The morning after mediation

Jack F. Fitch

Mediation is a powerful tool. When managed by a capable mediator, it can shine a bright light on a dispute, illuminating for all parties the strengths and the weaknesses of their respective positions.

The dynamic nature of mediation can also create unintended hazards.

This article is about "vendor's remorse," a concept familiar to the residential real estate profession, but equally of concern in civil litigation, and a potential hazard of mediation.

Vendor's remorse is the sickening feeling the morning after an intense negotiation when the vendor starts to think that the price agreed to the night before was too low. The same sickening feeling can, of course, affect the purchaser who believes the price is too high – often as a result of the same bargain. Vendor's remorse, whether experienced by vendor or purchaser, is a subjective reaction to the uncertainty of negotiating a deal when the price is determined, at least in part, by the will of the parties to the negotiation as opposed to objective criteria.

Settling a dispute is a form of sale.[1] The object of the sale is a release. A claim has been made. To satisfy the claim, the person against whom it has been brought will pay a price for a release to end the claim. The value of that release is frequently subjective, at least in part

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both to the person who has brought the claim (the vendor), and to the person against whom it has been brought (the purchaser). The subjective value of a release may be affected by the parties' assessment of liability or damages or by intrinsic factors that may be known to one of the parties and not the others.

In any negotiation some give and take is anticipated. Normally none of the parties to a negotiated settlement feel that they have been completely successful, but all of the parties should feel that the settlement is an acceptable alternative to the dispute that it compromises.

If one or more of the parties subsequently has second thoughts about the settlement reached, that party may seek to put the settlement in jeopardy. Attacking settlements reached in good faith clearly is contrary to the interests of all parties, and society in general, as the purpose of the negotiated settlement was to resolve the dispute between the parties, and not to reformulate and continue it.

In the give-and-take of negotiation, of course, each party seeks to advance its position and undermine that of the parties adverse in interest to it. Poor preparation, mistake or error can enter into any negotiation and result in a relatively less advantageous outcome for one party.

The process of mediation makes this even more likely, as it brings intense focus to the dispute over a compressed time frame, and risks magnifying the adverse impact of poor preparation, mistake or error, and their potential impact on the outcome of the negotiation. A party represented by a lawyer at mediation who subsequently believes that he has given up too much or accepted too little in the resolution of the dispute is likely to seek to blame the lawyer for the outcome. A complaint to the Law Society of Upper Canada or a claim against the lawyer may result.

Lawyers, of course, act as agents on behalf of their clients and in doing so have ostensible authority to negotiate and settle disputes on clients' behalf. In any negotiation and settlement, the lawyer needs to have clear and unambiguous instructions from the client. These instructions should be in writing so the risk of miscommunication is minimized. In a claim by a client against a lawyer alleging that the lawyer acted in breach of the client's authority, there will be a practical onus on the lawyer to prove the client's instructions and authority or risk a finding against the lawyer.

Preparing against vendor's remorse

Because of the dynamic nature of mediation and its ability to achieve settlements even in cases where the parties are skeptical about the chances of settlement prior to the mediation, proper preparation for the mediation is an essential ingredient in protecting against vendor's remorse.

Proper preparation begins with the inception of the retainer and includes a thorough understanding of the file. It will be too late to investigate the factual basis of a claim or defence, to engage experts and research law once the mediation has been successful.

Proper preparation also includes properly preparing the client to participate in and understand the dynamics of the mediation.

Although many mediators begin mediations with an explanation of the process, clients often are too anxious at the start of mediation to absorb all of the information conveyed in the mediator's opening, or to understand its full implications. A lawyer preparing a client for mediation should take the time to explain the mediation process to the client; he should particularly prepare the client for the pressure to settle which may be exerted during the mediation.

Proper preparation includes a review of the strengths and weaknesses of the case with the client so that the client is prepared for arguments that may be advanced during the mediation and does not become intimidated by the other parties to the mediation or the mediator.[2] A realistic assessment of the case with the client is equally important.

Mediation should be approached tactically. A mediation plan should be considered and discussed with the client. Since the objective of mediation is normally negotiation, negotiation strategy should be part of the preparation. An analysis of the case, a mediation plan and a negotiation strategy should be reviewed with the client and reduced to writing. Realistic objectives should be established and agreed to and also reduced to writing prior to the mediation.

Properly done this preparation will prepare the client for mediation and more importantly provide a realistic assessment of the client's settlement position which, if understood and accepted by the client and adhered to, will minimize the risk of vendor's remorse following settlement.

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It is important to recognize that the legal parties to an action are not necessarily the sole decision makers with respect to it.

More than one settlement achieved after a difficult day of mediation has been subsequently questioned by spouses, parents, siblings, friends, managers or employers. It is often difficult for those who were not involved in the negotiation of the settlement to understand why the case settled in the way that it did. However well-intended, the post-mediation analysis of other individuals may lead to vendor's remorse. Making sure that the appropriate people are present and participate in the mediation can be an important protection against vendor's remorse.

Even the best plans and strategies often need to be amended. Disclosure during a mediation, or the mediation plans or strategies of the other parties, can force re-evaluation during the course of a mediation. When re-evaluation is necessary, it should be shared with the client and amendments to the written plan made.

Ideally, the lawyer should know what the client seeks to achieve from the mediation before the mediation begins, although some clients are reluctant to share this information with their own lawyer let alone the other parties to the mediation. Encouraging the client's participation during preparation for the mediation and listening to the client during the mediation are critical to achieving the client's desired outcomes.

Slavish adherence to a mediation plan and negotiation strategy may have its own cost. Flexibility may increase the possibility of settlement, which should always be the desired outcome of a mediation or for that matter almost any dispute, although not at any cost. It is important to not lose a settlement opportunity even if deviation from the mediation plan and negotiation strategy are necessary to prevent the loss of the opportunity.

These changes should be carefully considered and fully reviewed with the client whose approval should be obtained in writing. This is easy to do. Most lawyers take notes during mediation negotiations. Review these notes with the client, and, where appropriate, have the client initial the note to signify his acceptance.

When a settlement is achieved at mediation, the settlement should be put in writing and signed by the parties and their lawyers. Most mediation agreements provide that the mediator is not a compellable witness. A dispute concerning the terms of a settlement achieved at mediation may be as difficult to resolve as the dispute that gave rise to the mediation in the first place, and just as costly.

Even if it is late and the participants are tired, the additional time required to reduce the terms of the settlement to writing and, if possible, have settlement documents executed will generally be time well-spent.

The settlement documents should contain language that directs the parties' attention to the significance of what they have accomplished. The following may be appropriate in most cases: "I have read this document carefully and have had the significance of it explained to me to my satisfaction. I understand that by signing this document I am making a full and final settlement of all of my claims or the claims against me in this matter."

In some situations clients may question the result, no matter what documentation has or has not been completed at the end of the mediation: For example, if mediation was long and difficult; or if the result is acceptable but not all that the client hoped to accomplish; or if the mediation plan and negotiation strategy had to be changed; or if someone whose influence may have been appropriate did not attend the mediation, a lawyer can expect post-mediation questions. Make time for the client the next day or the day after when the questions are raised. A few minutes of patient support and explanation may prevent uncertainty, distress, distrust and, ultimately, a complaint or claim by the client.

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1 Wendell S. Wigle Q. C., one of my partners, wrote an article in the 1970s which articulated the commercial nature of litigation as the sale and purchase of a release. I have always been grateful to Wendell for this article, which I regret I no longer have a copy of, but which has significantly influenced my approach to the resolution of disputes throughout my career.

2 Mediators each have their own style. Some mediators are retained because of the enthusiasm and energy that they bring to the negotiation process and are expected by the parties to pursue settlement vigorously. Other mediators are more passive and preferred for that reason. The mediator's reputation and style and their suitability to the case at issue should be considered carefully when choosing a mediator and when preparing for mediation.

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