MAKING MEDIATIONS WORK BY APPLYING THE 3 R'S – REASONABLE, REALISTIC & RATIONAL (With a Bit of Stoicism Thrown in)

PANEL DISCUSSION ON HOW TO PREPARE FOR RESOLUTION AND AVOID THE PITFALLS THAT RESULT IN FAILURE
CHAIRED BY IVAN LUXENBERG
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The topic of dispute resolution, particularly from the perspective of counsel, is one which has become quite popular over the last number of years. The litigants and their counsel are encouraged under past and current Statutory Insurance Regimes and the *Rules of Civil Procedure* to focus their energies and resources towards the mediated resolution of the dispute. Conflict resolution is the buzzword.

The concept of mediation stresses a more pragmatic, open-minded and common sense approach. However, motor vehicle (personal injury) litigation does have its share of potholes in the road that create a more bumpy experience than mediations involving other tort related claims (e.g. occupier's liability) or contractual based claims (e.g. long-term disability). This is partly as a result of a more positional approach adopted by the Defence, which is rooted in the changes to the Insurance Regime (e.g. Threshold issues/and the ever evolving deductible). The push to use Roster Mediators is becoming more prevalent. While it may be a cost saving measure to some extent, one wonders whether the underlying message to the Plaintiff's counsel is more of a reflection of how the Defence views the merits, or lack thereof, of the claim.

However, the mediation process serves a purpose. At the very least, it does allow the parties to put forth their positions and outline the risks associated with proceeding with the litigation. With respect to dispute resolution techniques and maximizing the benefits of the process, there are certainly ample texts and publications covering this topic, some of which are referred to in the body of this paper.

This paper cannot obviously discuss all aspects of negotiation techniques. It will review some of the problems that can arise during the mediation process and suggest some "creative solutions" to overcome the barriers.

SOME PERSPECTIVES TO CONSIDER

I consider the importance of some historical lessons taught by the Stoic philosophers like Marcus Aurelius, Seneca and others. A great book to consider reading is Ego is The Enemy by the modern Stoic, Ryan Holiday. He applies Stoic teachings to modern times and the challenges we face.

So, you are wondering how this can possibly apply to the topic of Mediations. Well, humour me for a moment.

Let us consider what we are engaged in – PERSONAL INJURY LITIGATION (claims dealing with negligence, SABS, LTD, etc.) The key word is PERSONAL. We are dealing with human beings and obviously human behaviour.

A claim that is being defended is a file. The file is a collection of data from various sources. We review the data. We form impressions about the claim based on the file contents. We assess risk and essentially judge the litigant (the label attached to the human being). The judgment is coloured by the role we play as defence counsel. We have not laid eyes on the person at this stage. Unfortunately, in a SABS claim, we do not even meet the person until the Case Conference. In Tort and LTD cases, we do meet the person at examinations for discovery. However, the discovery process is not always conducive to an open and friendly interaction. We try to assess someone's demeanour and credibility but the litigant will likely be defensive and on guard (and nervous). The person has been

prepped by plaintiff counsel and told only answer what you are asked. So, do you really get an accurate impression about this person?

The advantage offered by the mediation process is that you can be an advocate but leave the robes at the office. You are attending the mediation with the objective of having a fulsome and open discussion about the case.

What is important to remember is that you want to let the litigant know that their worth as a human being (whether as a spouse, parent, sibling, etc., is not being measured).

The “legal” assessment is focused on measuring the monetary values of the various heads of damage claims that are presented. It is rooted in a legal analysis and can be seen as a clinical and perhaps cold-hearted approach. However, that is how we assess and process these types of claims. Remind the litigant that your client is participating because they want to try and resolve the matter. While they assess risk based on the data, the mediation offers them an opportunity to meet and engage with the claimant. This opportunity should not be wasted. I always find that at the beginning of the mediation, the claims representative should try to chit chat with the claimant. This makes the process more humanistic.

The theme of the day, which starts right from the outset, is Resolution and Empowerment, letting the claimant know that a positive outcome will give that person the ability to remove the shackles of litigation and move on the journey to reconstructing their life.

GENERAL COMMENTS REGARDING THE APPROACH TO THE ADR PROCESS:

Essentially, there are two approaches to negotiating a settlement. The first approach is known as "positional bargaining". The negotiator does not focus his or her

attention on the interests of the other litigant. The counsel, as a matter of habit, adopts a narrow, one-sided focus. The achievement of victory is at all costs and one adopts an uncompromising stance. Little time is spent trying to develop options which satisfy or at least acknowledge the interests of both parties.

One of the flaws of this approach is the suppression of one's creativity. It may cause more harm to the relationship between the parties as it becomes a "contest of wills". The alternative method of dealing with dispute resolution is to adopt an "interest-based" stance. A number of authors have endorsed this particular approach.[1] It is not the author's intention to review in detail mediation techniques. However, it is important to have some understanding as to the different approaches as this forms an integral part to maximizing the benefits of the ADR process itself. From the counsel's perspective, if the approach proves to be a cost saving measure and facilitates the discussions, then why not adopt it?

THE PRE-MEDIATION PROCESS:

A number of points should be considered before participating in the mediation itself. Some of the factors that may contribute to a successful resolution include:

- Evaluating the tactics that you would use during the negotiation process itself.

[1] Examples of authors who endorse the problem solving approach are : Robert Fisher and William Ury., Getting to Yes, (Penguin Books U.S.A. Inc., 1991); William Ury, Getting Past No (Bantam Books, 1993); Robert Fisher and Scott Brown, Getting Together - Building Relationships as we Negotiate. (Penguin Books U.S.A. Inc., 1988); William Ury., Getting To Yes With Yourself (Harper Collins, 2015) – the prequel to Getting to Yes

- Consider the various scenarios that may be played out during the course of the mediation.

- Ensure that your client is "kept in the loop". It is important that the insurer has a full understanding as to the "worst and best case scenarios".

- It is important to consider your walk-away alternative. The phrase "Best Alternative To Negotiated Agreement (familiarly known as **BATNA**) was quoted by Roger Fisher and William Ury in their two books, Getting to Yes - Negotiating Agreement Without Giving In and Getting Past No - Negotiating Your Way From Confrontation To Co-operation.[2]

- Prior to the commencement of any mediation, one should consider the various alternatives to the negotiated agreement. In order for the negotiation to be considered a success from your client's point of view, the option that is arrived at should be at least as good as your **BATNA**.

- If you formalize your objectives before the mediation, you are forcing yourself to consider the possible outcomes. This assists you in making concessions and compromises as the negotiation process proceeds.

- Problem solving requires you to have an understanding of the interests that lie behind each side's position. Interest are the tangible motivations that lead one to take a specific position. What are the other side's needs, concerns and fears?

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[2] Ibid, Note 1

- Although perhaps difficult to do, it is important that you put yourself in the other side's shoes. How can you possibly modify their way of thinking if you do not understand their perspective of the dispute.

- Consideration should be given to not just the nature of the claim, but understanding the likely approach taken by the other side. Specifically, in cases involving a corporation with a large self-insured retention (e.g. a grocery store chain, a trucking company or a Municipality), there are added challenges. Simply stated, it is their money and accordingly, the approach taken will likely differ from that of a property and casualty insurer. At the mediation, you will likely be dealing with an independent claims adjuster who has limited authority from the corporation. It is important to alert the Plaintiff, before the mediation, to the added challenge. The crucial question is whether or not the claims adjuster has the ability to make a phone call or send an email to the decision maker during the course of the mediation. In some cases (particularly dealing with claims against a City), the resolution of the matter is held in abeyance until the Claims Review Committee approves the recommended settlement. Again, it is important that the Plaintiff is advised that the matter will not be finalized on the date of the mediation. From past experience as a mediator, it is surprising that the Plaintiff (and in some cases the Plaintiff's counsel), are unaware of the process of trying to obtain final approval.

- It is a mystery to me why there continues to be a practice of late delivery of expert reports and list of assessable

disbursements. Mediations are routinely booked at least six to ten months ahead of time. The process of obtaining authority is not one that takes 24 hours. In the "good old days," it was a simple process to walk over to one's Claims Manager and discuss the case and obtain authority. That does not happen now. The fact remains that there are committees or levels of authority that have to be considered. At the very least, Plaintiff's counsel should seriously consider serving the expert's report **at least** one month before the mediation. The Defence counsel may not be able to review the report the minute he or she receives it. It takes time to actually sit down and digest the contents of the report and then formulate an opinion and send it to the Claims Representative. That person has many files to deal with on any given day and not surprisingly, it may take a few days for the Claims Representative to actually review his counsel's opinion and look at the report. Time and again, I have been advised by the Defence that receiving an expert's report a week or less before the mediation does not help the process. The expert's report is not even considered when the Claims Representative tries to obtain authority before the mediation.

- The actual drafting of the Mediation Summary is an extremely important step in the dispute resolution process. The purpose of the summary is to set out counsel's perspective. In reality, the Summary provides counsel with an opportunity to set out the strengths of the case and the risks that the other side faces. Mediation Summaries which just regurgitate what is contained in medical reports is of minimal value. The Summary should highlight not only the opinions of the treating doctors and experts, but as well provide a critique of the other side's

> position and its experts. The role of the Defence counsel is to obviously explain to the insurer why there may be weaknesses in their position. This is partly designed to ensure that proper reserves are in place. However, there is no harm in reinforcing the position of the Plaintiff by setting out the pitfalls of the other side's position. By the same token, the Defence counsel will do the same. Clearly, the expectations of the Plaintiff must be tempered with the realities of the case. The role of the Defence counsel is to ensure that the Plaintiff understands the risks as well. **Once again, it helps the process if the Mediation Summary is delivered at least one week to ten days before the mediation so that both counsel have an opportunity to report to their respective clients.** In most cases, Plaintiff's counsel does meet with the client at least a few days before the mediation.

THE MEDIATION ITSELF:

What strategies and techniques are implemented during the course of the mediation itself from the counsel's perspective? One consistent theme in the various publications dealing with negotiating skills is the "Art of Listening".[3] As noted by George Fuller:

> *Although failing to be a good listener brings few consequences for most people, that cannot be said as negotiators. For them, listening isn't a social nicety it is a necessity, since there is no*

[3] George Fuller, The Negotiator's Handbook, (Prentice Hall, Inc. 1991); Windel Turley, Creating the Right Settlement Environment, Trial Magazine, June, 1994, at 28; Jerry Spence, How to Argue and Win Everytime, (St. Marten's Press, New York, New York, 1995), at 67;

> *room for giving lip service to listening when you begin to bargain.*[4]

Although it may be difficult to do so, it is important for the insurer's counsel to have some understanding as to the other side's feelings and concerns. It is important to begin to address them after their position has been set forth at the opening. An attempt to explore areas of agreement helps to narrow the issues and focus the energies on the more contentious points. One is in a better position to persuade the other side if the latter feels that they have been heard. They are more inclined to listen to you. Simply stated, it costs little to listen and acknowledge the other side's position without making any commitments. Opening the lines of communication and developing a rapport is sometimes half the battle.

Normally after the opening statements, it is tempting to react to the position that has just been set out and from your perspective it appears to be irrational or patently unacceptable. One approach noted by William Ury in Getting to Yes, is to step back and "collect your wits, and see the situation objectively".[5]

As noted by Mr. Ury:

> *Imagine you are negotiating on the stage and then you imagine yourself climbing onto a balcony overlooking the stage. The "balcony" is a metaphor for mental attitude of detachment. From the balcony you can calmly evaluate the conflict almost as if you were a third party. You can think constructively for both sides and look for a mutually satisfactory way to resolve*

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[4] Supra, Note 3, at 55. Mr. Fuller sets out a number of steps that increase your listening skills at the bargaining table. I refer you to page 55 which provides the reader with a number of helpful suggestions.

[5] Supra, Note 1 at 37.

> *the problem. Going to the balcony means distancing yourself from your natural impulses and emotion.*[6]

So, let us consider for a moment how the Stoics like Marcus Aurelius would approach an opening that was bombastic and bordering on insulting or a mediation summary that he vehemently took issue with.

Well, we know that the stoics regulated their emotions. They aimed to tame the impulsive remarks and knee-jerk reactions.

As Marcus said:

> *"We have the power to hold no opinion about a thing, and not let it upset our state of mind-for things have no natural power to shape our judgments"*

Point: anger is a toxic emotion that is clearly not constructive. It does not solve anything. It wastes energy. Listen quietly and attentively (there may be something of interest), but do not react. Emotional responses embolden and encourage the other side, adding fuel to the fire. You cannot control the external (what other say or do) but you can control how you perceive and react to it. A calm dispassionate reaction confused the other side and makes the other counsel/party appear unreasonable and their statements imprudent.

Advise your client that things may be said that may upset them but it is important not to react. Control of the "internal" (eg. Emotion) is within your control according to the Stoics. Remember that by reacting you communicate with both words and body language. Your non-verbal reactions can be very telling to the other side.

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[6] Ibid, at 37.

How can you establish that your negotiation position is a reasonable one? George Fuller has suggested there are certain techniques that can be of assistance when trying to persuade the other side that your point of view is a sensible one:

1. Be positive to persuade - being negative is counter-productive. Act, look, think and talk like you believe in your negotiation objective.

2. Know your facts and present them in a knowledgeable manner.

3. Make sure you are understood. Talk on a level the other party can understand.

4. Talk to the decision-makers.

5. Never engage in personally attacking your adversary, either directly or indirectly.

6. If possible, support your arguments with reference to third parties as this adds credibility (e.g. experts' reports).

7. Show the other side you can solve the problem they have.

8. Appearance counts. Whether it is a well-prepared written proposal, or neatly dressed negotiator, people are influenced by appearance.[7]

The focus should be on the task of identifying interests and creatively searching for options. One method that has been adopted requires the advocate to search for options by

[7] Supra, Note 3 at 70.

posing questions. This approach allows the counsel to hopefully understand what motivates the other party. One should avoid the use of confrontational and direct questions. As noted by William Ury, the framing of the question should be done in an indirect manner. A number of common questions that facilitate discussion include:

- "Why is it that you want that?"
- "What is the problem?"
- "What you are concerns?"
- "I am not sure I understand why you want that."
- "Help me see why this is important to you."
- "You seem to feel pretty strongly about this - I would be interested in understanding why."[8]

MEDIATION TIP IF THE MATTER DOES NOT RESOLVE

Even if the outcome was not the desired one, sign off on a civil note. Arguing at the end of the mediation and trying to sneak in the last word is unproductive-it sets a negative tone for future discussions. If there was a fulsome negotiation and the mediator was actively involved in the process, then treat the mediation as a stepping stone for further negotiations.

[8] Supra, Note 1 at 84.

Be respectful of the other side's perspective (or at least acknowledge it) – do not let anger/emotion take over. Toxic emotion hampers the ability to reason and clouds judgment. It does not advance your client's interests.

Advocacy is not measured by a barometer, but by reason and the ability to communicate respectfully in terms that are easily understood and resonate with the involved participants. The last thing you want it to have is Led Zeppelin's tune apply to your mediation – "Communication Break Down".

Every negotiator has his or her own style. However, if one approaches the dispute resolution process with an open mind, ears unplugged and employ some common sense, the resolution of the problem is achievable. Remember the 3 R's – "Reasonable, Realistic and Rational." And, of course, add a bit of Stoicism to the mix.

SOME BED TIME READING

There have been many books published dealing with the topic of negotiation. It is interesting to note that the authors of the seminal book, Getting to Yes continue to publish further books dealing with the topic. For those of you who have the time to read, here are some books that you may want to consider adding to your library:

- Roger Fisher and Alan Sharp., Getting it Done (HarperCollins Publishers, Inc., New York, 1998). The authors state in the introduction that "The goal of this book is to enable you to achieve high-quality collaboration with your colleagues – collaboration that produces high quality results".

- Roger Fisher and Daniel Shapiro., Beyond Reason – Using Emotions as you Negotiate, (Viking Penguin (USA) Inc., 2005). In the introduction, the authors state that this particular book offers the reader with a way to deal with the problem of

controlling one's emotions during the course of negotiation. They point out that emotions can be "distracting, painful, or the cause of a failed agreement". They offer the reader "a strategy to generate positive emotions and to deal with negative ones".

- William Ury., The Power of a Positive No, (Bantam Books, New York., 2007). In this particular book, the author notes that he decided to complete the trilogy that began with Getting to Yes and Getting Past No. He pointed out that the focus of Getting to Yes is on both sides reaching an agreement. The focus of Getting Past No was on the other side and offering strategies as to how to circumvent objections and resistance to cooperation. The third book, The Power of a Positive No, deals with "your side of negotiation" and teaches you how to "assert and defend your interests". This book is described as a life skills and negotiation workbook.

- Gain the Edge: Negotiation Strategies for Lawyers (Latz Negotiation Institute, 2002).

- Getting More – How to Negotiate to Achieve Your Goals in the Real World by Stuart Diamond (Crown Business, 2010).

- The Power of Nice: How to Negotiate So Everyone Wins – Especially You! by Ronald Shapiro and Mark A. Jankowski (Wiley 2001, 3rd Edition, January 27, 2015).

- The 7 Triggers to Yes: The New Science Behind Influencing People's Decisions by Russell H. Granger (New York: McGraw-Hill, 2007).

- How to Win Any Argument: Without Raising Your Voice, Losing Your Cool, or Coming to Blows by Robert Mayer (Career Press, 2005).

- How to Win Any Negotiation by Robert Mayer (Career Press, 2006).

- The 8 Essential Steps to Conflict Resolution: Preserving Relationships at Work, at Home and in the Community by Dudley Weeks, PHD (Penguin Putnam Inc., 1992, New York, New York).

- Bargaining for Advantage: Negotiations Strategies for Reasonable People by G. Richard Shell (Penguin Books, Revised Edition May 2006).

Certainly, there are many books written on this topic. Seminars are routinely organized dealing with negotiation practices. At the end of the day, while it is helpful to have the "tips" from the experts, it really comes down to how you use these tips and deal with the human psychology of negotiation and mediation. It should not be a robotic and mechanical type of process. If both sides attend the mediation with a view to compromise and reasonably assess the risk, then that bodes well for potential resolution. Every case has its own particular challenge. If one adopts an approach that is Realistic, Rational and Reasonable, then perhaps the chance of success will be enhanced.