

When it Comes to Mediation Advice, Receiving Can be Better than Giving

While many of us like to give advice more than receive it, occasionally we receive advice that is so useful that it becomes an integral part of our professional toolkit. In the following article, seven Society directors share some of the best advice they have been given and describe how it has helped them in their mediation practices:

Cheryl Berry: “Steven Covey’s 2nd Habit: Begin with the end in mind.”

Often words of wisdom that I find in other areas of my life hold wisdom in my mediation practice. Steven Covey’s 2nd habit, “Begin with the end in mind”, is an example.

Through my years of conducting family mediations, I’ve noticed that starting a mediation on the right note helps the parties focus on the task before them. Usually the parties arrive in quite a state - sometimes openly hostile, sometimes emotionally upset, and always anxious.

Taking the time to set the stage by welcoming the parties and going through the usual parts of an opening helps to settle their nerves. Towards the end of the opening, I tell the parties a little about my background as a family law lawyer, my observations about the emotional and financial costs of litigation and how those costs have impacted my clients and their families. I recognize that mediation can feel difficult and talk about the supports that the parties can access to help them through the tough spots. I ask the parties about how they would like to feel when the mediation is over. This helps them focus on the future and the goal of achieving a workable agreement. At some point during the latter part of the opening, I usually see the parties look at each other and nod. This is why they have come: they will begin with the end in mind.

Manon Boelman: “Pre-mediation sessions are invaluable.”

The best advice I have ever received is to try and arrange for a pre-mediation meeting with each of the parties. By pre-mediation meeting, I mean not only one during which the mediator discusses the mediation process with each of the parties, but also one where the needs and interests of each party are clearly identified.

I find that identifying the concerns and needs ahead of time expedites matters considerably at mediation, while defusing time-related stress. If everyone’s needs and concerns have been pre-identified, all parties begin the mediation at the same starting point. The parties are focused on what they will need to address at the mediation and what the other party will probably want addressed. “Setting the stage” or venting about what has brought the parties to this point also occurs at the pre-mediation sessions and is therefore less likely to inflame matters at the mediation. This allows for more focus on the future and the identification of viable solutions, rather than on the painful past.

To accomplish this, both the mediator and the parties need to respect the pre-mediation activities as much as the mediation itself. This means that an appropriate amount of time must be allocated for the pre-mediation session to be fruitful. Although parties may be reluctant to incur what they perceive to be additional costs for pre-mediation sessions, I find the majority are, at the end of such sessions, very appreciative of the benefits they reap in terms of preparation and confidence in themselves, as well as in the mediation process itself.

In my experience, pre-mediation sessions also provide the mediator with the opportunity to get to know the parties in a milieu which may appear much less threatening than a joint session. The result is that parties are less defensive and likely to be more candid and informative at the mediation, which often results in an agreement being reached sooner.

Bob Finlay: “When nothing seems to be working, stop trying for awhile and surrender to ‘what is’.”

During a tough match at the National Squash Championships, it seemed that nothing was working for me. My opponent definitely had the upper hand and momentum was on his side. Between games, I looked at my

continued on page 3

Society's best practice initiatives for 2006 are underway

Roster members were recently advised that the Society will be undertaking several new initiatives in 2006, including:

- offering to Roster members teleconferences on best practice issues,
- offering to Roster members workshops on topics of interest, and
- establishing a lending library of books on conflict resolution for Roster members' use.

We are pleased to advise that work on these three initiatives is now well underway:

Best practice teleconferences: The Society's first best practice teleconference, "Managing Multi-party Commercial Mediations", has been scheduled for March 23, 2006 at 4:00 p.m. Society director, Terry Harris, will facilitate the discussion. The teleconference will be a toll free call for Roster members.

The topic for the April 2006 teleconference will be "Dealing with Client Untruths". Roster members will receive an e-mail invitation once the date and time have been finalized. Suggestions for teleconference topics are invited.

Workshops: Roster members were recently invited to a full-day workshop, being offered jointly by the B.C. Mediator Roster Society and the Family Justice Services Division of the Ministry of Attorney General.

The workshop will be presented in the Lower Mainland on May 30, 2006, by Constance Ahrons, author of *The Good Divorce* and *We're Still Family*. The workshop is being offered to a limited number of Roster members at no charge.

It is anticipated that the next workshop for Roster members will be offered in the early fall of 2006.

Society lending library: The Society thanks Ben Winter, former member of the Civil Roster, for launching the Society's lending library by contributing two books: *New Directions in Mediation* (Joseph Folger and Tricia Jones, Editors) and *The Mediator's Handbook* (Jennifer Beer).

In addition to a number of other titles, the Society has obtained a copy of two new books by Roster members: *Preparing for Mediation: A Dispute Resolution Guide* (Deborah Lynn Zutter) and *Turning Conflict into Profit: A Roadmap for Resolving Personal and Organizational Disputes* (co-authored by Larry Axelrod and Rowland [Roy] Johnson).

Roster members will be notified when the lending library is ready for use. Ideas for suitable titles are welcome. ❖

New Roster Members

The Board of Directors is pleased to welcome the following recently admitted Roster members:

CIVIL ROSTER:

Sheila Begg (White Rock)
Karmen Cozens (Victoria)
Jenifer Crawford (Kamloops)
Carrie Gallant (Coal Harbour)
Chris Harris (Vancouver)
Vivian Kerenyi (Vancouver)
Stanley (Lee) Lourdeaux (Vancouver)
Jory Faibish (Vancouver)
Sawsan Habbal (Vancouver)
Gillian Saxby (Denman Island)
Jacquie Tarasoff (Campbell River)
Gordon White (Victoria)
Daniel Williams (Vancouver)

FAMILY ROSTER:

Vivian Kerenyi (Vancouver)

❖ ❖ ❖

Board of Directors

Jane Morley, Q.C. (President)
Terry Harris
(Vice President and Chair of Roster Committee)
Ron Tucker (Secretary-Treasurer)
Cheryl Berry
Manon Boelman
Joseph Boskovich
Mykie Brown
Bob Finlay
Gary Fitzpatrick
M. Jerry McHale, Q.C.
Carole McKnight (Vice Chair of Roster Committee)
Wayne Plenert
The Honourable Mr. Justice David Vickers

Catherine Morris

(Roster Committee Member – Not on Board of Directors)

❖ ❖ ❖

The Roster Report is published twice a year by the B.C. Mediator Roster Society.

Editor: Susanna Jani, Roster Administrator

Additional copies of The Roster Report are available on request from the Society office.

A copy of this, and previous issues of The Roster Report, are posted on the Society website at:

www.mediator-roster.bc.ca/aboutus_newsletters.html

coach with an expression of exasperation and said, "I feel like giving up." He said, "That is exactly what you need to do." After recovering from the shock of his statement, I asked him to tell me more. He continued by saying, "You're trying too hard. You are trying to make the win happen. You are applying your willpower in the wrong way. Relax, step back mentally and let new possibilities emerge." I went on to win the match.

I have since applied his advice in many situations, including in my mediation work. I remember one example very clearly. I was working with a separating couple to help them with a parenting plan and division of assets. I encouraged them to set ground rules for respectful communication, but they didn't always follow these and would spend part of each mediation session firing clearly "below the belt" comments at each other. I sometimes felt like a referee rather than a mediator. One session was particularly difficult: I tried interrupting them, I reminded them of the rules, I reframed until I couldn't think of anything else to say. Nothing was working. I felt like giving up. Then, my coach's comments flashed into my mind. I stood up and walked to the door of my office, turned to them and said, "I think the two of you need time alone to get some things off your chest and clear the air. I'll be back in awhile to check on your progress." They were clearly shocked as I left the room. Upon my return, I was pleasantly surprised to see that the attacking had ceased and they were negotiating about access. Maybe, as my coach had pointed out, I was trying too hard. As I stepped back and accepted 'what is', the process changed and new possibilities emerged.

Gary Fitzpatrick: ***"Be yourself at all times, and follow your gut instincts."***

The most valuable advice I received was not direct mediation advice but rather something given to me by example in another arena. That is, "be yourself at all times and follow your gut instincts".

When I started to practice as a litigator I was privileged to junior two top senior litigation lawyers. I did a couple of trials with one then a couple with the other. I soon noticed that one of them took notes of everything the witnesses said and could read back a week later exactly what was said. The other would, at the end of a five-day trial, have a couple of sentences on the first sheet of paper in his trial book. One would cross-examine in great detail; the other would ask a few key questions and sit down. One would do a detailed final argument; the other would make a few pointed comments and leave it at that. Both are known as the best in their field. I knew I could not copy either one of them. I had to find my own way!

Sometimes when I am reading summaries an idea will occur to me and I will hesitate because it may be "against the rules". For instance, I may have a "gut feel" it would be counter productive to do the required opening statements. I have, on a few occasions, studied the summaries and done a thorough summary of the various positions in preparation for the mediation. I do take the precaution, before I launch into the summary, of checking with the parties by saying, "I have a feeling it may be helpful if I give you my summary of what I got from the written briefs before we get started". The parties have always said O.K. and, at the end, usually agree I have captured what they wanted to put on the table so we move on to working on the problem. This can take high emotion out of a difficult situation or simplify what the parties are seeing as a complex problem. When do you do this? When your gut tells you the situation is right and you can "pull it off".

Carole McKnight: ***"It is the client, not you, who owns the problem."***

Several years ago I was compelled in my job to provide mediation and conciliation services for families. Within the first three months, I burnt out. I felt as if I was carrying a hundred-pound pack on my back. Every night I sweated over what would happen to the families and the children. I questioned how anyone could possibly work in mediation for any length of time without it destroying them. It was only when I returned to this work later that someone reminded me that it is the CLIENT who owns the problem and, as long as you take it on, it is not likely to work. True, you may have the perfect solution, but suggesting it as the right one means you then became responsible for the outcome.

Learning this valuable lesson of client self-determination was freeing for me. It allowed for creative thinking, exploring options, and being patient with a process. It meant respecting that when the client was ready to make a decision, then - and only then - would that be the right time, not when I thought it ought to be.

Jane Morley, Q.C.: ***"There is no such thing as excessive flattery."***

A friend of mine imparted this wisdom in a context quite different than mediation. He was referring to politicians and advising how to get them to listen. The word "flattery" has an insincere tone to it; I prefer "acknowledgement". And it is not just politicians who like to be acknowledged. We all do. I have come to the conclusion that acknowledgement is the magic of

continued on page 4

mediation. It allows people in conflict to move beyond their anger and hurt, and begin to negotiate an interest-based resolution of their conflict. I have also learned that, although it is better if the parties acknowledge each other, the magic can and does work even if you, as mediator, have to do the acknowledging yourself.

This was brought home to me once when I was mediating an employment dispute. The plaintiff, an Executive Director who had been fired, was proud of the work he had done for the company and outraged by the insult of the firing. He was not going to budge from an unrealistically high settlement demand because he wanted a clear statement from the company that he had been wronged. I figured that somehow I had to get the company directors attending the mediation to acknowledge the positive contribution the plaintiff had made to the company. I soon discovered that was not going to happen. The defendant directors sat in a room with their respective lawyers, who saw my role as mediator to shuttle from their room to the room in which the plaintiff and his lawyer were ensconced, delivering offers and counter-offers and occasionally expressing my opinion about the risks they faced in going to court. They were not about to be persuaded differently. Stymied, I decided I had no alternative but to jettison rule number one of mediation: if you caucus with one side, give the other equal time. I violated that rule by spending a good deal of the day with the plaintiff while the roomful of defendants and their lawyers debated their next offer. I heard the story of the plaintiff's employment life in detail, including all the good things he had done for the company. I listened and I acknowledged him. And 'lo and behold, when an offer came that was considerably lower than his previous "absolute bottom line", he accepted it happily, never

once meeting with the defendants, and persuading me (and his lawyer) of the magic of acknowledgement.

Wayne Plenert: "When it comes to child custody, focus on the long term."

For custody mediations, the best mediation advice I have received came from Bernie Mayer and Chris Moore during a family mediation course I attended in the 1980's. Their idea was to get the parties started with a focus on the long-term future of the children.

In practice, at mediation, I have each parent describe each child as they are now. I encourage them to provide something different from what the other has outlined. This gives the table an intimate view of the four year old and the six year old. Then each parent presents what they hope for that child as a young adult. If they are particularly at tension with each other, the parents often hope for children who are healthy and who respect both parents. Other parents are more ambitious, so we hear about potential careers or university, or how special needs will be overcome and challenges faced. Again, I ask for a different perspective from each parent for each child, as each parent is expected to recognize that the other has a different parenting perspective and connection.

In my experience, this discussion removes much of the confrontational aspect of the negotiation, and allows the parents to start building a structure and process that has a strong positive direction. Parents generally accept that in order for the child to achieve the goals they have set, the positive involvement of each parent will be required. In theory, they then accept the challenge that they should each be involved and accept that the other will also be involved. ❖

What We've Been Up To

UBCM Convention: In September 2005, the Society participated in the Union of BC Municipalities (UBCM) Convention's tradeshow and exhibition in Vancouver. With over 2,000 delegates attending, the convention proved to be an exceptional opportunity to promote mediation and the Rosters to local government decision makers.

BC HRMA Conference: In April 2006, the Society will participate as an exhibitor at the BC Human Resources Management Association's (BC HRMA) 44th Annual Conference, to be held in Victoria. Over 600 human resource executives and practitioners are expected to attend this popular conference.

Proposed Apology Legislation: In February 2006, the Society board of directors submitted a letter to the Ministry of Attorney General expressing the Society's support for the concept of apology legislation. The submission was in response to the Ministry inviting comments on its *Discussion Paper on Apology Legislation* of January 30, 2006. The paper is posted on the Dispute Resolution Office's website at: <http://www.ag.gov.bc.ca/dro/whats-new/index.htm>.

June 22nd Reception for Roster Members and Directors: Society directors thank all of the Roster members who braved the winter weather and attended the December 2005 social in Vancouver. The Society will be hosting its next reception in Victoria on June 22nd. Details will be sent out to Roster members closer to the date of the event. ❖