Second time lucky: re-mediation offers parties another chance at settlement

By Salima Stanley-Bhanji and David Stark

While mediation settles the majority of matters, with most reports estimating an over 80 per cent success rate, sometimes it doesn't work. However, the disputants aren't bound to take the case through litigation. Where the parties agree to take a second attempt at mediation, re-mediation provides an additional possibility for settlement before commencing expensive and prolonged litigation.

Re-mediation can be useful where there is a neutral third party who continues to work with the parties to encourage another run at mediation, or where one of the parties is still committed to alternative dispute resolution, notwithstanding the initial failure of mediation to settle the case.

Mediation may not reach a successful conclusion the first time for a number of reasons:

1. Unavailable information: There may have been insufficient information available at the mediation to enable the parties to reach a mutual resolution. Further details such as medical records, expert reports or reports or records particularizing costs may be required for the matter to progress. The requirement for further information often does not become apparent until the parties have the opportunity to dissect matters at the mediation, particularly if the parties engage in the mediation process prior to the discovery of documents.

2. Absence of relevant parties: The plaintiff may have elected to proceed with mediation, but at the mediation it becomes apparent that another defendant who is not present should shoulder some of the responsibility.

3. Pre-conceived bias: The parties may have been through a court-assisted process such as a judicial dispute resolution (JDR) or settlement conference. If the judge offers an opinion that heavily favours one party, it may alienate the other party from the pre-trial settlement process. The resulting withdrawal by this party has the potential to encourage the other party to commence the litigation process. It should be emphasized to the parties that a trial decision heavily favouring one party may result in an appeal with the potential to have the case re-tried. This cost and delay should be part of the analysis when considering the option for re-mediation following a JDR or settlement conference.

4. Positional parties: The quintessential mediator's approach is that the parties don't have to agree with each other, they only need to understand where the other is coming from. If a mediator jumps too quickly to the final phase of mediation, where the parties usually brainstorm various possibilities for resolution, then there may not be sufficient background and information exchanged between the parties to promote mutual understanding.

This reinforces the positions of the parties, making it difficult to adopt a mutual resolution. Positional attitudes may also be entrenched if the parties have already engaged in an extensive negotiation process leading up to the mediation.

When it starts to become apparent that mediation may not settle, a mediator will often request that the parties consider the alternative options in order to reaffirm commitment to the mediation process. Where mediation becomes heated or emotional, it may be beneficial for the parties to obtain some distance from the mediation process before they can objectively reflect on the benefits of continuing with a re-mediation.

5. Procedural hiccups: Mediation may fail because one of the parties takes exception to the mediation process. There may be concern from one party about the conduct of another party or the conduct of the mediator, and as a result, one party unilaterally terminates the mediation. In such a case, where the terminating party believes the mediation has turned sideways, recommencing mediation with a new mediator may allow the mediation to proceed afresh, with renewed confidence and comfort in the process.

If a case comes forward for re-mediation, it will be necessary for the mediator and the parties to spend some time going over the previous mediation, particularly if there are new parties involved. It is essential that clarification regarding the last offer is obtained before the re-mediation commences. If a new party is involved, it may be necessary for the new party to adjust its bargaining position to account for movement towards settlement that would have been obtained in the prior mediation at which it was not present. This allows the parties to commence the re-mediation at a point of perceived fairness.

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The fact that a case does not settle at an initial mediation does not mean that the mediation process can not be revisited. In fact, that failed process may carry the seeds for a successful re-mediation where the parties are motivated by their understanding that it may be the last option prior to embarking on a lengthy and costly litigation process.

Where there is resistance to try re-mediation, a cost benefit analysis of a settlement where the parties drive the resolution process, versus a trial with an uncertain result and potential for appeal, can assist in moving parties back to the mediation table.

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