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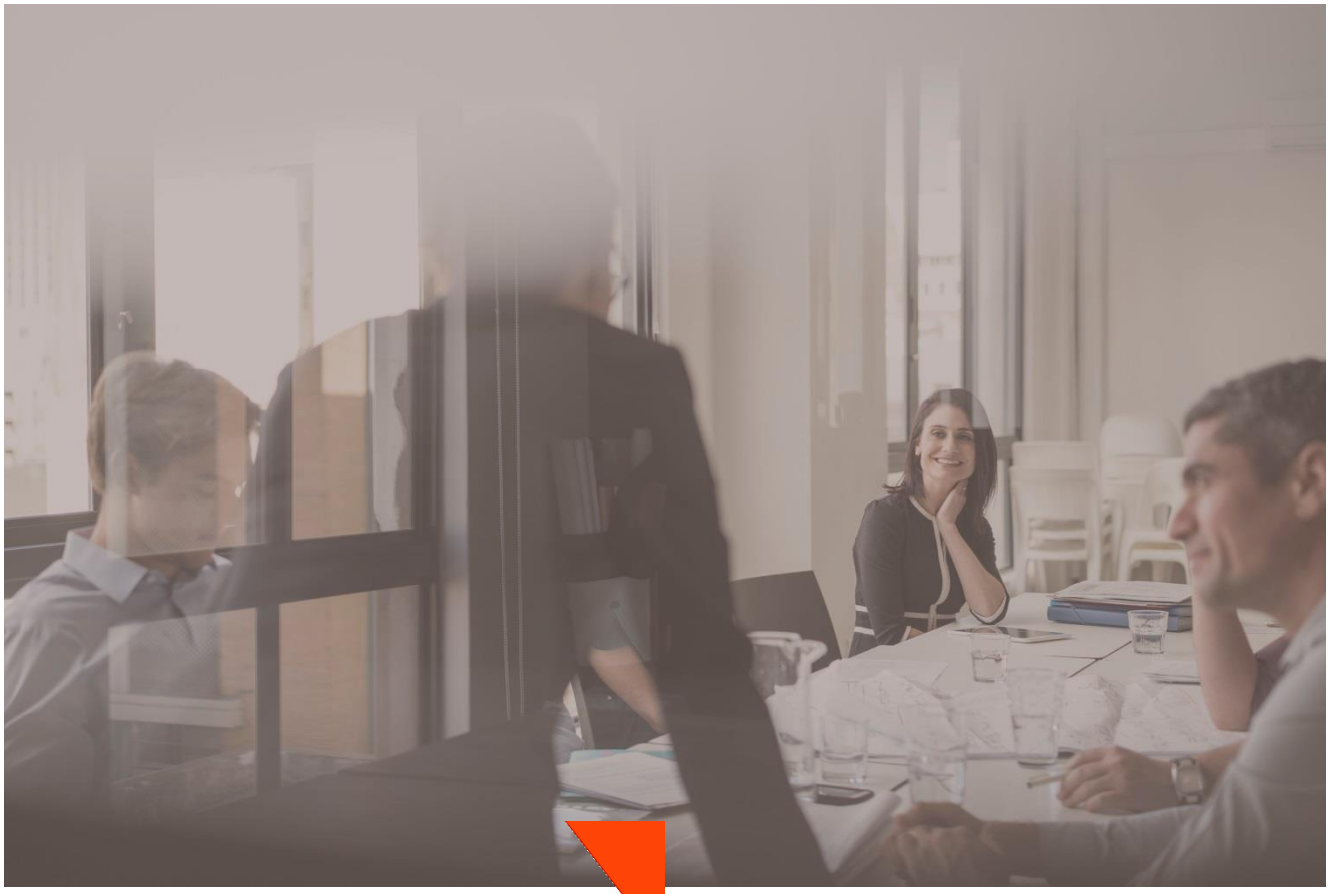

Making Mediation Matter

Labour, Employment and Human Rights Group Seminar

June 11, 2019

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Making Mediation Matter

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Agenda

- Identifying settlement opportunities
- Preparing for mediation
- Strategies for effective mediation
- Conversation with Elaine Newman

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Identifying Settlement Opportunities

When should you settle a case?
• Bad facts or bad law
• Weak, hostile or missing witnesses
• Costs outweigh benefits
• Reputational risk
• Risk of additional claims being made
• Need for finality, privacy or predictability

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Identifying Settlement Opportunities

When do you raise settlement?	
Civil Proceeding	• When you receive a demand letter. • Mandatory mediation (Toronto & Ottawa). • Settlement Conference (Small Claims Court). • After Examinations for Discoveries. • After attending Pre-Trial.
Arbitration	• After a grievance is filed. • During the grievance procedure set out in the collective agreement. • When counsel is retained. • First day of arbitration hearing.
HRTO	• Mediation organized by HRTO if all parties are agreeable. • First day of hearing/throughout process.
OLRB	• Mediation organized by OLRB for most proceedings. • First day of hearing/throughout process.

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Planning and Preparing for Negotiations

1. Analysis
2. Information gathering
3. Issue identification and assessment
4. Develop a plan and a strategy
5. Review, rehearse, and negotiate

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Step 1: Analysis

- Define your objectives
  - What do you *need* to accomplish?
  - What would you *like* to accomplish?
- Determine if negotiation can meet your objectives
  - Is there another, better way to achieve your goals?

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Step 1: Analysis

- Identify your outcomes
  - What is your best case?
  - What is your reasonable, acceptable case?
  - What is your worst case?
- Identify your anchors
  - What are your must-haves?
  - What are your nice-to-haves?

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Step 2: Information Gathering

- Know the facts of your case
- Know the facts about the context of negotiations
  - What were the outcomes in similar negotiated resolutions?
  - What would a decision maker award if the matter proceeds?
  - For unionized employers, how might this impact other grievances or disputes between the parties?

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Step 2: Information Gathering

- Know the other party, their pressures and motivations
  - What pressures are they under?
  - What are their motivations?
- Know the other party's negotiator
  - Is the negotiator familiar with employment law? Are you?

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Step 3: Issue Identification & Assessment

- Identify issues, classify, and prioritize within each class
- Assess the strengths and weaknesses
  - What negotiation points or strategies become apparent?
  - Are there any expectations that you should manage?
  - Do you need to refine anything?
- Identify target and resistance points on each issue

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Step 4: Develop a Plan & Strategy

- Create a negotiation plan that outlines:
  - Your desired settlement result or range
  - A list of major and minor issues to be negotiated
  - Your target and resistance point on each issue
  - The bargaining/overlap zone
  - Opening offer
  - Possible concessions

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Step 4: Develop a Plan & Strategy

- Develop a negotiations strategy
  - What will be negotiated?
  - What style will you employ?
  - What method will you employ?

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Step 5: Review, Rehearse & Negotiate

- Review your plan for accuracy
- Prepare your responses to the other party's positions, questions and comments – consider an outline if the issues are complex
- Negotiate!

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Tips for Effective Mediation

- Determine your negotiating style.
- Understand how to address deadlocks.
- Forum specific advice:
  - Civil Courts
  - Arbitration
  - Administrative Tribunals (e.g. human rights, labour board)

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Negotiating Style

What is your negotiating style?	
Avoider	Dislike and avoid conflict.
Compromiser	Value relationships.
Accommodator	Like to solve other parties' problems.
Competitor	Like to win and be in control.
Problem solver	Focus on problems and mutual gains.

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Tips for how to break a deadlock

- Focus on interests, not positions
- Invent options for mutual gain
- Introduce an objective standard
- Negotiate a different issue
- Take a break
- Make a concession
- Change negotiators (if this is an option)

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How to use deadlocks to your advantage!

- Deadlocks can happen naturally but they can also be used as a negotiating tactic to:
  - Demonstrate determination and confidence
  - Test the determination and confidence of the other side
  - Obtain information
  - Increase your control over the pacing/timing of negotiations
- If you use a deadlock as a negotiating tactic, be sure you have room to change your position and break the deadlock

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Strategies in Mediation

- Different approaches:
  - Present small starting offer and negotiate in small increments. Do not tell the mediator your bottom line.
  - Provide the mediator with your bottom line right away and trust the mediator to sell it to the other side.
  - Hold back some items as negotiating tools (i.e. structure of damages, reference letter, etc.).
  - So many others…

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Mediation in Civil Proceedings

- May be mandated (e.g. Toronto)
  - Settlement conferences for small claims actions
- Strategic selection of timing of mediation (i.e. before or after examinations for discovery)
- Cost of proceeding past mediation higher

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Mediation in Arbitration

- Ongoing relationship between the parties.
- Mediation may affect other matters or disputes between the parties.

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Mediation in Administrative Tribunals

- May be mandated (e.g. OLRB)
- May be voluntary – consider whether to attend
- May be more formalized (e.g. opening submissions)

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Legal Issues in Mediation

- Mediations are protected by settlement privilege.
  - Information shared and admissions made in mediation cannot be relied on after the mediation.
- Mediators cannot usually be compelled to testify.
  - A mediator cannot be called to testify at a hearing, arbitration or trial.
  - Sometimes your mediator will be your decision maker.

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Conversation with a Mediator

- Why do parties need a mediator if both parties are settlement minded?

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Conversation with a Mediator

- What does a mediator need to have a successful mediation?

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Conversation with a Mediator

- How should a client prepare for a mediation?

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Conversation with a Mediator

- Ideas to handle a limited budget?

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Conversation with a Mediator

- What are the most common mistakes that employers make in mediation?
- What are the biggest mistakes?

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Conversation with a Mediator

- What mistakes do mediators make at mediation?

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Conversation with a Mediator

- What are some particularly successful strategies to reach a settlement?

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Conversation with a Mediator

- What is your biggest “pet peeve” that you have seen in mediation from counsel or the parties?

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Conversation with a Mediator

- How do you deal with a party that is unrepresented?
- How is mediation different with an unrepresented party?

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Conversation with a Mediator

- Is it helpful to know a party's end goal at the start of a mediation?
- How does knowing a party's end goal at the beginning of a mediation change the process of the mediation?

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Conversation with a Mediator

- How do you handle high conflict personalities?

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Conversation with a Mediator

- How do you deal with parties that are at an impasse?

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Conversation with a Mediator

- Do you provide parties with your opinion on the strength of their case?

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Conversation with a Mediator

- When should a party refer to an offer as a “final offer”?

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Conversation with a Mediator

- How often do parties walk out?

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Questions?

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Notes

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Reference Materials

Key Strategies in Conducting a Successful Mediation

Elaine Newman
Arbitrator and Mediator

What is "Strategic" Mediation?

"Shut up and see what the other side does". This is neither a strategic nor effective way in which to approach the mediation process. It is a waste of time, money, and opportunity. It was your grandfather's approach to negotiation.

Whether one is entering approaching mediation of a wrongful dismissal action or a human rights complaint, strategic human resource management requires a preliminary determination of what the goal is for human resource management is in general, for the long term, and only then for the specific process at hand.

For example, if the long term H.R. strategy is to "win every fight", that approach must be adopted in the mediation process, and reflected in every step of the negotiation. If the general H.R. strategy is to improve relations with employees and maintain an image as a progressive employer, that approach must be reflected in the mediation. If the long term strategy is to prepare the work force for change or upcoming challenge, the same rule applies.

When each stage and process is linked to the long term goal, as determined and articulated by the organisation's leadership, management of human resources may be said to be "strategic".

Begin with asking yourself this question: "What is our organisation's overall H.R. strategy? If you cannot answer this question, you have identified an organisational shortcoming. The strategic plan for human resource management should be immediately accessible to all involved, and used as a measure for determining "success" in each process – whether the process is adversarial or collaborative.

Control Your Lawyer

Once the organisation has determined its long term H.R. strategy, communicate that strategy clearly with your lawyer. It is critical that if counsel is managing your mediation,

they are aware of your strategic goals,, and are prepared to give force to those goals in the process. If the goal is the achievement of a long term improvement in employee relations, and maintenance of the great employer image, it is counterproductive to have counsel conducting a “Type A” “win at all cost” mediation. Do not leave this option to counsel. Your H.R. strategy – your choice.

Mediation Preparation Requires Attention

Fulsome preparation for mediation requires that basic data be known and analysed by those presenting the positions and offers. In a wrongful dismissal mediation, know the salary, benefits, bonus entitlement, stock entitlement, pension entitlement, (and calculate a monthly value of compensation including all appropriate items) length of service, position held, place within the organisation’s hierarchy, reporting lines, performance record where relevant, details of facts and evidence where caused is alleged. Know the exact sums paid to the employee upon termination, the period for which benefits were continued.

If employment was terminated for cause, come to mediation with your evidence of cause, including memos, emails, video, photographic evidence, witness statements, investigation reports. Demonstrative evidence is as valuable at mediation as it is at trial. If the strategy is to “win”, plan on persuading the opposing party that you will win at trial. You can only affect that persuasion with evidence. Mediation time is expensive and should not be squandered hunting down basic data. It is the true mark of an amateur.

If the mediation pertains to a human rights complaint, come prepared with medical reports, ergonomic reports, memoranda of previously attempted accommodation efforts, emails of complaints and resolutions, a survey of available suitable positions, a list of vacancies that might be suitable, plans for return to work, a plan for monitoring reintegration and communication pathways. If the issue is that you have reached the point of undue hardship, bring the proof. Armed with the knowledge that in many disability cases, extensive discussion about accommodation unfortunately leads to discussion about ending the relationship, come to mediation prepared to offer a termination package when return to work discussions fail. Let the discussion initiate with the Mediator – not from the Employer.

In other words, if you want to "win" at mediation, the goal is to convince your litigation partner that you will win at trial or hearing. They will not take your word for it, and your degree of litigation confidence is irrelevant to the opponent. Be prepared to prove that you will win at trial,

Manage Your Mediator

The Mediator is there to serve the parties. The process belongs to the parties, and not to the Mediator. Instruct her to manage the process in the way you want – in the way that is consistent with your goal for that process, and your long term H.R. objectives.

Ensure that you use your Mediator's skills to the fullest. Decide whether you want to negotiate with your Mediator while you negotiate with the other party, or whether you trust your Mediator sufficiently to tell her your goals and bottom line, and let her get you to the goal. If you do not trust her enough to take that leap, work with another Mediator.

Decide to what extent you will confide in your Mediator. Instruct your Mediator to run the process in the way that meets your goals.

Consider asking your Mediator for advice in the negotiation – she knows more about what's going on in the other room than you do, and will know when you are in danger of risking the process by asserting a position that is too aggressive.

Remember that this is your process- not the Mediator's. Make her work to your requirements, and according to your strategic goal.

Appreciate the Power of Apology

Even the multi-million dollar earner in the financial services sector will require an apology if the termination was implemented dishonestly or in bad faith. Or, if the termination was implemented without expressing thanks for the millions the employee earned for the company while employed. This is a point not to be overlooked. Apology is critical in resolving some difficult wrongful dismissal and human rights complaints, and it makes good sense to come to the process prepared with that apology and the authority to communicate it.

In a recent wrongful dismissal termination mediation, counsel for the American defendant flew up to Toronto from L.A. for the sole purpose of offering a heartfelt apology to the terminated Plaintiff. It was an extremely effective move, and allowed for an excellent settlement discussion. Without that initiative, the parties would have faced a very lengthy trial around punitive damages.

There are no Limits

The range of options in settling employment disputes is limited only by the imagination and commitment of the parties. Preparation for these processes should be the most creative aspect of the work. Brainstorm options. Run ideas up the flagpole. Express genuine empathy for the extraordinarily difficult position of the terminated or disabled employee. Think about what you would wish for your own kid – if he or she was at the other end of the termination letter. Get the creative human juices going, and manage your process in order to achieve strategic mediation management.

E.N.

What material does your mediator need?
What mistakes do employers make in mediation?
How often do mediations end in tantrums – with one party walking out – and why?
What mistakes do mediators make?
To whom are mediators accountable?
How do I get better at this?

Biographies

Elaine Newman

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Full-time Arbitrator and Mediator
Practice restricted to workplace, employment, labour relations, human rights, harassment and sexual harassment matters.

Education:
1975, Ba, University of Western Ontario, Dean's List
1978, LL.B., Osgoode Hall Law School, York University, Carswell Prize
1979, Call to the Bar, Province of Ontario (retired from Law Society 2018)
2000, LL.M., Osgoode Hall Law School, ADR Program

Academic Appointments:

Lecturer, Queen's University Industrial Relations Centre — Course Director, Strategic Grievance Handling Course, and Lecturer in Foundations Course

Associate Director, LLM Program in Labour Relations & Employment, Osgoode Hall Law School (2001 to 2009) — Program Development, Administrative Management, Student & Faculty Support

Adjunct Professor, Osgoode Hall Law School (2003) — Design and instruction of the Law of Workplace Safety and Insurance

Instructor, York University, Atkinson Faculty Dispute Resolution (2000 to 2011) — Curriculum Designer & Lead Instructor in Advanced Dispute Resolution Certificate Program, Teaching Ethics of Mediation and Practicum in Dispute Resolution

Program Designer, On-line Ethics Course, Alternative Dispute Resolution Institute of Ontario

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Areas of Expertise

Labour Relations and Collective Bargaining | Labour, Employment & Human Rights | Employment Advice and Litigation | Labour Mergers and Acquisitions | Occupational Health and Safety and Workers Compensation | White Collar Defence and Investigations | Human Rights | Executive Compensation and Incentive Plans | Occupational Health and Safety (OHS) Prevention Services

Education

2008, JD, Queen's University

B. Mgmt., 2004, University of Lethbridge

Jurisdiction

Ontario, 2009

Language

English

Shane D. Todd advises employers on workplace issues and represents them in legal proceedings. He has won cases at trial and on motions, negotiated and enforced agreements, and achieved great settlements for clients.

Shane worked as a human resources professional prior to beginning his practice. He knows what issues look like in the workplace, and he understands the need for timely and realistic solutions. He leverages this experience to provide proactive, timely, and high quality advice to clients.

Shane is a frequent writer on human resources law developments. He is also routinely asked to speak about workplace issues, and to conduct training.

Shane has particular experience working with federally regulated employers. In 2010, he was seconded as in-house counsel at the world’s largest express delivery companies. In 2013, he was seconded as in-house employment counsel to one of Canada’s leading chartered banks.

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Megan Beal

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Area of Expertise

Labour, Employment & Human Rights

Education

2013, JD, Queen's University

2010, BBA, Accounting, Wilfrid Laurier University

Jurisdiction

Ontario, 2014

Language

English

Megan practices in all areas of labour and employment law, including labour arbitrations, employment litigation, human rights litigation, occupational health and safety issues (including reprisal complaints) and proceedings before the Ontario Labour Relations Board

Regularly providing advice on employment standards, risk management, employee terminations and human rights issue, Megan assists both unionized and non-unionized employers across a wide range of industries. Megan also has experience assisting employers in the construction industry with proceedings before the Ontario Labour Relations Board. Megan assists employers with drafting employment contracts, policies and procedures, employee handbooks, and other employment documents to ensure legal compliance.

Megan is a graduate of Queen's University Faculty of Law. During her time at Queen's University, Megan participated in and coached a team for the Willem C. Vis International Commercial Arbitration Moot, which takes place in Vienna, Austria. Before attending law school, Megan received a Bachelor of Business Administration, specializing in accounting, from Wilfrid Laurier University.

Prior to joining Fasken, Megan worked at a leading labour and employment boutique law firm in Toronto and Hamilton.