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Child Protection Mediation: A Mediator's Perspective

These materials were prepared by Colleen J. Cattell, QC of McKechnie & Company, Vancouver, BC, for the Continuing Legal Education Society of British Columbia, March 2009.

CHILD PROTECTION MEDIATION: A MEDIATOR'S PERSPECTIVE

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I. Choosing the Mediation Process

In essence, mediation is a facilitated negotiation where parties try to resolve their dispute in a private informal setting with the help of a neutral third party. In the child protection field it has proven very successful, both in the number of resolutions achieved and in party satisfaction.

A. The Advantages of Mediation

Studies show that parties in dispute prefer mediation for two key reasons: the degree of their participation in decision-making and the ability to communicate their views to the other side.

The advantages of mediation include:

- avoiding the cost, risk and stress of litigation;
- speedy resolution. A mediation session can often be scheduled on short notice and it is not necessary that legal action has been commenced. As long as the parties have enough information to make decisions, mediation can occur at any point in a dispute;
- efficiency in resolving complex layers of issues, including the legal positions and the underlying personal interests at stake. Many disputes can be resolved in one mediation session as compared to days, weeks or even months of trial;
- control over the process and the outcome rather than relying on a judge to impose a decision—with more enduring settlements as a result;
- a range of creative and detailed outcomes not available as traditional legal remedies;
- privacy and confidentiality;
- preservation of ongoing relationships;
- personal preferences for a problem-solving approach.

In the child protection field the personal cost of litigation is particularly high; the adversarial nature of a trial and the risk of a negative outcome is very stressful for everyone involved.

It is extremely effective to gather everyone concerned with a dispute into one room to focus on resolving the issues. Rather than a series of communications between the family and the social worker, which are then relayed to the team leader and director's counsel, and relayed by the family to their counsel, followed by communications between the lawyers, mediation allows everyone to

participate in the same conversation. In a few concentrated hours a lot of work can get done. This is often of significant value to parents to whom the child protection process is unfamiliar. If children have been removed it can seem to them to move at a glacial pace, with no clear timeline. Ideally mediation results in a clear plan for moving forward, with expectations clearly set out. That tangible result often translates into feelings of relief and renewed commitment to making the plan work.

At the very least mediation will clarify the issues. Sometimes trials are necessary, and a judge has to make the decisions required, but in my view it is always better to proceed to trial knowing that the parties took all steps possible to resolve it first.

B. The Interest Based Model

Different mediation models include facilitative or interest based, evaluative, and transformative. In BC we generally tend to use a facilitative, interest based mediation model. The Agreement to Mediate used for child protection cases sets out clearly that:

> Without taking sides or telling the parties what they should do, the mediator will help the parties to reach an agreement.

The BC model is unique from other jurisdictions, like the US for example, where parties may be kept separate for most of the mediation and a form of "shuttle diplomacy" is used. Child protection mediations involve a lot of group discussion. Separate meetings are used as well, usually for parties to speak with their lawyers or privately to the mediator, but for the most part mediations proceed as joint sessions.

The child protection mediation model which has developed in BC is especially unique in the extensive use of pre-mediation orientation meetings. These are separate meetings with each of the parties, usually in person but sometimes over the phone. Counsel sometimes participate but it is infrequent.

The pre-mediation meeting is an opportunity for the mediator to obtain the factual background, identify the issues, confirm who should attend, and explore positions and interests. A key goal is explaining the mediation process for first time participants, and making them comfortable with the process and the mediator's role. Often a broad base of agreement will emerge from the pre-mediation meetings, or conversely the mediator can anticipate barriers to settlement.

Depending on the case I often try to get the parties to think about the other parties' perspectives as this is such a new and important shift for many people and key to them preparing for the session.

If I anticipate a high conflict discussion I might also help them to think in advance about ways to communicate their views effectively during the session, for example, using non-inflammatory language, or acknowledgment.

C. The Value Added by the Mediator

The mediator sets a collaborative tone, explores underlying interests, and assists the parties to:

- communicate;
- see the perspective of the other party;
- overcome strategic barriers (for example, information sharing with the other side) and cognitive barriers (deciphering what the other side needs from the negotiation)[1];

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1 See Robert Baruch Bush "What Do We Need a Mediator For?: Mediation's Value-Added for Negotiators," *Ohio State Journal of Dispute Resolution*, Volume 12, Number 1 (1996).

- create strategies, identify options, and formulate solutions;
- stay future focused;
- manage the emotional content;
- not lose sight of their stated goals and the child's best interest.

In child protection the imbalance of power, perceived and real, can be a huge factor. The insertion of a neutral third party contributes significantly to levelling the playing field.

Mediation is particularly useful when the parties are stuck and unable to make any forward progress on their own. Participating in a mediation session is a **process** change. The **content** of the dispute is the same but the process change allows the parties to re-engage differently. Sometimes the realignment of the social worker's relationship with the parents can be the major breakthrough, after which all of the other planning pieces fall easily into place. This is a transformative outcome.

Sometimes in the heat of a mediation session parties can get diverted from the focus they articulated in the orientation sessions. The mediator can use the discussions from the orientation session to refocus the party on making progress towards their end goal.

Mediation sessions often are emotional, for all of the reasons one would expect. When we say that the mediator helps to "manage" the emotional conflict that doesn't mean subduing it. The mediator, and counsel, can help parties deal with the emotional aspect and manage the process when it gets in the way of their ability to communicate effectively, hear what others are saying, process information, or make decisions.

II. Parties as Problem Solvers

One of the most rewarding aspects of the mediation process is the ability of parties, when put in the right setting and context, to move beyond their own positions. It comes as a result of open and respectful dialogue, listening and acknowledgement, and a setting where the group can collectively distance itself from the issue to be resolved. In mediator parlance we draw the image of putting the issues onto the middle of the table and collaboratively working around the table as a group to resolve them.

No one knows the situation and the potential range of creative outcomes as well as the parties themselves (and has as much at stake), which is why the parties are in the best position to craft a resolution.

One of the wonderful process dynamics of mediation is that a momentum builds as parties identify common ground and can see that an agreement may be possible.

III. Lawyers as Problem Solvers

Lawyers in child protection mediations play an absolutely crucial role in assisting their clients to resolve disputes.

Lawyers bring analytical skills, legal expertise, courtroom and mediation experience, a problem solving approach, emotional distance and highly effective communication and negotiation skills to the mediation table for their clients. Many lawyers have already shifted to practising collaboratively. These practitioners see their role as achieving resolution for their clients as early and as effectively as possible, and they utilize different approaches (early assessment of the case, open dialogue with opposing counsel, face to face meetings, negotiation, case conferences, mediation) to achieve that goal.

There is no question that the skills that lawyers bring to bear in a mediation context are more complex than presenting a case in court. Not only is advocacy required, but it is a form of persuasive advocacy geared to the group of diverse personalities who are participating in that mediation session. The range of backgrounds, cultures, and challenges at the table—including language, mental health, addiction, etc.—can be enormous. There are power imbalances on many levels. No two mediation sessions are ever the same. Nor can you anticipate or prepare yourself completely for how the discussion might unfold.

Different cases and a variety of personalities require different approaches. There is, however, now strong empirical evidence that lawyers who adopt a problem solving rather than an adversarial approach in negotiation are more effective. Andrea Schneider in her work "Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style," *Harvard Negotiation Law Review*, Volume 7 (Spring 2002) researched how lawyers rated each other using adjectives, bipolar ratings, goals and overall effectiveness. Her research showed that effective problem solving negotiators balance assertiveness, empathy, goodness and enjoyable company and are overwhelming more effective. Increasingly adversarial behaviour, described as "irritating, stubborn and unethical," is perceived as ineffective. It is a myth that the most effective negotiator is a hard bargainer.

Dr. Julie Macfarlane's recent book *The New Lawyer: How Settlement Is Transforming the Practice of Law* (UBC Press, 2008) describes a new model of lawyering which is very different from the traditional narrow concept of a rights warrior and more focussed on conflict resolution advocacy. This new role is geared towards participating in information sharing processes like mediation and negotiating best possible outcomes for clients. It is "new" because so much of our legal education is still very much focussed on a rights based approach to learning the law. Her book is a must read, particularly in exploring this new role, it implications for the lawyer-client relationship, the role of legal advice and ethics in dispute resolution processes.