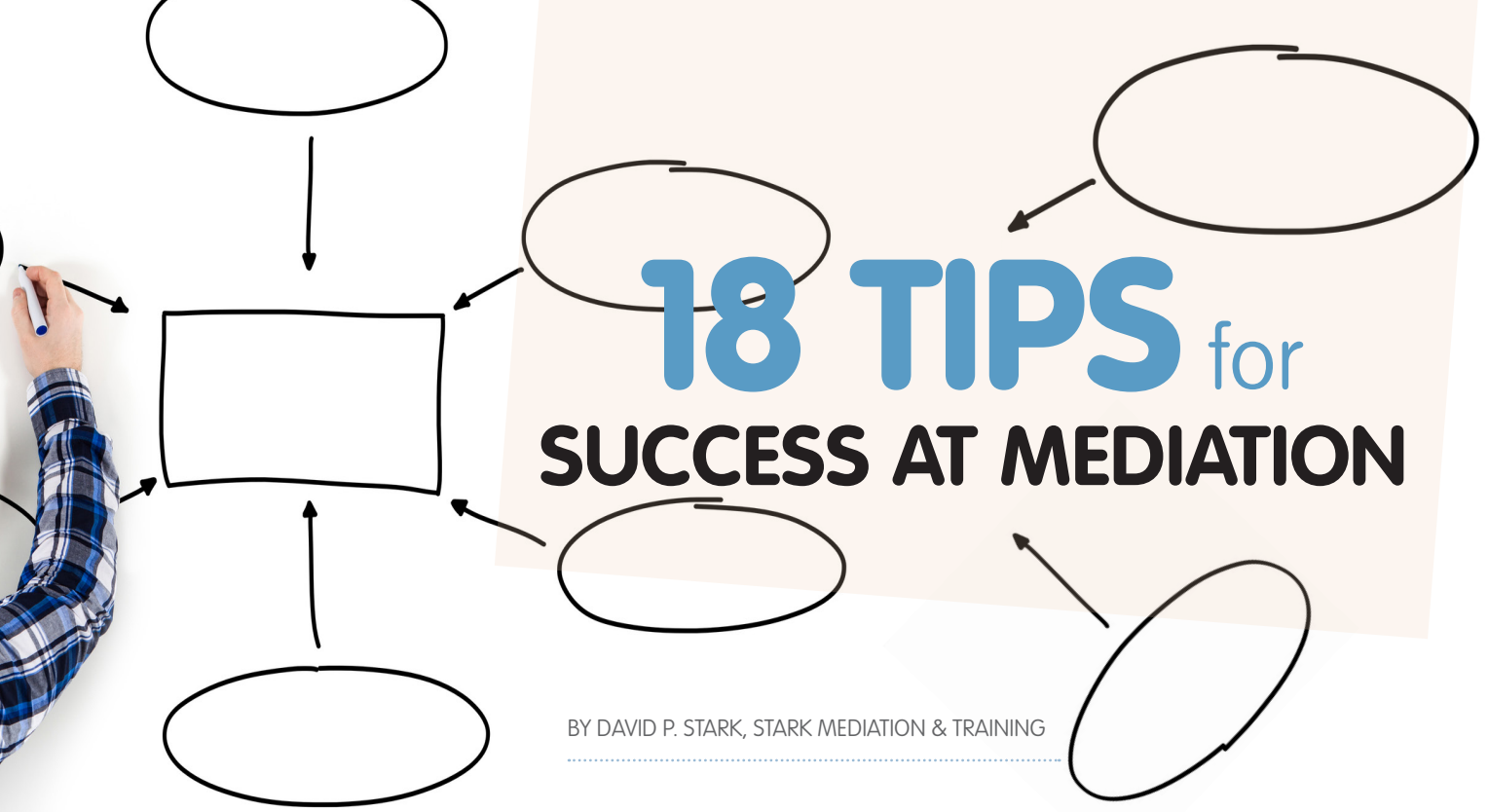

18 TIPS for SUCCESS AT MEDIATION

BY DAVID P. STARK, STARK MEDIATION & TRAINING

I have been involved in alternate dispute resolution since 1991. Since that time, I have participated in close to 2000 mediations, with over 900 as a mediator.

After each mediation, I make notes about the type of case, what worked and what didn't. I found that notwithstanding the type of mediation, there were a number of trends that emerged. I started to keep track of those trends so I would have better means of working with the parties to help them move to settlement. I share these insights from my notes and recollections of nearly 30 years in the mediation field.

1. THINK MEDIATION EARLY AND OFTEN. When you have a dispute that turns into a conflict or may turn into a conflict, think mediation early and think mediation often. While litigation is an integral part of the legal process, and one way to resolve disputes, it has limitations. It is not good at getting parties to sit down, listen to each other, understand each other's interests, and work toward settlement. Litigation is time consuming, expensive and the results are often unpredictable. Considering mediation early helps increase the opportunity for cost effective settlement.

2. CHOOSE THE RIGHT MEDIATOR FOR EACH CASE. Not all Mediators are the same and not all disputes are the same. Pay attention to the kind of dispute you have – including the issues and personalities involved – and carefully consider who would be the right mediator for that particular case.

3. UNDERSTAND YOUR OWN BIASES AND DON'T GET STUCK IN THEM. How we see the world has a lot to do with how we respond to the world. We process the world with a number of biases that are running, most of the time as sub-programs in our mind. Attribution is the basis of most misleading judgements, it is a program that is always running and we may not know it. It says thinks like, " I like people like me and dislike and distrust people who are different," and we then seek evidence that will support how we view the world (confirmation bias), we get attached to our cases (advocacy bias), and then devalue what the other side says (reactive discounting). Because of these biases, we miss opportunities to create value in settlements because our mind is closed to new information. Face to face meetings, active listening, open-ended questions and being open to new information, helps take us out of our biases.

4. PREPARATION. PREPARATION. PREPARATION. THE AMOUNT OF PREPARATION IS USUALLY A BIG PREDICTOR OF SUCCESS. Most cases that go to mediation are not about making new law. Rather, the focus is how facts fit existing precedent. Preparation includes all the back ground work on the file: investigation, fact work-up, and legal research. Key cases need to be reviewed and provided. Rarely will over preparation be an issue.

As a part of preparation remember that "how things start is how they go." Spend some time thinking about how to start well and begin the process on the right foot. That will help the mediation run smoothly.

5. THE BASICS NEVER CHANGE. REMEMBER THAT "LOW COST-HIGH YIELD" SKILLS LIKE GOOD MANNERS ARE IMPORTANT. Being polite and on time almost always yields dividends. Being on time shows respect to your learned friend. Don't be that person who has the reputation of always being late. Confirm date, time and place of mediation. It is my experience that many well-educated professional people will overlook the simple but obvious things.

6. BE FLEXIBLE… The mediation process is a dynamic process that moves with fluidity. But not always in the same direction. At times mediations seem to run backwards and at times may seem to have stalled. (The nature of dynamic equilibrium suggests that as long as the parties stay at the mediation parties are making progress.) Watch this and be part of the process to move the mediation forward. Things that cause mediations to stall include offers that seem to go backward, adding new items to the agenda late in the process, and positional bargaining and brinksmanship.

Most mediators have been trained in a four step process: (for example: introductions, opening statements, brainstorming for solutions, working towards a settlement or conclusion, or something similar) but the mediation can move forwards and backwards through that process, and there will be a number of different negotiating styles from the opposite party, i.e., soft v. hard, positional v interested based, tit for tat. Seek to collaborate, be prepared to compete, be versatile, and shift your style based on what is being sent from the other side.

7. …BUT HAVE A PLAN. As part of the mediation preparation process, spend time planning where you want to go and how to get there. Remember, it will probably take five to eight moves to get to a settlement position. If necessary, set a floor position as part of your pre-mediation planning, and don't go below the pre-set floor unless doing so is part of a well-thought-out plan. The mediation process will trigger emotional responses and can cause parties to act irrationally, so if you are getting caught up in the moment, remember the floor price. One of the lawyers I deal with calls it, "the upset position." When I asked him to explain, he said if he goes lower than that position he is upset. Spend time thinking about the needs of the other party as you plan: what does the other party really want, where do they want to end at, and how do we get there?

8. OPENING. Use opening statements to offer clarity on both the content and process. Perhaps hold out an olive branch with an apology, or a statement of intent (i.e. "we are here to listen and work hard towards settlement"). Be clear, use notes and have an agenda. The opening statements are an important part of the mediation process and are often overlooked and not utilized enough by counsel. A lot can be gained by using the opening to communicate to the other side: "we are trying to understand you."

9. LISTEN. Listen to the other side's opening statement and prepare to ask open-ended questions, (who, what, where, when, why, tell me a little more). This will tell you more of the story, perhaps more than the purely legal aspects of the case. Positions will be communicated and only after the passage of time, and considerable active listening, will the interests emerge.

10. WATCH THE NONVERBAL. Now be quiet and pay attention to the nonverbal messages coming from the other side, and watch what nonverbal messages you are sending out. Over half of the communication we send out is nonverbal, so pay attention. Sometimes, if possible, take another lawyer with you, and when one talks the other observes and takes notes.

11. KEEP AN EVEN KEEL. Hold your emotions in check, do not respond to attacks. When you feel the emotions rise, or you don't know what to do, take a break. Ury, calls this "going to the balcony." Take a break, pause, and breathe. Mentally regroup. The sympathetic nervous system responsible for fight/flight/freeze, powers up the body for survival but does not necessarily allow the brain to think rationally. When upset, or in doubt, taking a break will allow the parasympathetic nervous system to engage, and help restore mental balance.

The mediation process will from time to time involve the expression of many emotions, and as counsel, you may be identified with your client, and attacked. Try not to rise to the bait, engage the mediator's assistance and take a short break. This emotional discharge happens often in family law, and wills and estate matters, and to a certain extent can be cathartic and transformative.

12. LOOK FOR COMMON GROUND. Show understanding and ask questions. Allow opposite parties to hear the phrase, after listening to them, "If I was in your place I would do the same thing." As you develop and work through the agenda, find places where you can agree and collect yeses. The more items you can agree on, the more the parties will feel bound to the process and will continue to participate.

13. NON-PARTIES. What do you do if a party wants a non-party – such as a spouse, family member, or friend – to be part of the mediation. Sometimes, as part of mediation training, law firms or insurers will want to have juniors sit in. Attendees who are

not parties are only allowed by consent so see if the other party will agree and then put some rules in place to make sure the non-party is not interfering in the process. In most instances it is helpful to have the non-party in the room, but their role is usually confined to listening and support, and that may change in the caucus, were the non-party can be helpful in assisting the mediator in understanding other aspects of the dispute, e.g. injured and non-injured spouse.

14. EXPERTS. In some cases where there is technical evidence being relied on, it can be instructive and helpful for the parties and the mediator to have experts present. This will be extremely helpful, to understand and establish risks. Cases involving engineering, economics or medicine, are examples where this works. Again, seek the consent of the other parties.

15. PREVIOUS OFFERS. In a mediation where the parties have some prior negotiation, and then the briefs don't reflect this, I ask the question: "where do we go from here"? Are previous "without prejudice" offers to be referred to? Mediators will sometimes try to find out by asking each party in caucus if there has been prior bargaining, especially without prejudice offers, that one party or the other do not want brought up mediation. Prior bargaining cannot be ignored, especially if the starting position at mediation is now higher than previous offers. The bell cannot be unrung.

16. OFFERS TO BE REFLECTED ON. Perhaps a party may want to think about an offer overnight, or take the offer back to management, call a parent, or an elder. This is usually a good thing to agree to, allowing the offer to be open for a short period of time. To not allow this option means that one party is forcing the other into a take it or leave it option. My experience is the person being pushed into that option, will leave it, and the matter will not settle.

17. CALLING A FRIEND. Perhaps one party, usually the plaintiff, will want to talk the offer with a spouse, parent, grandfather, family friend, elder, etc. The party may want to do this at the mediation via phone or may want to do it post mediation, before acceptance. In my opinion no harm comes from letting a party do this. Again, If a party is not allowed to do this, and is given a take it or leave it position, most parties will leave it, and you have lost a chance to settle and you may not get it back again.

18. SPLIT THE DIFFERENCE. After all the science and the art of negotiation, have been used, if the parties are still apart, we may have the parties talk about a "split the difference" move. This seems to make sense because each party gives up something that looks the same, to each party, to get the deal done.

What to split and how large the difference is will depend on the type of case. I caution the parties not to move to "split the difference" too soon for a number of reasons. Experience teaches it is best used late in the mediation, and usually as the last move in a mediation. Further, it seems to work well if the number being split is small, given the context of the overall number, i.e. $10,000 to be split on a case involving $500,000.00.

This summary represents post-mediation thoughts, musings and reflections. I see this article as a sort of open source document that hopefully will be the start of your efforts to track what works and what doesn't. As you chronicle your successes, think why something has worked, and the same for things that don't work. As you work for continuous improvement, perhaps a chronicle of your own efforts will be published to help move the spirit and process of alternate dispute resolution forward.

David is a graduate from the Faculty of Law, University of Alberta. He is a member of the Law Society of Alberta, The British Columbia Mediation Roster Society and TLABC. He has participated in over 2,000 mediations, and over 850 mediations as a mediator.In November of 2011, he was accepted as a member of the British Columbia Mediation Society, the first non BC resident to be accepted. David lives and works out of Calgary, Alberta and continues to develop his mediation practice in BC. More information on David and his contact information can be found at www.starkmediation.ca.

1 Much of this article comes from my personal experience in mediation. There are many who might be interested in pursuing further reading. The first generation of dispute resolution books focused on the dynamics of the negotiation process, and on the mediation as group dynamics, communication and seeking information from the other side to determine if underlying the position, there were interests that would meet others' similar interests. The matching and meeting of interests allowed parties to move past the positional fight. These books also brought in game theory to predict potential outcomes. Much good has come from these ground breaking books, such as *Getting to Yes* (Fisher, Ury and Patton, 2nd Edition, Penguin Books, 1991), *Getting Past No* (Ury, Bantam Books, 1993), *Getting Together* (Fisher, Brown, Houghton Mifflin Company, 1988), and *Difficult Conversations* (Stone, Patton, Heen, Penguin Books, 2000)

A second generation of negotiation books started to focus on what is going on in the mind of the individual negotiator, what biases, and what mind traps existed. Diagnostic tools like MRI scans and psychological testing showed how the brain worked, and which portions of the brain fired in certain situations. Questions like, "What did negotiators struggle with in terms interpretation of facts?": "How does cognitive dissonance arise?": "How do we account for the different perceptions of facts?" What I have found fascinating, is how parties with the same information or facts, can come to polar opposite conclusions about what those facts mean. The conclusions then represented the reality the parties would work. Books like *Thinking Fast and Slow* (Kahneman, Farrar, Straus, and Giroux, 2011), *The Black Swan* (Talab, Random House, 2007) and *Mistakes Were Made, (But Not By Me)* (Tavris, Aronson, Harvest Books, 2007), help light the way to see when, where and how cognitive errors occur and help us avoid them.