Parties reluctant to give final offer

The tricky issue of mediation chill

BY DALE SMITH
For Law Times

While mediation is expected to be confidential, if it fails and the matter goes to court, a pre-trial judge will often demand to know what the last offer presented was. Alternative dispute resolution professionals say this can create a kind of "mediation chill," where parties are reluctant to give a final offer in the event that a judge forces them to reveal it.

"In private mediation, the general understanding is that, when the parties come to the table, the process is confidential," says Bernard Morrow, principal of Morrow Mediation in Toronto and a former litigator.

"Everyone understands that after the mediation has concluded, anything that was discussed at mediation cannot be disclosed outside of the mediation context. You can't reference at court or during an examination for discovery what was said during the course of mediation."

Morrow explains that the purpose behind the confidentiality commitment is to create an environment that allows those participating in mediation do so openly, without fear of reprisal or that something they say can come back to haunt them at a later date, and that it gives them the comfort to be more open and frank than they would be on the record.

"The difficulty I'm finding is that, on occasion, when we reach a critical point in the mediation process where we're getting to the tipping point in the negotiation, there may be a reluctance to go the extra mile if there's fear from one party or another, that in the event that a resolution is not achieved at mediation, the last offer made will anchor each party at pretrial," he says.

Lauren Tomasich says in mediation there should be a reluctance to give a final offer unless all parties know that they're in the same financial range.

Bernard Morrow says the purpose behind a confidentiality commitment in mediation is to create an environment that allows those participating in mediation do so openly.

Morrow refers to this phenomenon as "mediation chill."

He says he understands that one of the first questions asked by most pretrial judges is what the last offers were exchanged at mediation, and that this is where the anchoring and the chill come into play.

"If there's a fear at mediation that the process may not result in a resolution, a party may be concerned about putting their last offer out there because, if it's rejected, that's their starting point at pretrial," says Morrow.

He says that whatever their reasons are for not wanting to have that anchor, it becomes problematic.

"One gambit that I've seen is where the defendant doesn't want to make an offer," says Ian Stauffer, partner with Tierney Stauffer LLP in Ottawa, who both litigates as well as acts as a mediator and arbitrator.

"They'll say to me as the mediator: 'See if you can get the plaintiff to make another offer with the understanding that we might respond to it.'"

Stauffer says that the biggest problem in terms of settlement with mediation is that parties are often not prepared because they can occur too early in the process.

As an example, there may not be certain reports available, such as regarding future loss of income, or if the reports do come in, they come in too late for the other party to fully digest them.

"There's just not enough evidence to give comfort to the defendant," says Stauffer, adding that some insurers don't want to get reports early on in the process as a means of trying to save money.

Lauren Tomasich, litigation partner with Osler Hoskin & Harcourt LLP in Toronto, says there should be a reluctance to give a final offer unless the parties know that they're in the same financial territory, and she agrees that parties can be reluctant to give a position in mediation that they would be bound to at pretrial.

"I've also had the opposite situation where the spread was really small and the pretrial judge didn't really pressure people to settle, so it can depend on the judge, the circumstances and the dynamics," says Tomasich.

She says that, more broadly, successful mediators never get into offers until they have enough information that the parties are really in the same ballpark, and even if the mediator is trying to push parties in either direction, it isn't productive to tell each party at what point the other side is.

"Final offers, from a psychological and emotional perspective, can be tricky," says Tomasich.

"People can really get fixated on the number, and the psychology and emotion can prevent them from changing even when the economics would dictate that they should. A final offer is really dangerous, because when is anything really final?"

Tomasich says that if the mediation fails and it reaches pretrial, that final offer could no longer be valid because of the added costs of reaching that stage, which would add to the reluctance of telling the pretrial judge of the previous offer.

"Things will have changed between a mediation and when you're at pretrial," says Tomasich. "If mediation happens at a point where there isn't as much information as you have when you're at pretrial, your position may be totally different, so you don't want the pretrial judge to use your former position to leverage a settlement when that's not what your client's intention is."

Michael Schafler, partner with Dentons Canada LLP in Toronto, says pretrial negotiations are also expected to be confidential in order to maintain settlement privilege, and he doesn't think that such a "chill" really exists.

"I have never gone to a mediation that a client where we are representing has said that we're only going to 80 per cent or 'I don't want you to put my final number on the table,'" says Schafler.

He says a good settlement is for both sides to understand that if they're well represented and that if there's a settlement number that is acceptable to everyone, it's one where both sides are uncomfortable.

Schafler notes that, as a commercial dispute lawyer, he doesn't like to go to mediation early because there is an information imbalance.

"You don't know what the other side knows and vice versa," says Schafler.

"There's not a lot of motivation to have a good, honest discussion about settlement. By the time you do get to mediation in that scenario, you will have done discoveries."

Schafler says that because of the cost of discovery, if a mediation doesn't succeed, there should not be a jump in costs between mediation and pretrial in most cases.

Schafler adds that there's also no reason why plaintiff's counsel can't put out a Rule 49 offer when they file their statement of claim in order to keep pressure on the defence side.

Morrow suggests that one way to combat the "chill" may be to have parties consciously and formally agree that all final offers will expire within a finite period of time following mediation to address that expectation at pretrial.

That, however, may be difficult to enact in practice.

"It's very tough to tell a pretrial judge, 'I'm sorry, your honour, but I'm not at liberty to disclose that information,'" says Morrow. **LT**