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Mediation: A Warning Not to Bully a Client into Settlement

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Case Commented On: *Raichura v Jones*, [2020 ABQB 139](#)

If a lawyer fails to prepare his client for mediation, and bullies her into a settlement, a court may find the lawyer negligent and award damages to the client amounting to the difference between what she settled for and what she likely would have obtained in court (or arbitration). That is what happened in *Raichura v Jones*, [2020 ABQB 139](#), a recent decision from the Alberta Court of Queen's Bench. In this case, the lawyer was ordered to pay damages of \$131,939. In other words, this case is a lawyer's nightmare. The facts may be uncommon, but the decision includes important warnings. The case has naturally provoked interest from the family law bar and has already been blogged about by Lorne Wolfson [here](#), and by Aaron Franks and Michael Zalev in the [June 1, 2020 edition of This Week in Family Law](#) (paywall). As both blogs pointed out, the decision is being appealed. My primary interest with *Raichura v Jones* is the resounding message that lawyers should not bully their clients into a settlement.

The Case: *Raichura v Jones*

Briefly, Jones represented Raichura in a family law dispute in 2005. Jones was her second family lawyer, and is a litigation lawyer. Raichura's first lawyer was a collaborative lawyer who represented her in an attempt at settlement through collaborative practice (a form of dispute resolution whereby parties enter into a contract saying they will negotiate in good faith and they will not commence litigation while they are trying to do so). Prior to that she had tried mediation without counsel. All attempts at settlement had failed and Raichura wanted to proceed to court, which is why she hired Jones. The issues included child and spousal support, as well as property division. Jones and Raichura commenced litigation but changed course to mediation-arbitration. During mediation, Raichura was under the impression that she had to settle because if she did not, her former spouse would declare bankruptcy and she would be left with nothing. The decision does not suggest her former spouse threatened to declare bankruptcy, but rather that Jones flagged bankruptcy as a possibility. Raichura testified that she "gave up" during the mediation, and agreed to terms of settlement (at para 47). Two months later, she learned from a radio program that bankruptcy would only impact property and not support, drastically increasing the amount she would have been able to receive. As a result, she commenced an action in negligence against her former lawyer.

Justice David Gates divided up the allegations against Jones into pre-mediation, mediation, and post-mediation phases of the lawyer-client relationship. The pre-mediation claims included the following:

- failing to keep Raichura “informed on critical communications”;
- failing to “explain the risks” of med-arb;
- failing to obtain “sufficient disclosure”;
- failing to “recommend mediation only after” receiving disclosure;
- failing to explain the “risks of proceeding without” disclosure;
- failing to “obtain the client’s instructions to proceed”;
- failing to “fulfil his promise to prepare her for mediation” (at para 55).

The mediation period claims against Jones were the following:

- failing to “advocate on legal concepts”;
- failing to properly advise on the “impacts of possible bankruptcy”;
- failing to assess the client’s “willingness to continue in the mediation”;
- failing to assess whether “she truly agreed with the mediated outcome” (at para 56).

The post mediation period claims included the following:

- failing to properly prepare the “separation agreement”;
- failing to advise on the client’s “options” if she did not sign the agreement;
- failing to act when an RRSP was found to have no value (at para 57).

While Jones did succeed in defeating some of these claims, Justice Gates found him negligent in the pre-mediation phase, and in failing to properly advise on the effects of bankruptcy. The court held that “Ms. Raichura was coerced into a mediation she did not want or instruct on an informed basis. She was not properly prepared for the mediation and went in unaware of her legal entitlements. This meant she could not make an informed choice when settlement options arose” (at para 172). She ended up entering into an agreement where she “received substantially less than she believed she was owed” (at para 173). If she had “proper legal representation, she would not have been at mediation, or not have been so ill-prepared and underinformed so as to accept a very compromised settlement, and instead would have proceeded to arbitration” (at para 176).

The Standard of Care for a Lawyer

It is well settled that the standard of care for a lawyer is to provide the services that would be provided by the reasonably competent lawyer in the same circumstances (*Central Trust Co. v Rafuse*, [1986 CanLII 29 \(SCC\)](#), [\[1986\] 2 SCR 147](#)). This means that when a client sues her lawyer in negligence, a court will look to what a reasonably competent lawyer practicing in the same area of law, during the same period would do, not what an expert in that particular area of practice would do today. Jones was held to the standard of care of a family law lawyer in Calgary in 2005.

Pressure to Participate in Mediation

Jones was found to have pushed his client into mediation-arbitration, having scheduled the mediation contrary to her instructions (at para 86). Justice Gates found that Raichura was told she had to attend mediation to “show that she was an agreeable person” and to show the

mediator-arbitrator how far apart their positions were, so they could proceed to arbitration (at para 110). Raichura was led to believe mediation was a “necessary evil” (at para 33). Justice Gates emphasized that this was “inaccurate advice” and the decision to try mediation was a decision the client should have made, not the lawyer (at paras 110-112). Jones “was obliged to inform her about her options along with the advantages and disadvantages of each course of action, then seek her instructions, rather than making the decision himself and convincing her to go along with it” (at para 112).

There are two observations that flow from this important point. The court’s decision does not reflect a reason why the parties could not have proceeded straight to arbitration. The client had already tried collaborative practice with her previous lawyer, and she felt there was “no point in negotiating” with her ex-husband, nor did she feel capable of asserting herself in such a process (at paras 80-85). Jones seems to have had a goal of showing the mediator-arbitrator that his client was not to blame for the lack of a settlement. The mediation was just for show. I’m confident most lawyers have examples of mediation being used inappropriately, including instances of lawyers using the process to access information, to gauge a party’s bottom line, or as in this case, to try to persuade the arbitrator. Entering into a consensual process in bad faith is a waste of time and money for everyone.

The law governing lawyers does not require lawyers to negotiate in good faith, unlike in collaborative practice. Federation of Law Societies of Canada, [“Model Code of Professional Conduct”](#), requires a lawyer to “act in good faith” when dealing with another lawyer, but such a rule does not prohibit a lawyer from leveraging a dispute resolution process to pursue the client’s interests (R 7.2-1). In fact, leveraging a process might actually be good lawyering in some instances. The point here is that the client was not properly advised as to what mediation would entail, and based on her past attempts at negotiation she was sure she did not want to participate in any further attempts – that should have been the deciding factor.

Second, and more importantly, even though the decision mentions nothing of family violence, that does not mean there was no risk. Raichura seems to have been clear she needed someone to advocate on her behalf (at paras 80-85). The idea of a lawyer pressuring a client into a consensual dispute resolution process that requires her to participate meaningfully in order to appear “agreeable” can be dangerous. Wanda Wieggers, Jennifer Koshan and Janet Mosher comprehensively discussed the risks of mandatory mediation [here](#) and on ABlawg [here](#). In short, forcing a victim of family violence into a process aimed at achieving a consensual resolution, with a mandate to appear agreeable, has the power to risk her safety, intimidate her, cause revictimization, lead to an inequitable outcome (which it did here), and provide an opportunity to prolong a pattern of coercive control. Any suggestion to a client to enter into a consensual dispute resolution process so as to not appear “difficult” or “obstructive” (at para 33) needs to be carefully avoided if that client is vulnerable to the power of the other party.

Failure to Prepare for Mediation

The evidence on standard of care, which the court accepted, provided that there are “two schools of thought on how to prepare for mediation” distinguished by mediation “typical in southern Ontario” compared to the “approach in Calgary” (at para 69(g)). In my view, this is the wrong

way to categorize the distinction. The different types of mediation, which I discussed previously [here](#), turns on the mediator and type of mediation they offer, not the jurisdiction. I think what Kevin Hannah (the expert) and Justice Gates meant is the distinction between evaluative mediation and facilitative mediation, both of which are offered in both provinces. I think the Calgary approach refers to facilitative mediation, because of the emphasis on interest-based negotiation. That said, evaluative mediators may incorporate interests into their practice, so I'm not certain in my interpretation of what the Calgary approach means because of the failure to use accurate terminology. I think they refer to the Ontario approach as evaluative mediation because of the emphasis on preparing written materials and the mediator's evaluation of positions. (See also: John C Kleefeld et al, *Dispute Resolution: Readings and Case Studies, 4th ed* (Toronto, ON: Emond, 2016) at 291-315.) According to Justice Gates, Raichura seems to have been reasonably expecting to participate in evaluative mediation, but she ended up in a facilitative process (at para 129). The failure to distinguish between types of mediation seems to have led to some of the disconnect between the lawyer and his client – between what she thought she was getting, and what he thought he was providing.

The evidence on standard of care showed that the Calgary approach requires the lawyer “to be familiar with the matrimonial estate, have a handle on the financial facts available, and have an appreciation of the information required to properly advise the client” (at para 69(f)). Raichura wanted information on property division, potential options, and ranges of possible support prior to the mediation, but she received none of the above. It was not the lawyer's practice to provide his clients with such information (although he promised to do so in this case). As a result, the client felt (and was) unprepared for mediation. Justice Gates found Jones breached the standard of care by not “advising his client on what she would likely be able to receive for spousal support, child support and matrimonial property were the matter to go to trial” (at para 124). Moreover, in this case, Raichura did not want to mediate, so the court said Jones should have gone further to ensure she was prepared (at para 126). As a consequence, by “not knowing where she stood, Ms. Raichura entered the mediation in a significantly disadvantaged position, compounding the vulnerable position she was already in as a person uncomfortable advocating for herself” (at para 127).

In short, there is an important lesson here: regardless of whether a client is participating in evaluative or facilitative mediation, a lawyer is required to prepare his client for mediation. A lawyer must ensure his client understands what the process will “actually entail” (at para 111), and he must ensure she understands her BATNA (best alternative to a negotiated agreement) (at para 124). A client cannot be expected to negotiate successfully or enter into a reasonable settlement without a clear understanding of what her best alternative to a negotiated agreement is.

Let a Client Sleep on It

Raichura said that during the mediation she “felt backed into a corner” and she would have liked time to “go away and think” about whether to continue with the mediation or proceed to arbitration (at paras 159-160). Failure to give the client time to think did not breach the standard of care (at para 161). This issue arose after she had agreed to waive retroactive support, believing, incorrectly, that the amount was “nominal” (at para 44). After that, during an

afternoon break, Raichura expressed a desire to proceed directly to arbitration. At that point Jones explained the cost of arbitration and raised bankruptcy as a possibility, which seems to have contributed to Raichura feeling that she was cornered and had to continue with the mediation. Failing to properly advise on the effects of bankruptcy was a violation of the standard of care (at paras 154-156). Sleeping on it would not have cured her informational deficits; she did not know her BATNA. But my hope is if a client was asking for time to consider the fully informed terms of a deal, then she would have to be given the opportunity to sleep on it – a cooling off period.

Agreement-by-exhaustion seems common in some areas of practice, including family law, but typically I think it involves the party and her lawyer trying to use exhaustion to pressure the other side into settlement. Here, the lack of accurate legal advice was the problem, but the issue of agreement-by-exhaustion seems important enough to comment on, particularly the idea of pressure being exerted on the client by her own lawyer.

Some mediator codes of conduct emphasize party self-determination, which includes a mandate to allow the parties to come to an uncoerced decision. (See e.g.: Family Dispute Resolution Institute of Ontario, "[Standards of Practice for FDR Professionals](#)" at Standard 1, Ontario Association for Family Mediation "[Standards of Practice](#)" at 15, and Alberta Family Mediation Society "[Code of Professional Conduct](#)" at Article 9.) Moreover, when I conducted empirical research on ethics and professionalism in family law ADR, the participants generally viewed reaching a settlement in a mediation through means of exhaustion and capitulation as “unethical”. They suggested that ethical mediators ought to facilitate a settlement not force one. (See: Deanne Sowter, “Professionalism & Ethics in Family Law: The Other 90%” (2016) 6.1 *Journal of Arbitration and Mediation* 167 at 211-212.) But that mandate applies to the mediator, not the lawyer.

The *Model Code* is silent on conduct that specifically relates to mediation – it only includes a provision for a lawyer acting as a mediator, not a lawyer representing a client *during* a mediation (R 5.7). The term “tribunal” is defined to include mediation, which means the Code applies to all mediation the same way it applies to litigation (R 1.1-1). Jurisprudence provides that a lawyer cannot pressure a client into signing an agreement. (See: *McClenahan v Clarke*, [2004 CanLII 25843 \(ON SC\)](#).) To me, using a dispute resolution process to do that is basically the same thing.

In my view, what follows from these observations is that even though a mediator’s role includes steering the process, it is still a lawyer’s responsibility in a private consensual dispute resolution process to not let the process overwhelm the client’s needs. If the client needs a break, is exhausted, confused by the terms, or in any way unable to participate meaningfully, then the lawyer must give that client a break, the space to walk-away and think, if that is what she wants. If not, there is a risk the client will enter into an agreement under duress. Meaning, if she signs under duress then she can seek to have the agreement set aside (See: *Dickieson v Dickieson*, [2011 ABQB 202 \(CanLII\)](#)). Duress is “less likely” to be found where a client has had “independent legal advice and ... a meaningful opportunity to review the domestic contract” (*Turk v Turk*, [2017 ONSC 6889 \(CanLII\)](#) at para 303; aff’d [2018 ONCA 993 \(CanLII\)](#)). That means both sides ought to be advised against the idea of pressuring a party into a settlement, and both counsel ought to adhere to the same advice. Legal advice also presumably ought to include

the risks associated with staying at the mediation table and with walking away. It may not be a wise choice to walk away from a mediation. Sometimes the deal on the table will not be there when the client comes back, but so be it. That is a risk that a properly informed client gets to take.

The Court Asked About Advocacy

Finally, the court asked about advocacy. Raichura claimed that Jones failed to advocate on her behalf about specific issues – failing to advance legal arguments about imputing income, the nature of debts, and the consequences of non-disclosure. Framing the type of advocacy as facilitative (i.e.: “the approach that is common in Calgary”) Justice Gates said:

[146] ... [I]t is difficult to know what the standard of care is for a lawyer attempting to assist their client to settle a matter. Is the lawyer required to advance all legal arguments the client wants advanced? If the lawyer believes the client’s argument is ill-advised or unfounded, is there an obligation on the lawyer to discuss that with the client in advance of the mediation and obtain the client’s instructions? Or is the lawyer’s duty to act only in an advisory and informational role ... ?

There was no evidence provided for the court to answer these questions, and so the “failing to advocate on legal issues” ground of negligence could not succeed (at paras 144-148).

Rule 5.1-1[1] of the *Model Code* says an advocate acting in an adversarial process has a duty to “raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client’s case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law.” As I have argued [elsewhere](#), evaluative mediation is adversarial, and thus this provision applies.

I think perhaps there is a perception that in a non-adversarial process such as facilitative mediation, a lawyer’s role is diminished somewhat. However, the reverse is actually true, as there is a heightened responsibility on the lawyer to get the law right because of the absence of a third-party decision-maker. What a lawyer is doing is different. He is not making legal arguments to be decided by a third party, but he is making legal arguments that a mediator or opposing counsel will find persuasive, or not. They are bargaining in the shadow of the law where interests may dominate the discussion and terms of settlement, but the lawyer is still an advocate tasked with pursuing his client’s objective. The process does not create a limited-scope retainer whereby a lawyer is only tasked with advising on the law or providing legal information. Notwithstanding the unhelpful way the *Model Code* distinguishes adversarial processes, even in a situation where raising every argument is likely going to be viewed as unreasonable, the lawyer’s job is to advance those claims if that is what the client wants. The crucial feature here is for the lawyer to ensure that is actually what the client wants. Any “ill-advised” or “unfounded” arguments ought to be discussed with the client, including the potential damaging consequences of pursuing an aggressive approach (R 3.2-2). The lawyer’s role is to ensure his client understands the nature of her instructions, do his best to facilitate a good deal for her, and pursue her interests within the limits of the law.

In essence, this case is a warning to counsel acting for parties in any settlement-oriented process. There was a disconnect here from the beginning. This client had a settlement-oriented lawyer previously, she had tried collaborative practice and mediation already. Both attempts failed. She wanted a litigator, and she thought she retained one, only to find herself back where she started in an interest-based process. It is not a lawyer's job to decide the client is misguided or unwise, and thus supplant her exercise of autonomy with their own paternalistic views. A client needs to understand the various process options and her BATNA, in order to properly consent to a settlement. A lawyer's job is to facilitate the client's ability to make fully informed decisions, not make decisions *for* the client.

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