

## **The Use of Settlement Counsel**

Many in the Victoria Bar are now experienced with mediation in all kinds of disputes. It is accepted that mediation can, at the very least, shorten the time to settle which makes it an advantage even in the easiest files. In more difficult cases, many know that the presence of a mediator can keep things on track. Studies show that people are more likely to feel free to raise a concern with a neutral, so a deal is more likely to stick. In other situations, people feel better about accepting an idea for settlement if it comes from a neutral, as they are less likely to devalue it purely as a reaction from the other side. Increasingly, we are finding that a short day spent together with everyone in the room can produce a final papered deal.

There is another role for those trained in both litigation and mediation. The use of “Settlement Counsel” is becoming more accepted in large disputes. Where there are multiple parties or complex facts to gather, counsel for the parties agree to retain “settlement counsel” who is charged with the responsibility of keeping the file in momentum and in particular watching for opportunities to settle. A neutral who has the confidence of both parties and their counsel can more easily see when these moments exist. In cases where there are multiple parties, some of whom may have only a tangential interest in the file but whose consent is nevertheless required, the use of settlement counsel may prove invaluable.

Take the example of a Wills Variation Act file where there are multiple siblings and multiple charities. It is not clear whose responsibility it is to anchor the proceedings so that all are included and all avenues of communication are open. Sometimes these files do settle but very often not until the eve of a trial when one of the main parties’ counsel has their attention focused squarely on the case.

One such case in which I recently acted as Settlement Counsel involved five siblings in different jurisdictions, some of whom were represented and some of whom were not. There was also an issue of capacity of the testator and of the named beneficiary. We were able to settle everything by email and telephone in a few months and, since my costs were shared by everyone at the table, relatively little expense. This case seemed bound for litigation over a small amount as important principles were stake, such as honouring the perceived wishes of the testator. Thankfully the expense and divisiveness of litigation were avoided.

In another WVA file, as Settlement Counsel, I brought the three contesting private beneficiaries together, one of whom was a noted public figure. She was a reluctant participant who did not want the publicity but had no choice about her participation since she was named in the proceedings. They met with two charities, developed a commitment to progress and worked out deadlines for the litigation track which I was to supervise. While doing this, I learned a lot about their real positions and interests and was able to identify moments when settlement looked possible. I met with some individually and some in groups and a settlement was reached in a few weeks.

Sometimes employing “a mediator” will not be acceptable to everyone. However, if you instead contract with a neutral trained in both litigation and settlement to advocate and identify options for settlement, this can be good news for all concerned!

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