

Kenneth J. Glasner QC



# How to Assist Clients to Resolve Their Disputes

The British humourist Jerome K. Jerome wrote:

**If a man stopped me in the street, and demanded of me my watch, I should refuse to give it to him. If he threatened to take it by force, I feel I should, although not a fighting man, do my best to protect it. If, on the other hand, he should assert his intention of trying to obtain it by means of an action in any court of law, I should take it out of my pocket and hand it to him and think I had got off cheaply.**

We live in a cost-conscious global society—not just financial costs, but also emotional and productive costs. Many businesspeople want to resolve their conflicts and get on with business. Many times they would like to repair their long-term relationship with the other litigant.

For over 20 years, some of the leading companies in the United States have made a pact requiring them to use ADR methods before going to court.

As a mediator, you must understand product, process, and culture. By product, I mean the subject matter in dispute. Process is self-explanatory.

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Culture is sometimes defined as, “what fish swim in.” It is all around us. Each of us lives in many cultures that affect the way we act and how we think. The culture of those employed in the real estate industry in the Lower Mainland may be different from the culture of colleagues practising in Prince George or Kelowna. The culture surrounding an ICBC motor vehicle accident case is different from that of a fire insurance case, an employment case, a real estate case, a *Wills Variation* case, or a professional association or self-regulating body case.

There is no one way to approach the resolution of a dispute. Each case presents specific issues and requires an

approach that will deal with those issues and perhaps the underlying or side issues. Attached to each of those issues is the culture of the people involved in the dispute, including their counsel.

There is no particular set time when mediation is appropriate. In some cases, it is just before trial or arbitration; sometimes, it is prior to the issuance of the writ, if not earlier.

A decision to attend a mediation is not a decision to settle. It is a decision to explore the possibility of settlement and to see if settlement makes more sense than the alternative.

At mediation the appropriate test is whether the offer is better or worse than proceeding without an agreement. Sometimes this is referred to as BATNA and WATNA: Best Alternative to a Negotiated Agreement and Worst Alternative to a Negotiated Agreement, coined by Roger Fisher and William Ury in their 1981 bestseller, *Getting to Yes: Negotiating Without Giving In*.

- Mediation may result in a settlement.
- Mediation may result in reducing the trial or arbitration from six

weeks down to three days.

- Mediation may result in a reality check for your client.
- Mediation may result in a reality check for you.

Commercial mediation is not a “touchy-feely” form of mediation, although it may deal with the needs, wants, and fears of the parties. It is, in many instances, hard-nosed risk-management analysis.

In British Columbia, a number of rules require parties involved in civil litigation to mediate.

1. Under BC Reg. 127/98, a party involved in a motor vehicle accident can compel the other party to mediate.
2. Under BC Reg. 4/2001 of the *Law and Equity Act*, a party can serve a Notice to Mediate on the other side, requiring that party to mediate. There are some exceptions to that rule under Section 2.

Additional rules are set out requiring mediation, based upon what is commonly called “Leaky Condo” litigation.

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The courts are now cognizant of the need of mediation to the extent that costs may now be awarded against parties for failure to mediate. (See *Schwabe v. Lisinski* BCSC Victoria Registry 2005/09/13.)

In May 2004, the English Court of Appeal dealt with the issue of the failure to mediate. The case set out certain factors that the courts will take into consideration in awarding costs where the plaintiff has been successful at trial but should have attempted mediation. (See *Halsey v. Milton Keynes General NHS Trust et al.*)

Many of our clients want a resolution of their dispute and, if it can be done outside the courtroom, the client will seek that alternative with or without our help. It is essential that we master ways to assist our clients to resolve their disputes. ▲

**Kenneth J. Glasner, QC, CARb**, has an active practice in the areas of corporate, commercial, real estate, and commercial leasing. A founding member of the BC Arbitrator’s Association Alternative Dispute Resolution Subsection of the Canadian Bar Association and the local chapter of the Society of Professionals in Dispute Resolution (SPIDR), he is a member of the ADR Institute of Canada Inc., a Trustee of BCICAC, and a member of the Vancouver Maritime Arbitrator’s Association. He has on occasion acted as a panel member on discipline matters for the Real Estate Council of BC.

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