Pushing the envelope of settlement

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(In this paper I will not deal with appeals from judgment, nor circumstances in which a case ends because the party or parties abandon it; rather, I will be discussing the two more usual conclusions to litigation, which are judgment at trial and settlement. My subjects will be the kinds of judgments possible in Court and the kinds of settlements possible in mediation, and comparisons between the two.)

Civil court cases ordinarily end in 1 of 2 ways: either a trial judge ends the case by pronouncing judgment, or the parties end the case by settling it for themselves. It may seem odd at first, because they seem to have the same result – that is, an end to the litigation – but those two ends come about through very different processes, and may yield very different results. In this paper, I will compare the circumstances surrounding a judge's giving judgment with the circumstances in which mediating parties settle their cases – and will argue that, because of the legal limitations on a judge's actions, mediation offers a relatively vast array of possible solutions to mediating parties.

The nature of a judge's power:

An appreciation of this paper starts from understanding the role of a trial judge – in particular, the fact that a judge does not have a free hand in deciding how to rule on a case.

The power of a court to grant judgment is created and controlled by law. The judge's personal opinion about the merits of the case is legally irrelevant. The judge cannot ignore the facts of the case or the applicable law in order to avoid a rule that would otherwise apply, nor make up some remedy of his or her own. It is the judge's task to decide the facts of the case, apply the relevant law to those facts and grant a remedy that law prescribes.

The powers of a judge are limited in this way because they are granted for a specific purpose, namely, to be exercised for the good of the public in the discharge of defined duties. In the exercise of his or her powers, a judge may be required to infringe upon freedoms of members of the public, but in order to ensure that there is no infringement beyond what may be necessary in the exercise of legitimate power, the powers are defined narrowly and strictly so as to infringe as little as possible.

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The following are examples of cases in which a judge's powers are limited compared to the powers of the parties in the same situation.

"All or nothing" cases:

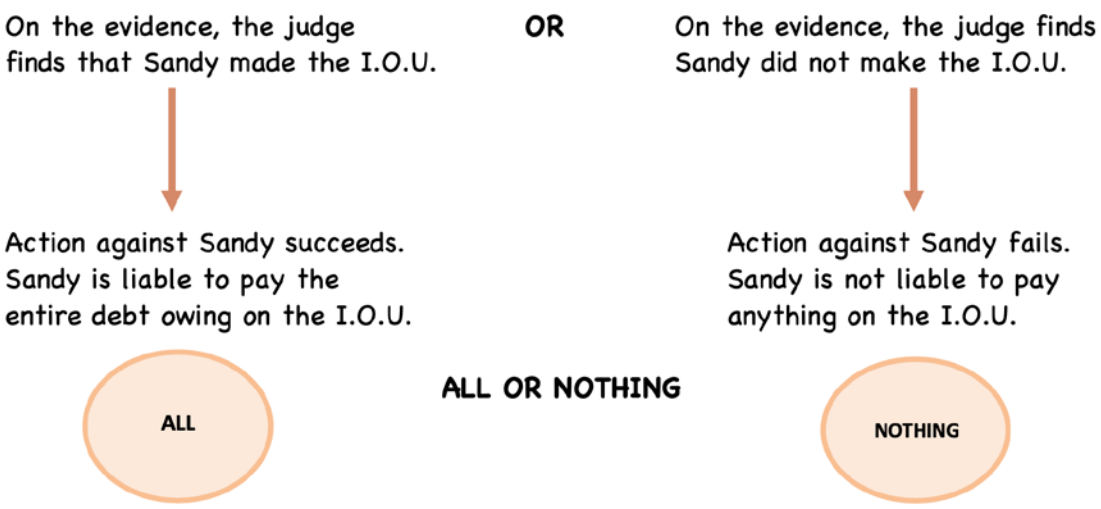
In some disputes – not all, but some – the law provides for an "all or nothing" result. An example is a claim on an I.O.U. (promissory note), as in the following situation:

Assume a claim is made against the defendant ("Sandy") for collection on an I.O.U. Sandy denies making the I.O.U. No other defence is raised. In this situation, Canadian law is such that only 2 legal results are possible at trial: either Sandy will be found to have made the I.O.U. and will be pronounced liable to pay the entire outstanding balance to the plaintiff, or Sandy will be found not to have made the I.O.U., and thus will be held not to owe any money on the I.O.U. at all.

In this situation, the trial judge must work within this "all or nothing" analysis, which is imposed by law. Because of this law, the judge has no power to order recovery of part of the debt only, for example, and can do nothing but decide whether Sandy made the I.O.U. or not. That finding by the judge will determine whether the result is to be all or nothing – and the judge must base that decision on evidence and law, not personal opinion.

This diagram shows how the law works in Sandy's case before a trial judge:

Legal analysis *figure 1*
Trial against Sandy for payment on an I.O.U.



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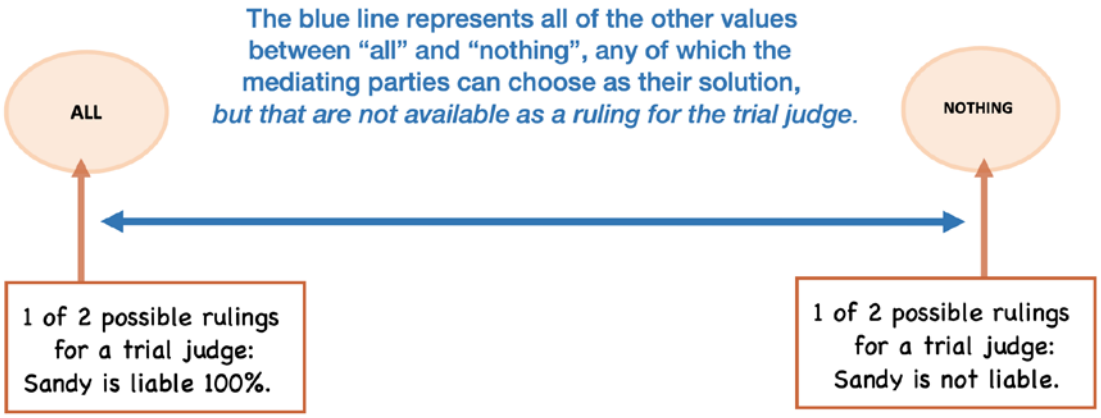
That was an analysis in law. By comparison, in a mediation of this case, the parties would not be constrained by the law as it would apply at such a trial – they would not be stuck with the "all or nothing" answer that would be binding on a judge. The mediating parties can agree to apply the "all" or "nothing" result if they wish, but they can also decide to settle on any of the figures between "all" and "nothing", which the judge cannot do.

To illustrate the comparison, the following diagram shows how mediation would work in the same case. Note the blue line, showing the range of possible solutions available to the parties. Compare the operation of the "all" or "nothing" rule, which would govern a judge's decision in this situation, which is shown in red.

figure 2

Mediation Analysis
Mediation of the same action against Sandy (payment on an I.O.U. claimed)



<u>"Range" cases:</u>

The "range" case works differently, but still results in close control of the judge's power to deal with the case. This example relates to an action for personal injury. It is not like the case discussed above: there is no "all or nothing" rule governing the judge's decision in this situation. The law grants some discretion as to how the Court will value damages, but that discretion is limited, as the judge must consider the evidence and comparable decisions of other courts. In effect, the evidence and those decisions act to define a "range" of possible results. Having in mind the particular facts of the case before him or her, the judge must make a decision reflecting the facts that is consistent with decisions in the other cases in the range, and pronounce judgment accordingly.

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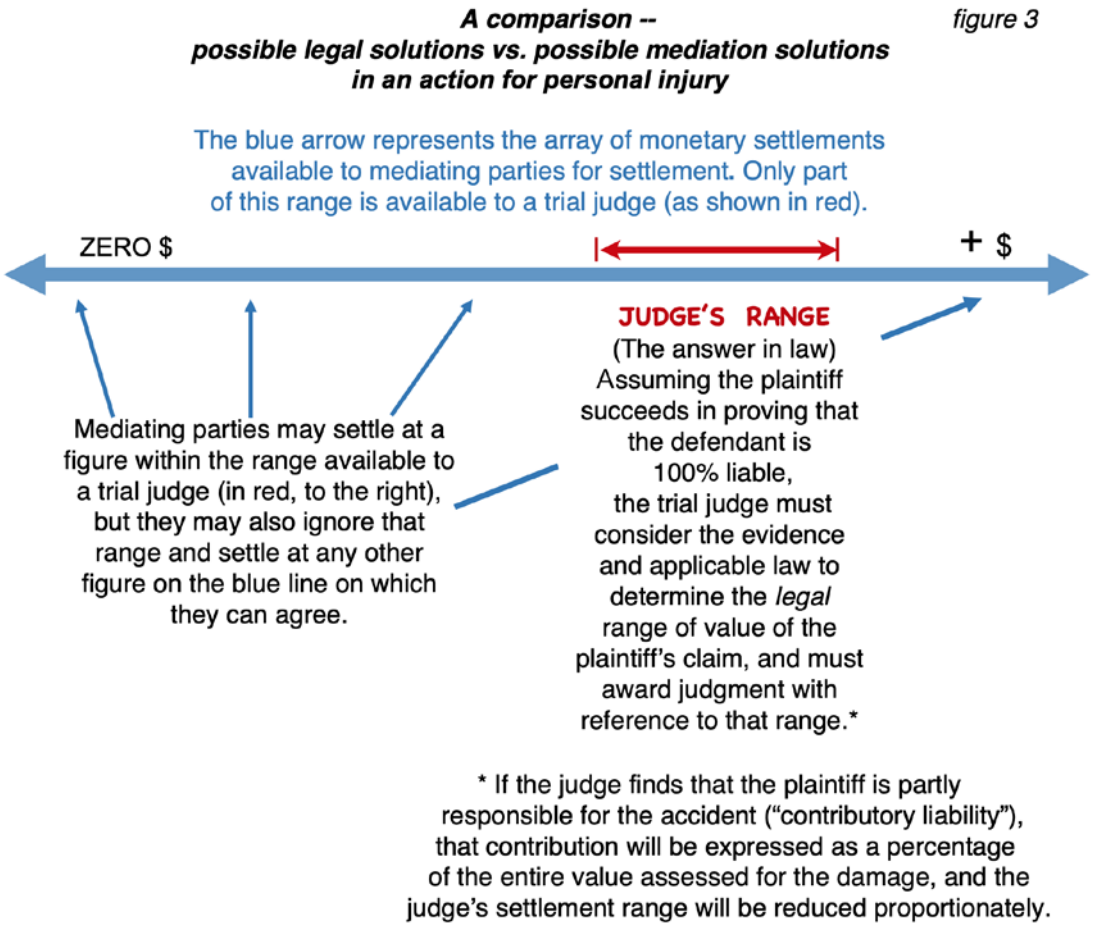

The important thing to understand from these examples is that the solution chosen by mediating parties need not accord with any of the possible legal answers to the problem, so the range of solutions available to them is much broader than that available to a trial judge dealing with the same situation.

What do these examples say about power?

Some readers may find it a little mind-bending to realize that the parties in both of the cases discussed above have more power with respect to disposition of their cases than a judge. In fact, that is true of the parties in every civil and commercial case, and there are good reasons for it.

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When acting together, mediating parties always have more power than a judge: A judge is appointed to act in civil disputes, with powers that are limited to ensure that they do not infringe any further on the rights of private citizens than necessary for him or her to do the job for which he or she was appointed. By comparison, mediating parties are free individuals involved in handling their own personal affairs as they like, and as it is their right to do, provided they are acting lawfully. Viewed from this perspective, it makes sense that the parties would have more power with respect to their affairs than would a judge.

Here are three simple scenarios in which the parties at a mediation could decide to solve their problem by means of remedies with respect to which a judge has no power.

Apology	Mediating parties can decide to resolve their dispute by the delivery of unilateral or mutual apologies. A judge cannot order a party to apologize.
Walk Away	There is no legal requirement that anything be done to address the issues in the case, if the parties don't wish to do so. Mediating parties can decide to resolve their dispute by simply walking away, with no exchange of money or other value: consideration for a walk-away deal is the mutual exchange of the parties' "walking". A judge cannot stop the parties if they decide to walk away.
Charitable Exchange	In mediation circles, the story is told of a case in which two parties began to get on so well during a mediation that they decided to end their dispute without resolving it – they agreed, instead, to abandon the case and that each of them would honour the new peace between them by giving a substantial gift of money to a charity chosen by the other. Such a result is a matter of private contract between the parties; a judge could not order this resolution.

What about certainty?

If parties have the power to settle, early and economically, why do so many spend so much time and money pursuing litigation instead?

The most common reason is that at least one of the parties believes that there is a correct answer to the problem and that they are the party that will get that answer in a trial win, if they persevere.

That belief is illusory. There is no one "correct" answer. As demonstrated by the cases discussed at the start of this article, there is a range of many possible answers in every case, any of which can be acted upon by the parties, but only some of which are open to a trial judge. A legal answer is certainly a possible answer, but it never becomes "the correct answer"

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– even if it is the answer pronounced in judgment at a trial, it can still be changed by the parties, if they act jointly to change it.

In any event, the dispute belongs to the parties: if it is their settlement agreement that resolves it, who is to say that the value they put on their case is any less "correct" than a trial judge's answer?

And there is no certainty in the litigation process itself. It is well-established that trial results are uncertain. There are decisions in which the courts acknowledge that different judges, working with the same facts and law, can end up with different results – and that the differences between those results do not mean that there has been any error or negligence on the part of any of the judges. This situation can arise because judges reach different but reasonable conclusions on the evidence, or apply the law differently, but not incorrectly, in reaching judgment. This observation applies not only to judges who reach different figures in the range of possible values of a claim, but also to the situation in which they reach opposite results – that is, where the trial decision of one judge is positive for the claimant and judgment granted, while the trial decision of another is negative and the case is dismissed. In this scenario the same rule applies, namely, that the difference between them does not mean that either of the judges was mistaken or negligent, or that either one of the decisions is necessarily "wrong".

Legal practice bears out the fact that there is no certainty in litigation. Mindful of the complexity, and the number of contingencies and wild cards that can present at a trial, knowledgeable counsel do not give an opinion with respect to success in terms of one certain answer, but rather in terms of ranges of value or "odds", like those given in games of chance.

As for the parties, when a party talks about his own case with certainty – of having a strong case and winning at trial – it is an expression of defensiveness, wishful thinking or, perhaps, egoism, but not of certainty: contrary to what the party may believe, no one can have such certainty. Nevertheless, participants often adopt the idea that there is one correct answer as they litigate. This is not only mistaken, but counterproductive, because this belief tends to limit the thinking of the party who adopts it, shrinking perspectives on the case, blinding him or her to the existence of the other available solutions and driving the parties' bargaining positions apart. The concern I raise here is not a legal concern, but a process concern relating to mediation itself, because a mediation can be derailed or defeated by such thinking.

About Compromise:

As a mediator, one of the things I hear most often is "I don't want to compromise." When I ask the party for his or her reason for saying that, I invariably get an answer like "I shouldn't have to compromise, I did nothing wrong". That is not the question. At a trial, no one is going to

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ask that party whether or not he or she did something wrong. Their opinion in that respect is irrelevant. The issues between the parties will be decided by a judge on principles of law which the parties may not know or understand and which are not personal to them, in a process they will probably find confusing.

The issue of compromise is more subtle than that. Apart from the competing merits of the case exerting pressure towards higher or lower values, there are other forces at work with respect to compromise, most of which flow from other life events and the passage of time. Once mediation is being undertaken, circumstances are not as they were when the dispute arose. The parties are now locked in a melodrama they didn't foresee or want, legal costs are being incurred, egos are in flame and no one wants to be wrong. In addition to fixing the original dispute they were in, the parties now find themselves in the mess of expense and obfuscation that is litigation, and must find a way to fix that, too. It is a separate problem, and it complicates the original problem.

In order to extricate themselves from this situation, the parties may experience a new interest in compromise. Human nature and experience are such that parties typically recognize that a settlement is going to necessitate compromise. The opposing party may not know the reason for a compromise in settlement, but that doesn't mean there isn't one. As a mediator, I am often privileged to know what is driving a party's willingness to compromise. So, for example, why would a party agree to a settlement that provides for payment of less than the whole of the debt claimed? These are some possible explanations – the first 5 are the most common reasons for compromise:

- the compromise reflects the party's belief that, based on his or her own estimate of the odds of success at a trial, the case is worth less than the debt claimed;
- the amount claimed was inflated to begin with, which is a common way of trying to bully an opposing party into settlement. A compromise to settle at a lower figure would reflect a realistic valuation of the case after correction for that inflation;
- costs can be a big motivator for compromise: a party may settle in order to eliminate further litigation expenses of their own, such as the ongoing fees of litigation counsel, the fees of expert witnesses who will not now testify, etc. A party may also settle in order to avoid any possible liability for the other side's costs, or both;
- a party may compromise in order to have the certainty of a settlement, which terminates the risks of trial and any undesirable results that could occur there;
- the parties have come to realize that there is no economy in their quarrel – the costs they are paying to fight will probably amount to all or most of the value they are fighting about.

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Here are some more unusual explanations for compromise:

- a compromise may reflect the party's explicit or implicit acknowledgment that he or she is partly at fault for the problem, an acknowledgement that may be based on legal analysis, or may reflect a more personal belief;
- a party may compromise and settle to secure an early end to a case because its existence is causing financing difficulties, or is impeding the completion of an important pending transaction;
- a party may compromise and settle because of sensitivity to adverse opinion that has arisen around the case, including dissident voices within an organization of which they are a part,
- peer pressure in the industry, criticisms by the media or adverse public opinion;
- a party may compromise and settle out of sympathy for the circumstances of the other party, where there is hardship, for example - with or without express acknowledgment of that hardship;
- a party may compromise and settle because an agreement reached in mediation is private and confidential, which the party prefers over having the result of the litigation being a matter of public record as would be the case if judgment were pronounced after a trial;
- a party may compromise and settle because he or she believes the opposing party will voluntarily pay a settlement debt negotiated between them, but may resent any judgment pronounced against him or her and act to delay or defeat collection of a judgment debt if the case goes to trial;
- life events tend to cast the importance of litigation issues into new light. Whether they are positive (marriage, birth of a child), or negative (death of a close one, divorce, serious illness), life events can prompt reassessment of the value of matters in litigation and the compromises that might be acceptable to end it.

In any of these situations, a party experiencing such circumstances may decide to keep them confidential, but they are still there, shaping his or her choices and conduct in the background. This is why I think it is always worthwhile to pursue settlement opportunities – things have changed since the dispute originally arose; you probably don't know what is now motivating the other party, and they probably don't know what is motivating you. You might get a surprise... I have seen many surprises.

Non-Monetary Settlement:

The situations discussed at the start of this article related to money – the awarding of money by a court and settlement for money by mediating parties. But resolution based on money is only part of the array of possibilities available to solve disputes. Mediating parties are never limited to settlement based on the payment of money – they may also resolve their case by means of a non-monetary settlement.

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When mediating parties are negotiating a settlement that is not based on money, they can use anything of value, provided they can agree upon the property that will be used and that the asset is available – that is, that title to the asset can be made out, and that there is sufficient unencumbered value in the asset to make the deal possible.

The property used in their settlement may be property that is in dispute in the litigation, as long as the parties consent to that. On the other hand, the property used in their settlement need not be property that is in dispute in the litigation – it can be completely separate. It is for the parties to decide what consideration will be deployed in their bargain, and to decide on its value.

I have seen many cases in which property changed hands in settlement, including a valuable watch, a cottage property, a Maserati, an operating brew pub, a painting and a portfolio of stock options.

Non-monetary settlements hugely increase the number of possibilities for the parties to resolve their dispute. Consideration in a non-monetary settlement can be –

- a tangible form of property, such as chattels like those listed above;
- an intangible form of property, such as a customer list, patent or copyright;
- a commitment to do something, such as building a retaining wall;
- a commitment to stop doing something, such as ceasing to block a flow of water one has been impeding;
- a transaction, such as the purchase and sale of a business or shares.

With respect to transactions used to resolve a case – I have seen settlements in which one party bought out the other in a property or business, settlements in which the parties agreed to sell a property or business to a stranger in the marketplace and share the net proceeds, and settlements in which the parties decided simply to liquidate the business they were quarrelling over and move on.

Note, too, that the property that will be deployed in the non-monetary settlement can be used to facilitate the transaction in two ways – by using it in specie, as the actual thing to change hands in the settlement, or by using it as security to support a deal on other terms.

The law as to a Court's jurisdiction over property that is not money is complex, varying depending on what the property is. Generally, if the property is tangible and is the actual subject of the lawsuit, and relief is sought directly against it, the Court will have power to make orders directly against the property. Thus –

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Power against property:

If a plaintiff sues to recover possession of a tractor-trailer, and is able to prove that he or she is the owner, and that the defendant is holding it unlawfully, the Court will have the power to order the return of the vehicle to the plaintiff.

However, the Court cannot substitute a different property in its judgment:

Let us say that the defendant converted the tractor-trailer and sold it to a third party located in China. Assume, also, that the defendant has a second tractor-trailer that is virtually identical to the first. The trial judge does not have power to order that the second tractor-trailer be substituted for the first in a judgment in favour of the plaintiff – though the parties could agree to make that substitution if they chose.

Powers In breach of contract cases:

This example relates to a contractual provision which is the subject of the litigation – a buy-sell agreement, also known as a "shotgun" clause. Many shareholders' agreements include such clauses, which are designed to deal with disputes by effectively forcing one party out. For example, such a clause might provide that a party can offer to sell his or her interest in their business to the other at a named price, but he or she will be obliged to buy the interest of the other party at that same price if the offer to sell is not accepted.

The Court cannot re-write terms of the contract:

Depending on the facts of the case, a court may declare the clause void, or could enforce it by ordering performance in accordance with its terms, but the court has no power to change the clause by re-writing its terms.

The parties to a mediation relating to the clause can do much more than that:

For example, the parties could agree to modify the buy-sell mechanism in their agreement by devising a sale process that is open to other bidders, or they could agree that the buy-sell mechanism will apply to assets that would not otherwise be included. Neither of these variations of the buy-sell mechanism could be ordered by a judge as part of a trial judgment. They are creative and practical, but they are not "legal" in that they are not remedies provided by law.

The Court can't include in a judgment an order requiring the posting of security for performance of an obligation under that judgment:

Even where a trial judge believes that the defendant against whom a judgment is being pronounced is a collection risk, and even where there has been evidence in the case that the defendant has other assets that could support the judgment debt, the trial judge has no power to make such an order. The parties, on the other hand, may sweeten any offer in play between them by adding a provision for security.

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The Court cannot pronounce a judgment binding on third parties; but parties may settle their dispute by an agreement that includes a third party;

> From time to time one finds flitting around the edges of a case a non-party who is very actively interested in it. Because he or she is not a party to the case, the court cannot pronounce judgment against such a person even if it is shown that he or she is involved in the dispute, but on a settlement basis, motivated by relationship to one of the parties or some other such factor, this third party may be moved to deal directly with the parties and may join in their settlement agreement.

*

In conclusion, to illustrate my point about non-monetary settlement offers, I have modified figure 3 from page 4 of this paper to show the myriad possibilities available:

I hope that this paper represents a useful start and that you will turn your mind to some of the ideas outlined here.

figure 4

The blue arrow represents the range of possible values available to mediating parties for settlement of a damages case *in money*. Part of this range is available to a trial judge (shown in red).

The blue rectangle represents non-monetary settlement possibilities that are alternatives to a settlement in money. The parties may settle their dispute on any terms as to payment of money, from zero to the maximum value of the claim (the blue line), or may make any non-monetary settlement they can agree on (the blue rectangle). By comparison, the judge can order a judgment for payment of money, only, as guided by the range of values laid down by comparable cases, and has no power to grant non-monetary relief (no access to remedies represented by the blue rectangle).

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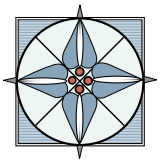
I'd like to close this article with some notes to counsel. I know you will appreciate that representing a case on one of the grounds outlined in this article is completely different from representationon what are conventionally considered to be the legal merits and possible solutions at law. There is a risk that the first mediation attendance will be a wash-out, because the parties will have prepared and attended on different grounds. That is wasteful and expensive.

My recommendation is that you should be prepared for this alternate approach if you are serious about it. Bring to the session relevant title paper, security agreements, valuations and so on, so the real work can be done in the session. Consider bringing an expert who can facilitate any business the parties are able to do – an accountant or real estate agent, perhaps. In one of my mediations, the case was settled on the basis of a purchase and sale of a business amongst the parties: one of the lawyers had thought to bring a solicitor to the session. Working in collaboration with counsel, that solicitor was able to prepare all the necessary documentation in the session, and all the business flowing from the settlement was completed that day.

Of course, the fairest and most useful thing would be to make your disclosure about this option to opposing counsel ahead of the mediation session. This requires some initiative in launching the necessary discussions, and can be difficult. My best advice about this dilemma is, if your idea is an appropriate solution, addressing the real concerns of the parties fairly in all the circumstances of the case, then disclosure shouldn't do any harm.



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