

PREPARATION FOR MEDIATION

Suggestions for Lawyers *

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Here are some suggestions to make the best use of mediation to help your clients reach a solution that works.

1. ***Know your mediator.*** If there is the option as to who will be the mediator, choose someone with whom the clients will connect. A positive relationship between the clients and the mediator is one factor that is important, as they must buy into and trust the process for the mediation to succeed. Consider the mediator's education and experience to ensure that the issues in dispute fall within the mediator's expertise.

2. ***Know the parties.*** Not all clients are good candidates for mediation. Before the client invests the time and/or money, consider whether the parties will be able to engage in a process that is voluntary and based on compromise. Consider the timing of the mediation. Some clients may not be emotionally ready to mediate (i.e. the separation may be too fresh; they may not be ready to disengage from the relationship). Some clients may require individual counselling before they can resolve their family law disputes amicably. In cases where there has been a history of domestic violence and/or power imbalances, the suitability of this process must be considered, and safety measures may need to be implemented.

3. ***Explain the process.*** According to the Canadian Bar Association (Ontario), the definition of mediation is as follows. "Mediation" is a process in which an impartial person, a mediator, helps disputing parties to try to reach a voluntary, mutually acceptable resolution of some or all of the issues in dispute. The mediator's role is to assist and encourage the parties to a dispute to:

- i. Communicate and negotiate in good faith with each other
- ii. Identify and convey their interests to one another
- iii. Assess risks
- iv. Consider possible settlement options
- v. Resolve voluntarily their dispute

4. ***Distinguish between open and closed mediation.*** Many lawyers and mediators recommend closed mediation based on the belief that clients will be more open and honest if they are assured that the court will not be informed of the discussions in the event that a settlement is not reached. However, open mediation may be more suitable in certain cases. The provision of a report in the event of a stalemate ensures that the Court has evidence upon which to determine which party is being unreasonable. Open mediation may also prevent the process from being used as a delay tactic in the

proceedings because the parties are accountable for their positions. It is important to determine in advance what type of information will be contained in an open mediation report: will it merely set out the parties' areas of agreement and disagreement, or go

further to include the mediator's recommendations? (note: This is concerning because the mediation process is not an investigation or assessment)

5. *Temper unrealistic expectations.* A successful mediation is one where both parties achieve a result that meets the “bare minimum” that they are willing to accept – clients should not enter the process expecting their “best day”. Lawyers should temper their clients’ expectations in order to increase the likelihood of success.

6. *Focus the clients on their interests not on their positions.* The goal of the mediation is to try to meet as many of the parties’ interests as possible. For example, if daycare costs are an issue in the mediation, help the client to consider the interest (that the child will be cared for while the parent is working) rather than the position (that the child attends daycare X at a cost of \$ 1,200 per month). In doing so, creative options can be considered such as the provision of child-care from the other parent or extended family, which may have additional non-monetary benefits as well.

7. *Explain the lawyer’s role in the mediation.* Even when lawyers do not attend the mediation they play an important role in the process. Mediation should be thought of as an alternative method inside the legal system and not an alternative to the legal system. Whatever happens in the mediation should be reviewed by the lawyers so that the parties can understand the legal issues. The understanding reached in mediation can be firmed up and fine-tuned or even changed before it becomes a legally binding resolution. The provision of legal advice during the process may prevent the result from being undone in the future.

8. *Employ the “who cares” test.* When providing legal advice in the context of mediation, it is important to advise the client as to the likely range of results that may ensue if the matter proceeds to Court. However, the lawyer should consider that the client may be prepared to agree to something other than what a court may order. If the agreement may have a significant impact on a client’s legal rights, the issue should be carefully explained to the client so that he/she understands what he/she may be giving up. However, after providing the advice the client’s instructions should be respected. In many instances the lawyer should think twice before interfering in the agreement (i.e. who will pick up and drop off the children from access visits; how the cost of hockey programs will be shared).

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Suggestions for Clients

Here are some suggestions to make the best use of mediation to help you help yourself reach a solution that works.

1. *Be prepared.* Review important issues and facts before you arrive. Be sure that the other party (or his or her lawyer) has all the information you will be relying on in advance of the mediation. Be sure you have all the facts and information you need to make a decision. If not, let our office know. Mediation is most effective if everyone knows the facts in advance and has a chance to think about those facts before meeting.

2. *Consider your options.* Think about a range of settlements that will meet your needs. Think about the range of options the other party might be prepared to accept or offer. Mediation offers the opportunity to resolve disputes in more creative and flexible ways than can a Judge. Do not set a bottom line. You are attending mediation so the other party will re-evaluate their case and seek settlement options. You should be prepared to do the same.

3. *Know your legal costs.* Know what further legal costs may be incurred by you if you do not resolve the matter at mediation. The cost of settling early may be an important factor as to whether or not you wish to resolve the matter by way of mediation. Further negotiations between counselor further litigation can be very costly.

4. *Know your case.* Be sure that you fully understand through discussions with our office what are the possible range of outcomes if you do pursue litigation or other options. Ask our office to give you a realistic assessment of risk, and to advise you of the possible good outcomes and the possible bad outcomes of failing to settle.

5. *Know your lawyer's role.* In mediation our office has a different job than in a Court room. What you want is to convince the other party to accept a settlement you can accept. Our office will want to keep the lines of communication open.

Acknowledging the other party's strong points and holding back on statements that might offend the other party are good tactics on your lawyer's part.

6. *Participate.* A significant part of the mediation is discussion between the parties as assisted by the mediator. Lawyers have an important role to play, but often it is the clients' participation that makes the mediation successful.

7. *Focus.* Be clear about your concerns, your needs, and your objectives. Be prepared to discuss these. This type of information assists the other party to formulate settlement offers that satisfy your objectives.

8. *Trust the mediation process and the mediator.* The process may seem foreign to

you. It may be different than other negotiations you have been part of, but remember that the mediation process is a proven way to resolve disputes.

9. Listen carefully and respectfully to the other party. Think about how you listen. Let your body language tell the other person you are prepared to listen and prepared to discuss. Speak carefully and respectfully to the other party.

10. Be assertive in stating your concerns and viewpoints, but avoid language that will antagonize the other party (e.g. "bottom line", threats, accusations, sarcasm). You will be more persuasive if you are hard on the problem but easy on the person. Even if you do not feel that you are to blame in this matter, this is a good time to ensure that you communicate in a positive neutral way so that you can achieve what you want –a settlement.

11. Be willing to persuade the other party about the sensibility of your position. Look for outside information that the other side will respect, that supports your viewpoint. Our office will provide one form of outside information, namely what Courts have decided about similar cases. Think about what your family's traditions or practices are. Think about what other families that you both respect have done in similar situations.

12. Be open to persuasion. Be on the lookout for creative solutions. Part of what makes mediation successful is that people find solutions one has thought of before. To do this you must go to mediation with an open mind.