What Is Mediation All About? Why Bother?

LAWYERS OFTEN BELIEVE that the case they are working on is about them. They win; they lose. They knock themselves out against some dreadful witness or a difficult judge. They triumph on some arcane point. They tell war stories that grow with every retelling.

The fact is that most cases are about the clients, not the lawyers. It is the client who wins or loses; lawyers are simply retained to provide professional services. They are just professional service providers.

Clients who want to take their disputes all the way to court are few and far between. The overwhelming majority of civil cases settle before trial. As far as most clients are concerned, the earlier that cases settle, the better. However, early settlement requires negotiation, and lack of negotiation skills and opportunities may prolong disputes beyond their "best-before date."

In 1999, mediation became mandatory for civil proceedings commenced in Ottawa, as discussed in Justice Beaudoin's piece. This caused quite a stir at the time. Before then, mediation rarely occurred in civil court cases in Ontario. There was no culture to support the practice in

which parties retained the services of a mediator to help them to resolve disputes. Lawyers set cases down for trial and settled them before the trial occurred. Then, as now, relatively few cases proceeded to trial.

Mandatory mediation led to several consequences, not all of them beneficial:

- The settlement rate increased. This has benefited everybody.
- Mediation represented a new step in lawyers' already busy schedules. The addition of this step increased costs, at least where the cases did not settle. This has benefited mediators in particular. To the extent that it reduced pre-trials and trials, this has benefited both clients and courts administration.
- Mediation forced litigators and litigants alike to think about settlement long before the judicial pre-trial. This has benefited everybody.
- Litigators began to plan their cases around the mediation. While not true in every case, the moment of maximum impact often switched from the trial to the mediation. To the extent that this reduced costs and accelerated the time schedule to case resolution, this has benefited everybody.
- Litigators (at least in Ottawa) became familiar with and later expert in mediation as the discrete process that it is. People prepared for and behaved differently in mediation than they did with respect to discovery, pre-trial, and trial. This practice gave a tactical advantage to those lawyers who could best execute a strategy focused on mediation, as opposed to other steps in the court case. This has

been beneficial to those who have developed the expertise. It has not usually been harmful to those who have yet to develop the skill.

- Mediation created its own culture, and this culture is dissimilar to the culture that surrounds the discovery, pre-trial, and trial processes. The opportunity for high-risk, high-stress confrontations has been substantially reduced, thereby leading to a culture of civility and fellowship within the Ottawa Bar. Those familiar with the mediation process fell into patterns of behaviour: when meeting opposing counsel equally familiar with the process, much of the unnecessary distraction and confrontation that has long permeated civil litigation was avoided. Counsel could get to the heart of the matter, and resolve their cases constructively. This benefited everybody.
- In some cases, lawyers do not start to prepare their case until shortly before mediation. This frustrates negotiations beforehand and increases costs for those cases that really could be resolved without mediation. This does not appear to benefit anyone.
- On the whole, mediation has been a tremendous success story in eastern Ontario. Mediation has become either compulsory or commonplace elsewhere during the past decade. As with all legal procedures and processes, familiarity breeds expertise, and expertise gives strategic advantage. Lawyers, especially litigators, thrive on strategic advantages.

The mark of true professionals is that they put the interests of clients ahead of their own interests. Media-

tion may not advance the interests of the lawyer, who does not get a chance to devote billable hours to the meat grinder that civil litigation has become. Instead, mediation advances the interests of clients, who are forced to confront issues and resolution before the legal costs get out of hand.

A collateral benefit of mediation is that it fosters collegiality among lawyers. Lawyers for all sides get to shake hands and congratulate each other on a job well done after a settlement that satisfies the interests of the parties. As can be seen, this benefits everyone.