



Rose Keith is Associate Counsel at Harper Grey. She graduated from the University of Saskatchewan Law School in 1992 and was called to the Bar of the Province of British Columbia in 1993. Ms. Keith's practice has focused on personal injury and employment law. She is a roster member of Mediate BC with extensive experience as both counsel and mediator in conducting and participating in mediations. She is an active member of both the Trial Lawyers Association of British Columbia and the BC Branch of the Canadian Bar Association, actively involved in her community through participation in a variety of boards.

BY ROSE KEITH
HARPER GREY LLP
@rakeith

A large ocean liner was headed across the Atlantic from Portsmouth to New York. As it neared its destination at night, a lookout from the bridge reported "light bearing on the starboard bow". "Is it steady or moving astern?" the captain called out.

The lookout replied, steady, which meant that they were on a collision course. The captain then called to the signalman, "Signal that ship. We are on a collision course, change course 20 degrees". Back came a signal "Advisable for you to change course 20 degrees". The captain said, "Send, I'm a captain, change course 20 degrees". "I'm a seaman, second class" came the reply. "You had better change course 20 degrees". By that time, the captain spat out "Send. This is the mighty ocean liner, HMS Franconia. Change course 20 degrees". Back came the flashing light "This is a lighthouse, recommend you change course 20 degrees".

- ANONYMOUS

Mediation can be a very effective process for resolving disputes and probably one of the primary reasons for this is, as the quote above notes, sometimes you just do not have all the information that you need to make a decision. But how can you make sure that you get the information at mediation to ensure that you are giving the right advice to clients? The effectiveness of a mediation starts before you get to the venue. In this column I will address how the technical aspects of a mediation, before the mediation even begins, can help contribute to an effective mediation. Those aspects include everything from timing of the mediation to choosing the venue for mediation.

As counsel, there are a variety of reasons why I would recommend mediation to my client. I may recommend mediation because:

1. Scheduling of the mediation is a way to get the other parties to pay attention to my case;
2. I don't understand why the other side is taking a certain position on a case and mediation provides the opportunity to have that an exchange of information to help me understand the basis of a position that is being taken;
3. Mediation provides an opportunity to show case my client and/or evidence in the hopes that it will sway the other side to see the case in the same way that I do;
4. Sometimes mediation provides a difficult client with a better perspective on the other side's case and can be of assistance in helping a client understand the realities of their case; or
5. Sometimes it can simply be to have a facilitated negotiation.

All of these are good reasons for having a mediation and regardless of your reasons for mediating the end result can be a greater and richer understanding of your case. Mediation is a tool that can be powerful. Mediation gives you an opportunity, if used right, to obtain information to help you more fully analyze and assess your case. Mediation provides you with the opportunity to gain a better understanding of the other side's view of your

case, how they intend to present their case and how they view your evidence. Gaining that understanding in turn provides you with the opportunity to more fully understand the risks your client faces going forward with a case, helps you develop and hone your theory of the case and gives you the opportunity to test your evidence against the theory of your case. If your case does not resolve at mediation, the information that you gain in the process will assist you in more fully developing your case and in deciding what evidence you will need going forward. From my perspective as counsel, mediation is a win-win proposition as it provides the best possible opportunity to achieve a negotiated resolution, failing which I will have gained a more fulsome understanding of my case.

In terms of when to have the mediation, there are a variety of factors that dictate when it is best for a mediation to take place. As counsel, my goal typically is to have a mediation once I have all the information necessary to fully analyze the issues in a case. That necessarily will require that all opinion evidence has been obtained but I also typically will try to have a mediation occur early enough in the process that I am able to obtain further evidence, including opinion evidence, if it seems to be necessary once the mediation has occurred. Conducting a mediation early enough in the process will allow me time to fill holes in my while at the same time it has to be late enough in the process that the evidence has been fully developed to achieve its intended goal.

There are a variety of places where you can have the mediation occur. These range from the formal mediation/ADR facilities with break out rooms and provided food and beverage to conducting the mediation at your office. The advantage to using one of the facilities that are specifically set up for mediation is that you can be assured that you will have available an appropriate break out room as well as a group room. As the mediation is occurring off site distractions will be eliminated. The disadvantage of some of the larger facilities is that there will be a number of other counsel and parties also conducting mediations which can be

distracting. It also can affect privacy. Conducting the mediation at other facilities not specifically set up for mediation can result in challenges when it comes to the facilities themselves and having adequate and appropriate space for break out rooms. It is also very important, particularly if you are conducting the mediation in your office, to ensure that distractions are removed. There is a danger when mediations are conducted at your office that during the downtime that inevitably occurs between negotiations you use the time for doing other office work rather than working on the case that you are mediating. The downtime at mediation gives you an ideal opportunity to focus on your case and to have discussions with your client about development of the evidence and your theory of the case. If you don't remove the distraction of other cases during the mediation you lose the opportunity that your day of mediation presents.

Regardless of where you chose to hold your mediation, there are a number of things to keep in mind when it comes to your client. Remember that mediation day for the client is a very big day. It presents for them, the biggest possibility of resolving their case which most client's ultimately wish to do. It also will be a very stressful day for the client. Most clients will not have ever attended a mediation before and the lack of familiarity with the process will result in stress for the client. You can help to lessen that stress by providing the client with control and information. Help your client physically get to the location of the mediation without difficulty. That includes giving them directions to the venue, instructions on where to park, meeting them outside of the mediation location itself so that you can help them find their way there, being with them when you check in to the mediation location and helping them to feel comfortable and settled once you arrive at the mediation location.

Plan out who will be at the mediation. If your client is an individual that needs extra support, don't hesitate to suggest that they come to the mediation as a support person, either participating in the mediation or simply being in the break out



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room as support for your client. Ensure that if you are bringing someone other than your client, that you let the mediator and other parties know in advance. They will likely be required to sign the Agreement to Participate in Mediation along with the parties and will be bound by the same agreement. I have also seen counsel bring paralegals or other members of their staff which can be very helpful particularly if there is a lot of documentary evidence that may be at issue or assistance in resolving the case.

The choice of mediator and using the mediator effectively is another element that contributes to the effectiveness of the mediation. There are a large variety of mediators that may be available. You can find mediators by using the MediateBC roster, by seeking recommendations from colleagues either directly or through use of such things as List Serves, google searches or going directly to individuals that you know are qualified to conduct mediations. There are a variety of different approaches that mediators will take and it is important to consider those approaches when analyzing what will be most effective for your case. The mediator does not make a decision in your case but depending on their approach they can improve the effectiveness of the case. From my perspective as a mediator, I see the mediation as an opportunity for me to help the parties understand each others perspectives and views. To do so requires me to get a good understanding of the positions each party is taking and to not be hesitant to challenge the parties on the positions that they are taking when it doesn't line up with the evidence or the law. In my opinion you don't need a mediator who has subject matter expertise but you do need a mediator that is able to communicate effectively with the parties and who is able to help put your client at ease. Some mediators are very interactive with the parties while others take a much more hands off approach. Choose the appropriate type of mediator for your preferred style as well as what you think will work best with your client. When deciding on your mediator, don't hesitate to question potential mediators about the approach that they take in mediation.

The final technical pre-mediation item is the mediation brief itself. The importance of the mediation brief can not be overstated. For counsel, it provides the opportunity to harness all of the evidence, develop your theory of the case and to review the law. It is the ultimate preparation tool. For clients it is likely the first time that they have seen laid out what their life experience looks like as a legal case. For the opposing side it provides them with a glimpse into how the case will be presented. For the mediator, it allows them to identify in advance potential issues, preparing for the discussions that will occur at the mediation. Put the time and effort into the mediation brief that it deserves.

Consider whether a pre-mediation conference call with the mediator would be useful. A number of issues can be canvassed in such a call including if there are any unusual dynamics between the parties or counsel, if one or both of the parties has any special needs or if for some reason the mediation should be conducted in a different manner than usual. These matters can also be canvassed at the outset of the mediation however discussing this in advance means that the mediation itself can be spent dealing with the issues in the case. A pre mediation call also provides a mediator with time to then consider the specific issues that you raise and the way to best deal with them on the day of the mediation.

Mediations have the
potential to be a phenomenal tool
for counsel to help their client
achieve their goal.

To maximize the power of this tool, consider and take care of all of the technical aspects including venue, choice of mediator, logistics for your client and most importantly the brief. Putting the time and effort into these pre mediation steps will ensure that you and your client get the most out of the mediation. V

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