Resolving a racial discrimination complaint through mediation

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Question: Can mediation resolve a racial discrimination complaint to the satisfaction of the parties? Is the process cost-effective?

Answer: Yes, and this actual racial discrimination case illustrates how mediation resolved several formal actions. The facts are changed to the extent necessary to protect anonymity.

A lawyer accepted a contract of employment to practise in a "team environment" with other lawyers. The lawyer alleged that a team member made comments that were derogatory, humiliating and based on inaccurate stereotypes about the lawyer's racial or cultural group. The lawyer sought management's intervention.

The team member denied that the comments were related to race; they were intended to improve work performance. The team member took pride in a high level of cultural sensitivity and was upset by the allegations. Management agreed to the team member's request to remove the lawyer from the team and offered to move the lawyer to a new team. The lawyer argued that the change to the employment relationship constituted constructive dismissal. An impasse occurred; the employment relationship ended.

The lawyer retained legal counsel and commenced a civil action for wrongful dismissal; a Law Society complaint against the team member; human rights complaints against the employer and the team member for systemic racial discrimination and a class action on behalf of the lawyer's racial group.

Several weeks passed. During that time, each party approached me seeking mediation. At first, the law firm refused to participate. Later, the lawyer refused to participate. Anger, humiliation and a desire to hold the law firm publicly accountable motivated the lawyer's refusal. The lawyer was considering a media release that would identify the law firm and focus on "systemic racial discrimination."

I cannot compel mediation participation; nor do I conduct complaint investigations. But my follow-up resulted in the lawyer postponing the media release.

Several months later, both parties agreed to mediation. Several reasons may account for the shift in attitude: 1) a sufficient level of trust in my neutrality had developed on both sides; 2) legal and personal costs were mounting; 3) adversarial processes were becoming more unsatisfactory with the passage of time; 4) the lawyer was contemplating escalating the Law Society complaint; and 5) both sides had retained legal counsel who were experienced with the mediation process. They saw the "window of opportunity" and the low risk that an "Ombudsperson" mediation offered.

Prior to the mediation, I sent detailed preparation letters to each legal counsel. Authority, confidentiality, procedure and expectations were addressed in advance. The Agreement to Mediate and the Rules were previewed. Confidential mediation summaries were provided to me, but not exchanged. Advance preparation was critical and put everyone at ease with the process. I did not want any procedural "surprises." The parties waited until my calendar was clear, despite my offer to retain an alternate Ombudsperson.

Mediation is not a "group hug;" it is an opportunity for the parties to assume responsibility for the resolution of a legal matter with potentially serious consequences. After the joint opening session, I caucus with each party and counsel. Shuttle diplomacy can be very effective to address power imbalance and "hidden agendas." Joint sessions were reconvened when needed.

Acknowledgements were exchanged; admissions of liability did not occur. It was clear that, if the matter did not settle, the case would turn on the credibility of the lawyers (parties) involved. I was the "agent of reality" and focused everyone on interest identification; alternative case scenarios; risk management; the likelihood of success or failure; procedural, legal or financial impediments; quantum ranges and realistic expectations. I did not opine on the merits.

Movement was incremental and, at times, painful. Emotions were high. Repressed anger, tears and rage were "vented" before decision-making occurred.

I mediated for nine consecutive hours until the parties and their counsel reached an agreement. The settlement provided for: 1) damages (over four figures but less than six); 2) the language the parties must use when responding to enquiries about one another; 3) steps one party would take to assist the other with a specific matter; 4) discontinuance of all actions and 5) a release. The settlement was reduced to writing and executed before anyone left the room. The parties expressed satisfaction with the outcome. Their lawyers ranked the experience "excellent" compared with other mediations.

The collective image of the profession is tarnished when lawyers are found to discriminate or litigate against one another. We ultimately bear the cost of discipline, civil and administrative hearings. But for the availability of Ombudsperson services, these parties might still be in litigation, involved with human rights, published in the *Vancouver Sun*, or reported in the *Discipline Digest*. What is the cost to you, as a taxpayer and lawyer, when those processes run their usual course?❐