THE MEDIATION GUIDE

NAVIGATE THE FASTER, CHEAPER, KINDER PROCESS

David Greig, Lawyer

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PREFACE

I'm going to make this short, because this book is about mediation — it's not about me. That said, you might like to know why you should read what I have to say.

I am a 63-year-old lawyer and mediator, with 34 years of experience.

I come from a family of legal professionals. My father was a judge, my mother a legal secretary, and my sister a lawyer.

Thinking that I might have promise as a musician, I left high school before graduation to play guitar. That did not go entirely as planned, so I returned to school. In the early 1980s, I obtained an English Literature degree at the University of Victoria.

Then, in 1986, I obtained my law degree. I graduated in the top 10 percent of my class. It was a small class. I had also earned some bursaries and awards, and an invitation for graduate studies, but I needed work. I started at a small firm, and liked it. My employers were kind and helpful.

I handled a variety of cases, but focused on trial work.

Eventually, I wanted my own firm. I left my employer to form a new practice group.

The new firm was busy, and within a few years, we had expanded to 10 lawyers and 20 staff.

Over the years, I have worked on many different types of cases. For a time, I handled criminal law, corporate litigation, real property law, and even some conveyancing and wills. I later turned my focus to family law, estate litigation, and personal injury. This diversity has helped me to build perspective and experience.

During my career, I have conducted almost all of my practice in the Supreme Court, and in the Court of Appeal. I have acted for and with injured persons, construction companies, children, doctors, lawyers, insurance companies, the Office of the Attorney General, disadvantaged and disabled people, single parents, and a few celebrities.

I also had the opportunity to appear on television a few times, and on radio. I had a newspaper column for some time, and have authored three other publications on family law, which are marketed and sold by my publisher, Self-Counsel Press.

I have appeared regularly in Provincial Court, Supreme Court, and the Court of Appeal, and have argued before the Pension Disability (Appeals) Tribunal, the Real Estate Council, and have served as counsel for the Provincial Attorney General's office. I have acted for small and large corporations, and foreign governments. I think I have handled more than 1,000 divorces, and I know that I have attended hundreds of mediations.

With that experience, I have come to believe that for almost all clients, mediation is the preferred path to resolution.

INTRODUCTION

All communicative people engage in negotiation. Here, in the Americas, we barter and bargain every day. We do that at work, at school, and at home. Sometimes we engage in negotiation without realizing it.

If you've ever tried to entice a teen to eat vegetables, do homework, be kinder to a sibling, or put laundry away, you have negotiated. You may have enjoyed a form of dominance in the negotiation process — by reason of your power, age, and "parental authority" — but you are nonetheless engaging in a process aimed at trying to reach an understanding. You want the child to change his or her behaviour. You hope to strike a deal. In the end, you might simply impose an edict, and see how that works, but negotiation is where it all starts.

You also negotiate every time you buy a house, a car, or argue with a friend about who will pay for lunch.

Negotiation is everywhere.

There have been some outstanding books on this topic. The psychology of persuasion as a tool of negotiation has fascinated the public for many decades.

When you negotiate family issues with your child, the terms and parameters of your negotiations may be very different from the methodology employed when you buy a car, or write an offer on a new home, but the principles are basically the same. You engage logic, knowledge, language, listening, and compromise in an effort to find a way to settle your dispute. You are engaged in the pursuit of a bargain.

When you bargain with a teen, there's a certain inequality of power in the process, but that's often the case when parties come together to make a deal. Whether that power imbalance is real or imagined, one side almost always has an upper hand. Or so it seems.

However, in every negotiation and deal-making endeavour, there is something which both parties desire: a resolve. Your son (the messy teen) wants you to leave him alone. He may even want to please you, even if you'll never get that admission. He wants the lecture to end. You want his behaviour to change.

You both want a deal. You both know — even if you outwardly deny it — that some kind of a compromise is better than no deal at all. Finality, certainty, and peace (the end to disharmony) trumps an imperfect settlement every day of the week.

I've heard this in my career a few hundred times, from judges. As a litigator working in divorce court, I was often required to attend a pre-trial procedure (called a "judicial case conference") which, in my practice, meant that the two parties and their lawyers were required to meet with a judge before drawing swords and marching off to trial. These JCC proceedings provided an opportunity for each side to summarize the facts, and then explain his or her position to the judge. Following that, the judge might pontificate a little about the range of possible outcomes, and would typically deliver a warning about the miseries of litigation, the cost of trials, and the imperfections of the court system. He or she would encourage the parties to think carefully before proceeding to trial. The judge would invariably encourage negotiation and discourage litigation.

That was always an enlightening event for the parties, even though I almost invariably told my client all those things before we started the lawsuit. Somehow, it meant more when the judge said it, particularly if it was done in a court setting, and delivered with a stern and ominous tone.

On almost every occasion, the JCC would end with the judge saying something like this:

"There is one further thing that I want you to both think about: It is always open to you people to solve this case without the Court, and to find a solution that you craft and create yourself. And I want you to know that, in my experience, every single case that is settled by the parties (rather than a stranger to the family), beats a judgement in terms of result. That is so because when I have three to five days to listen to your stories, at the end, I remain an outsider, and yet I am empowered and required to decide how the rest of your lives will proceed. That decision is really one which you should be making – not me. Talk to your lawyers. Make sure that you have tried every single alternative to litigation – whether it be simple negotiation, mediation, or arbitration –and do that before you come back here, and commit to having me (or another judge like me) decide your fate for you."

There were multiple variations on that warning, of course, but almost every session ended with something similar.

Even though I spent most of my adult life working as a litigation lawyer, I always found those chats very helpful, informative, and stirring. And yet, nine times out of ten, on the drive back to the office, the clients would not talk about the substance of that warning. They wouldn't ask me about settlement options. Instead, they would recall intricate details of insignificant remarks made by opposing counsel and their spouse — but they missed the point: "Did you hear what she said about the car?"or "I can't believe he mentioned my credit card bills." Various unimportant snippets of the conversation registered, but the bit about mediation rarely stuck.

That needs to change. People need to understand that what judges have been saying about the need to resolve disputes without litigation is sound advice. Court should be the option of last resort.

After a few hundred of these JCC events, I realized that, in fact, the time for talking about alternatives to litigation is before the litigation has started. I remain convinced of that now, while I continue to work as a litigator and a mediator.

Keep in mind that for almost 35 years, I have earned most of my income from arguing with litigants (and lawyers and judges) inside the court process. That's the way lawyers have worked in the Americas for more than 100 years. In the last 10 years, however, I've come to the resolute conclusion that for the vast majority of cases, mediation is a better way. It's also a process to consider at the outset: before legal bills, principled positions, and hurt feelings have been cultivated.

While it may seem a little odd that I would try to discourage people from a process that's paid my way for so very long, it's not odd at all. Almost every lawyer that I have met or known understands that litigation is harsh, pricey, miserable (for the litigants), and sometimes unpredictable. It's also almost always unaffordable.

If you have just purchased this book, or are trying to decide whether to do so, I probably don't need to spill any more ink trying to convince you that mediation is worthy of consideration. You likely already know that, or you wouldn't be reading these words. So, enough said. Now, in the following chapters, we are going to explain why I say mediation is "faster, cheaper, and kinder," and learn how and why it works, and how to make it work for you. I hope you'll find it all helpful and encouraging.

1

ABOUT MEDIATION AND ALTERNATIVE DISPUTE RESOLUTION (ADR)

1. The Origins of Mediation

This is not a history book, and I am not a historian. However, if you are going to invest some serious time, energy, and money into a process such as this (particularly if it might govern some important issues, for the rest of your life), you should probably know something about its origins.

Mediation is not a clever idea dreamed up by lawyers and psychologists in the 1960s. It is, in fact, an ancient process, which dates back about 4,000 years.

The true genesis of mediation has been the subject of great scholarly debate. It seems generally agreed, however, that some of the earliest evidence of mediation (in a form similar to that which we now know) dates back to the Mari Kingdom, about 2000 BCE. There, in what is now Syria, various manners of domestic disputes were settled through a mediation-type process, involving an impartial third party or "go-between," who brought the parties together in a voluntary and private process to find a binding and

consensual resolve. The process was most probably used to resolve property disputes and other family squabbles.

A similar historical pattern is seen in Egyptian, Greek, and Indian culture after 2000 BCE.

The process was also known to have been a part of other cultures throughout Asia, Hawaii, and other Polynesian countries. In the Americas, the record is clear that mediative processes were in use by 1790 (on matters relating to treasury issues, and property disputes). In fact, some early legislation was enacted in several jurisdictions in America in the early nineteenth century, dealing with arbitration and mediation principles.

Near the end of the Russo-Japanese war (1904–1905) it was clear that the Japanese would be in a position to force Russia to abandon its expansionist policy in Asia. The specifics of the Peace Treaty that ended the conflict were very much in dispute, however, and outside help was sought. In 1906, Theodore ("Teddy") Roosevelt stepped in, and successfully used a mediation style model of dispute resolution to broker a peace deal. It was an effort that won him the Nobel Peace Prize.

Family mediation really took shape and form after 1950 in America, probably with a marked increase in divorce rates. Within a decade, a similar pattern emerged in Canada. At about the same time, litigants seem to have demonstrated interest in the use of mediation for personal injury matters, labour and employment matters, estate disputes, and even construction law matters. By the 1970s, as mediation use grew as a viable alternative to traditional litigation, formal training for mediators became available throughout North America, and competency and proficiency standards began to be developed. Mediation was in vogue, and new theories, practice models, and research and scholarly writing on the topic flourished. The growth of mediation continues unabated today.

2. What Is Mediation and How Is It Different from Other Alternative Dispute Resolution Methods?

Quite often, people refer to mediation as "alternative dispute resolution" or (erroneously) as arbitration. These terms need clarification.

Generally speaking, any process in which two or more parties seek a settlement of a material disagreement will involve some effort at *dispute resolution*. That phrase is the parent of all formal and informal systems which

seek to solve disagreement. Dispute resolution, as a concept, includes and encompasses *negotiation*, *mediation*, *arbitration*, and *litigation*. We say "alternative" when we're discussing methods alternative to litigation (court).

In arbitration, the proceeding is voluntary, private, funded by the parties, and arranged at their convenience. However, the arbitrator's purpose is to hear the parties and decide the case, imposing an arbitral determination (sometimes called a decision or award). That decision is binding on the parties as it would be if a judge had made it. In many ways it is similar to litigation, except the parties hire the arbitrator and have the case heard in private.

Mediation is perhaps best described as a private and voluntary process, funded by the parties, in which two or more parties in conflict meet together, with an impartial third party, to find a resolution. Mediation —

- is private (and almost always attended only by the parties and the mediator);
- is funded by the parties;
- is convened at any practical place convenient to the parties;
- can be convened, often on short notice, at any time convenient to the parties;
- involves the use of a mediator who typically has professional training and identifiable credentials; and
- never involves a recording or transcript of the process, but if a settlement is reached, typically results in a written recording of the terms, sometimes called "Minutes of Settlement."

Obviously, not every dispute is material, and not every couple or group with a dispute genuinely wishes or expects a resolve. For instance, when you and your spouse disagree over some minor matter regarding household chores, it's likely not the kind of dispute that calls for intervention — at least not in any formal way. You may simply agree to disagree, and move on to something more important. Often, those kinds of disputes just fade into the obscurity of yesterday. Or, you may concede, and carry on. See Chapter 5 about "surrender" — an often overlooked tactic that has a proper place in the world.

In other kinds of disputes, the parties may not be engaged in dispute resolution at all, because neither party genuinely wants a resolution; sometimes the fight itself takes on a life of its own. Stories of these kinds of disputes abound, but some memorable examples might include the Hatfield

and McCoy feud, and the fictional story of the *Jarndyce v. Jarndyce* estate litigation in Dickens' *Bleak House*:

> "Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in the course of time, become so complicated that no man alive knows what it means. The parties to it understand it least, but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; along processions of Chancellors has come in and gone out but Jarndyce and Jarndyce still drags its dreary length before the court, perennially hopeless … "

Of course, in a review of the history of many religious disputes, we see the same generations-long argument over various points, always of intense importance to the parties, but rarely capable of or leading to lasting resolution. Sometimes, the best that can be hoped for is a temporary and fragile "cease fire." The underlying dispute never seems to end.

In family law, this too occurs with some frequency. I have noticed, for instance, that when a formerly loving relationship ends because one party has found a new lover, the stakes, anger, and hostility can often be heightened. In such circumstances, the spurned spouse may wish to engage in a continuing fight because "some attention" is better than being forgotten — at least one can be remembered by war. It may not make sense to an outsider, but it's a real feature of some prolonged disputes.

In such circumstances, no book about mediation is likely to help. Professional intervention, the poultice of time, or other resources will better serve. It is very difficult to negotiate constructively with a party who takes pleasure from engaging in disagreement. It is for that reason that there are some disputes which are simply not realistically resolvable by mediation (or negotiation of any type).

Fortunately, it has been my experience that most disputes are amenable to dispute resolution, and particularly mediation. That is so, I believe, because most parties in conflict understand, or can be shown, that peace is best. Even a "so-so" settlement is better than a great war.