to them both. They found a resolution which allowed the teacher back in the classroom subject to some strict conditions. This could never have happened without them negotiating face to face.

For a mediation to be effective it needs to look for a pragmatic, effective and realistic solution which is capable of overriding the desire for complete vindication or victory. Of course, neither all people nor all cultures are preoccupied with vindication or victory—this may be a cultural bias among Western whites raised on a “rights ideology.” When I have worked with my local First Nations community I have noticed that vindication or victory does not seem particularly important to them. What is important, especially if these are disputes within the community, is acting with honor, and being seen to do the right thing. However, many of the parties with whom I work have at some point been set on vindication—or even revenge—and absolute “victory.” If this is still their state of mind, mediation is probably premature and likely to be unsuccessful because any alternative to “winning”—a pragmatic solution, some type of accommodation and trade-off—is dismissed out of hand. In order for a mediation to be effective, the parties need to be ready in the sense of “hurting stalemate” I discussed earlier—ready to think about what it would take for them not to have complete vindication, ready to think about a realistic solution.

A few examples: Debt cases, which are often mediated. Absolute vindication or victory means that you get a judgment for the full amount of the money that you are owed. What you do with that judgment, darn, now you have to collect on the judgment. Instead of full victory or vindication, a realistic outcome might be a structured settlement that actually relates to what the person who owes the money is able and capable of paying and not defaulting on again.

Another example: A lot of times people find that they have pushed the other side as far as they think they can realistically go in the negotiation. Maybe if they carry on to trial they can win on that point of principle—but that is a big “maybe.” I do a lot of cases for school boards regarding classroom accommodations for children with forms of autism. If these cases go all the way to the Special Education Tribunal, perhaps the tribunal would order the school board to do something more than they offer in negotiation. But more likely, the kind of practical, pragmatic settlement that gets worked out between the parents and the teachers is as far as the school board can go because the school board does not have any more teachers or resources. Again, I think that is one of the things that sometimes happens is that people recognize that in reality this is as good as it is going to get. If that pragmatic solution is to override a desire for vindication it is critical that the complainant feels they are being listened to and taken seriously. Both the teacher and the principal that I worked with last week needed to sit down and tell each other about the impact of the events leading up to the dismissal and the decision itself; once that had been done, the dispute could be settled. It was the process of being listened to that for both parties made the difference.

Before closing I also want to mention some factors that we tend to associate with a good argument for trying mediation and which, in my opinion, are actually not all that relevant—and certainly less important than the issues I have just been talking about. The first is continuing relationships between the parties or among the parties. Of course it is useful if people have an investment in going on working together because that is an impetus to them to try to resolve the matter, rather than risk a win-lose outcome at trial. But there are lots of contexts in which I mediate where people do not have continuing relationships yet the pressure to settle, the need to settle, and the desire to settle is just as strong. Sometimes the fact that there is going to be no further relationship—for example in a termination case—doesn’t really affect the fact that the parties still want to resolve the matter. The person who has been terminated still wants to be able to say something to explain their

position and maintain their dignity. The employer still wants to be able to explain their position and avoid further bad blood and whispers in the workplace (not to mention the costs of litigation). There is no continuing relationship here, but it is just as important for these parties to come to an agreement rather than to carry on to trial. And the relative certainty of the law in this area makes mediation a very useful process for them. Another example—debt cases. People don't have continuing relationships in these cases. Yet again, we see those in mediation all the time where the parties have an interest in a pragmatic solution (for the creditor, collecting something rather than nothing—for the debtor, getting the collection agency off their back, off their credit record). In fact I would go further and say that in some cases, having a continuing relationship makes it harder for people to settle in mediation. There are many more issues to resolve, including the future. And when people have continuing relationships they often have more investment in continuing to fight.

Another factor that people sometimes believe to be associated with effective mediation is that one or the other side has a hopeless case. There is a cartoon that I have sometimes used in training which has one lawyer asking his associate “Would they think that I was a wimp if I suggested mediation?” There is an assumption that if one side proposes mediation, it is either because they don't have the guts to go into battle (I have a lot of research data to back up this point) and/or because they have a hopeless case. However when you think about mediation as a negotiation, why would it be effective if one side has no arguments, no power, no leverage? That seems unlikely. If you had a great legal case, would you mediate? I think that one or other side having a particularly hopeless case is not a good or a realistic condition for an effective mediation process. Instead, the fact that each side has something to lose, and something to gain as a result of settlement (or not) seems a better indicator of success (this is the “hurting stalemate” consideration again).

We also sometimes assume—erroneously I believe—that in order for a mediation to be effective the mediator needs to play an evaluative role. Evaluative mediators are sometimes described as “hashers, bashers or trashers”—they put the parties in separate rooms and go back and forth between them, telling each side that their case has holes in it or even that it is hopeless. There has been a trend in this direction in private commercial mediation and this assumes that this approach is by default the most effective. However this assumption is beginning to be challenged. In evaluations of court-connected programs the parties are saying “I didn't want to be told what to do, I didn't want to be told what

my case was worth, I wanted to tell the other side what had happened or what I thought would be fair and I don't want that evaluative opinion rammed down my throat." That seems fair comment—after all, that is what you go to the courts for, and not usually why you go to a mediator. I think that a highly evaluative approach is starting to appear less obvious to many counsel and clients as a condition of effective mediation. Not to say that evaluation isn't useful in some cases, but it should be asked for and regarded as one among many possible mediation approaches.

What do people need in order to settle? I think this is where we should be looking for the clues on effective best practice mediation. I wrote a paper about this some years ago, drawn from my own mediation experience ("Why do People Settle?" 45 *McGill Law Journal* (2001) 663). I concluded there that disputants need to feel that they can either let go of their conflict as a values issue—by which I mean, a matter of principle that is non-negotiable—or, more often, they can reframe it as a resources issue, a pie that gets divided up amongst people which represents a little bit of trade off between people over what they want and what they will give.

When a conflict is framed as a matter of principle, it becomes very hard to settle. Something I have learned as a mediator is that if you really probe into why a party believes something to be a matter of principle, it often has less to do with what happened in the first place and more to do with what has happened since the conflict began. It may relate to how the other side responded to their original complaint or grievance. For example, "I made them a perfectly reasonable offer and they didn't even respond to me." And so what might at its heart be a practical matter that needs to be resolved by some kind of resolution and accommodation between the parties, becomes a "matter of principle," and really hard to resolve. It is not to say that there are not values issues out there that are really hard to mediate but I think that there are fewer of them than we sometimes imagine.

In agreeing to settle, disputants also need to feel that their expectations are being met to an acceptable degree. When I interview clients, one thing that I hear a lot is "My lawyer told me that I had a great case and I was going to get all this, and then all of a sudden one day he called up and said 'we need to settle.'" This sudden "now we are done" (usually right before trial) confuses clients who need to feel that to some extent their expectations have been met. They also need to be given voice, have their concerns taken seriously and understand the place of

their concerns in the outcome. There is a growing body of research that touches on all these issues which is described as “procedural justice.” We need to be teaching lawyers about this at law school, where we focus on nothing but outcomes. And procedural justice is something that mediation can offer.

Finally, it is important to me to end by reminding you that above all, mediation is often a surprising process. Clients bring energy into the process; they bring information about the real underlying cause of the conflict and about acceptable outcomes. The shift toward resolution is often a magical moment and it is difficult to understand, from a purely legalistic or technical-rational perspective, why the change occurred. This should remind us to be humble in trying to predict which cases are right for mediation, and which are not.