Richard Sadowski LL.M.

Richard is the principal of Sadowski Resolutions Group which specializes in mediation, advocacy, negotiation and arbitration. Richard's own practice includes an emphasis on personal injury, insurance, employment and professional matters, to which he primarily employs an evaluative approach.

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Personal Injury Mediation - Observations and Views

Guest Speaker: Richard Sadowski, LL.M., Centre for Dispute Resolution

The ADR Institute of Ontario ("ADRIO") presented a live program and webinar on "The Good, The Bad and the Ugly of Mediation" that was delivered by Mr. Richard Sadowski on Tuesday, June 10, 2014 at the ADRIO office in Toronto.

By Mary Korica

Mr. Sadowski focused on his area of specialization—the personal injury field—to share his professional expertise and convey his belief that a mediator can constructively take a very active approach during the mediation process. When he first shifted his practice to mediation, the majority of cases were between a single Plaintiff and Defendant. Richard did note however that, in personal injury mediations, there can also be multiple parties (beyond one or more plaintiffs, there can potentially be tort, accident and benefits, and long- or short-term disability insurers present) and there is generally a power imbalance for the mediator to address between the plaintiff and the other parties. Mr. Sadowski described the personal injury field as primarily demanding an evaluative, rather than facilitative style of mediation given the limited nature of the relationships between the parties. He nonetheless emphasized the benefit of being able to recognize when elements of other approaches are called for and having the skill set to quickly shift between them.

> Mr. Sadowski described court as a very risky environment for all players given that the law is constantly evolving and an anticipated outcome can never be taken for granted.

Mr. Sadowski's own approach involves, early on and if possible even before the mediation begins, talking to the parties to test some information or positions since he prefers to have advance understanding of the situation and the parties' expectations. He also takes different approaches when alone with the various parties and their respective counsel out of sensitivity to their particular circumstances and for the sake of learning as much as possible about their needs, interests and "hot spots". Mr. Sadowski noted that it is necessary to canvass these matters repeatedly with plaintiffs over the course of mediation since they may not always fully divulge information or may change their minds.

In discussing how to effectively deal with parties, Mr. Sadowski mentioned that he finds points of commonality with them and trades stories so as to credibly communicate that he empathizes with them—something he notes is very different from venturing to communicate one understands any party's circumstance, which is ill-advised. He noted that it is very important for parties to choose an appropriate mediator, in terms of background (including whether the mediator is a lawyer or not, gender, temperament, etc., depending on the circumstances), since such factors can greatly influence whether the dynamic of the mediation will

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lead to settlement or not. Likewise, mediators do well to consider whether they are a good match for a particular mediation before taking it on.

Richard commended the work of many non-lawyer mediators, but emphasized that it is necessary for non-lawyers to understand legal terminology and concepts that are relevant to their work, noting that information and training opportunities are readily available. In addition to terms like "onus", "golden years" and "adverse cost awards", mediators should also understand "Rule 49s" (or "Offers to Settle"), which are an element of civil procedure. Mr. Sadowski often uses these since they establish a bar for settlement that factors into the outcome of an eventual court hearing.

Mr. Sadowski mentioned that some parties are reluctant to sign agreements to mediate. Where he has concerns about confidentiality, he insists the agreement be signed before the mediation begins. He noted that since the agreement is the sole instrument binding parties to pay the mediator, he requires it be signed, and a cheque provided, in advance when working with non-represented parties. His initial communication with self-represented parties includes a standard letter explaining that the mediator is a resource who can help them prepare for and navigate through the mediation process. This may facilitate both payment and the sense on the part of non-represented parties that the process is fair. Richard advocated making it easy for parties and lawyers to work with the mediator. He also suggested that mediators encountering difficulty collecting payment should sharpen their skills rather than resort to the law society or small claims court.

In response to audience questioning, Mr. Sadowski spoke about the largely pernicious influence of external sources of information on personal injury mediations, whether it be information from the internet or anecdotes from friends and family. He sees an increasing trend of parties taking on unrealistic expectations or positions based on information they have encountered without being aware of its full context. Mr. Sadowski encouraged mediators to hone their ability to identify these kinds of situations and address them. The mediator can privately learn from a party's lawyer whether the client's expectations are based on their counsel, or other influence. He cautioned that mediators should be careful with their wording in these situations. Richard described some of the ways in which he encourages a party to rely on their own lawyer's counsel rather than on a questionable external source, or if that is not the source of the problem, warn the party that their expectations are out of step with current court decisions and they are taking an approach dangerous to their own interests.

Mr. Sadowski emphasized that faced with unrealistic expectations he refrains from disagreeing with a party's lawyer in session. Rather he invites the lawyer and client into a private setting, at which point he may request permission to move their client away from a stated position that does not serve their interests. Mr. Sadowski may also try to help parties understand that in a courtroom or other third party decision-maker setting, an individual's truths are outweighed by evidence. This is to dissuade a client of the notion that because they consider themselves in the right, the mere opportunity for them to state their case will not simply convince others that they are right.

Mr. Sadowski sometimes requests as a last effort, before a mediation ends without settlement, for the parties to permit him to present in writing a "Mediator's Proposal". Namely it is what he describes to the parties as his assessment of a potential settlement, based on the limited information he has heard. He is careful to explain that it is not an assessment of what a judge or arbitrator or tribunal would decide. He also recommended being aware that a party may orchestrate an impasse anticipating the possibility of a "Mediator's Proposal" in an attempt to use the proposal as part of their strategy to gain advantage.

Mr. Sadowski described court as a very risky environment for all players given that the law is constantly evolving and an anticipated outcome can never be taken for granted. As a result he advises that resolution outside of court is highly preferable, except in a small number of cases where it would serve a public interest. He noted that courts rarely issue large awards and that there are many instances where parties have experienced an adverse outcome through the courts, one that would not have resulted from a mediation. In Mr. Sadowski's, view parties cannot be hurt by engaging in mediation.

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