

## Mediation Advocacy – Preparation is Key

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**The following is an excerpt from the author's recent book, *Mediation: A Comprehensive Guide to Effective Client Advocacy* (Toronto: Emond Publishing, 2017)**

The most important part of mediation as an advocate is preparation. Getting ready for mediation is very different from getting ready for trial. Seeing it any other way is dangerous. Preparing for mediation should be done thoughtfully, strategically, and comprehensively. This article will guide you through some important considerations. Specifically, it will look at deciding who should attend the mediation, preparing your opening statement and preparing your mediation plan.

### **Deciding who Should Attend**

You will have to advise you client about who should attend the mediation. This is a strategic decision. If you are representing an individual client, that client should certainly attend. Others may be useful attendees as well. If there are relationships at issue in the dispute, for example, your client may want to bring someone who will be affected by the outcome and will need to “buy in” in order for the agreement to be sustainable. A typical example of this occurs in family mediation where it is sometimes prudent to bring a new partner into the room to discuss parenting issues if that new partner will be involved in executing the agreement. In other cases, your client may benefit from the presence of a support person. Such a support person may help your client to make a decision or may just provide the emotional support your client needs to address the conflict or reach agreement.

If your client is an organization or corporation, you will have different considerations. Who will attend to represent the entity? Whoever attends the mediation must either have authority to settle the dispute or must be able to access the person with authority when a decision must be made. Obvious examples of representatives would be a President, CEO or Board Chair of a company. After all, these individuals will likely have the ultimate authority to settle and on what terms. However, they may not be the best ones to handle smaller disputes, the intricacies of which they may not be fully apprised. In such cases a division manager or supervisor may be better suited to attend the mediation. Think carefully about your client's goals of the mediation and match those goals with the best person to achieve them. Is there someone who can articulate the issues better? Is there someone who will appear more sympathetic to the other side or to the mediator? These are all considerations you should have in mind.

## Preparing your Opening Statement

While much of the mediation will unfold organically, the one piece you can have entirely prepared beforehand is your opening statement. As discussed above, you may or may not want your client to be involved in the opening, although some client involvement is generally recommended. Your opening remarks should not exceed 15-20 minutes. This is not a lecture on all the inner workings of your case. It is a summary and should set the tone for the rest of the mediation. Use plain language. Your opening is as much for the opposing client as it is for the mediator. Make sure they understand. Think of some strengths of the other side and determine whether these should be shared in the opening statement. Maybe there is an apology that should be offered right from the start to allow for a conciliatory process. Do not reveal too much in your opening. Be strategic with the information you wish to share. Once you have written your opening statement, share it with your client. Once again, surprises are neither productive nor necessary.

## Preparing your mediation plan

All the preparation that you have done to date will culminate in your mediation plan. The plan will dictate the way you approach the mediation from beginning to end. Of course, it will need to be sufficiently flexible to be amenable to change if unexpected information comes to light in the mediation. Your plan will include what you want to say in your opening statement, how your client will participate and what you deem to be acceptable options. Make sure your client is involved in the creation of your mediation plan. After all, it is their mediation plan too.

You should prepare your mediation plan in writing. Consider the following questions when writing your plan:

- What is your strategy for the mediation?
- What are your client's positions and interests?
- What are the other side's positions and interests?
- How will you reveal various offers?
- What is your BATNA?
- What is your reservation point, or the point at which you are better to walk away than to continue negotiating?
- What is your strategy in regard to your client's participation?
- What is your strategy with regard to caucus?
- How will you use the mediator to help you?

This outline of a plan will serve to illuminate the types of considerations you will have to think about in the planning stage.

This article has offered some suggestions on preparation for mediation as an advocate. The key to a successful mediation is sufficient preparation. Although some may view mediation as a safe zone, and a place to try out strategies, mediation is not an opportunity for discovery. It is not a place to "wing it". Preparation is crucial. You are an advocate in mediation just as you are an advocate in other forums. Never forget the goals of the process and the interests of your client.

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