

# MEDIATION MINUTE



In the last article I discussed some of the important steps to take in order to prepare for a mediation. In particular, I addressed the importance of issue identification and creative problem solving. In this article I would like to carry on with that theme and discuss some other important ways to prepare for a mediation. Whether your client is an individual or a corporation, proper preparation for a mediation will greatly improve the likelihood of achieving a settlement that will be beneficial to your client.

Discuss with your client the physical surroundings that they will encounter. Determine who will be in attendance at the mediation. Is your client comfortable being across the table from the opposing party and their lawyer? Are there individuals that your client would like to have in attendance? It may be very important for your client to be able to speak directly to certain individuals from the opposing side. In addition, your client may want certain people to be at the mediation to provide moral or technical support for them. Consider who should be in attendance in order to make the mediation as productive as possible. Mediators are always concerned to ensure that the appropriate decision makers, with authority to settle, are at the table or readily available but are there others who have important knowledge that will assist the parties in arriving at an informed decision on settlement? How many people will be in attendance at the mediation from each side? Is numerical symmetry at the table necessary or important for you or your client? In certain cultures, numerical symmetry at the negotiation table is a fundamental pre-condition of the mediation process. If your client holds that view, then ensure that you pay attention to that requirement. These things should be reviewed with your client well in advance to ensure that your client's expectations will be recognized in the mediation process. Have you discussed these issues with the other side as well? If the opposing party recognizes the importance of some of these procedural matters and agrees to work together to resolve them in advance then perhaps the stage is set for agreement on some of the contentious issues.

Who will be doing the talking? Many mediators prefer to have the disputants physically seated beside them and speaking in their own words about the issues. Will your client be comfortable with that process? Will you? One way to facilitate this process would be to have the client work with you in the preparation of the summary of facts and issues for the mediation brief. Perhaps a point form presentation of the facts and issues would be acceptable and would allow the

client to comfortably go through the presentation of their position without overlooking an important fact or issue in dispute. Consider reviewing this with your client and perhaps rehearsing appropriate language that accurately reflects your client's position. Discuss ways in which you and your client can articulate their position clearly and forcefully in the mediation. By discussing some of these ideas and reviewing them with your client in advance, you can help to remove some of the anxiety that your client will no doubt be feeling about the mediation process. This review will help your client feel more comfortable and in control of the process and will no doubt improve the likelihood of a successful result.

Finally, discuss advocacy in the mediation context. While in the courtroom you may be the "take no prisoners, gun-slinging" type of litigator, in a mediation session, conciliation is generally more the order of the day. Ensure that you discuss this with your client to clarify your respective roles and to alert them to the fact that a mediation session is different from an examination for discovery or a court application. Don't be afraid to ask your client what they are expecting from you. Let them know that you are firmly supporting their position and that you are working with them as a team. Discuss with them the fact that it may be necessary to use more conciliatory language in the mediation than you have in the past. Make sure that they appreciate that this does not mean that you are "going soft on them" and that you will continue to advocate their position forcefully and strenuously when necessary. While there may be perfectly legitimate times where you or your client need to express a point of view forcefully, to be difficult, obstinate and objectionable throughout the entire mediation process will not lead to a successful conclusion. Make sure that your client understands that your advocacy and negotiation skills may be employed in different manner than they may have seen in the past so that they are not suddenly surprised by your change in demeanour, if that should occur.

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