BAY STREET CHAMBERS

PREPARING A CLIENT FOR MEDIATION

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Preparing the client for mediation should demystify mediation and the mediation process by explaining how mediation will be conducted, including the roles of the various participants and what to expect during the mediation. Preparing the client for mediation should also eliminate the element of surprise. Clients should not be taken by surprise by the mediation process or by tough issues raised for the first time by the mediator, or counsel for the opposing party.

1. Explain the difference between mediation and litigation.

- Goals of litigation and mediation are different; trial and arbitration are about winning, whereas mediation is about resolution;
- Compromise is an inherent element of the mediation process;
- Prepare client to accept the process and the reality of compromise;
- Mediation, unlike litigation, is not an adversarial process;
- Explain the difference between the adversarial nature of a trial or arbitration and the consensual, co-operative process of mediation;
- Mediation is the continuation or commencement of the negotiation process;
- Mediation is an assisted negotiation;
- Explain the differences between the lawyer's role in mediation and in litigation; collaborative in mediation verses adversarial typically observed in litigation; change in role of lawyer from litigation gladiator to mediation negotiator;
- Explain the differences between the trial brief and the mediation brief and the reasons for such differences;
- In litigation the judge decides who wins and who loses; in mediation the parties control the outcome; don't have to settle if parties don't want to;
- Mediation is not binding unless a settlement is made.

2. Explain the role of the mediator.

- The mediator is a neutral person whose main role is to facilitate discussions between the parties to lead to settlement;
- The mediator is not a judge or jury and is not empowered to decide the dispute and may not even express an opinion about who is right or wrong;
- Although neutral, the mediator may ask hard questions about the facts, the evidence and the critical issues, push the clients to talk about these issues and play the "devil's advocate", challenging some of the client's assumptions about the case;
- Explain typical techniques used by mediators such as the way they can act as a devil's advocate, engage in reality testing, and convey offers and counter-offers back and forth.

3. Explain the mediation process.

- Where the mediation will be held;
- How long the mediation session will last;
- Who will be present;
- The roles of the participants;
- Explain what a caucus is, that there may be many caucuses throughout the mediation session and that some may be long;
- Prepare clients for things they don't want to hear, i.e. the weaknesses in the client's case; the strengths of the other side's case; the risks;
- Explain that offers may not be exchanged until very late in the session;
- The dynamics that may unfold, i.e. the "back and forth" dynamics, the give-and-take and the offer and counter offer nature of mediation;
- Prepare the client for the ups and downs.

4. Explain confidentiality of the mediation.

- Mediation contemplates full, complete and candid discussion about the dispute and thus the confidentiality rule;
- Anything said in the mediation cannot be used later by the parties in the legal proceeding if the case is not settled;
- Explain the degree to which anything said in the caucuses (private meetings) cannot be disclosed to the other side;
- Important aspect of confidentiality is that parties can freely share with the mediator in caucus their concerns about the case, the parties' motivations and other relevant matters.

5. Comprehensive assessment of the case.

- Make a candid and realistic assessment of the probability of success in the court or at arbitration, the likely outcome and the cost of getting there;
- Canvass the realistic possible outcomes, from the best to the worst;
- Frank discussion with client about the relevant risk involved with each outcome and ensure client understands the realistic possible outcomes;
- Assessment of the strengths, weaknesses and vulnerabilities of both sides should include assessment of:
    - the legal elements of the claim and the defence to be proven;
    - the onus of proof;
    - facts in dispute;
    - material facts in issue;
    - credibility issues, where applicable;
    - expert evidence obtained;
    - other party's expert evidence;
    - range of potential damages (high, low and most realistic);
- Advise the client of the strengths and weaknesses of his or her case as well the strengths and weaknesses of the other side's case;
- Don't understate or overstate – be realistic;
- Dispel the "sure winner" or "slam dunk" myth; "sure winner" or "slam dunk" cases are extremely rare;
- Remind client that what is fair or right is not always the same as what the law allows;
- What is the client's best day in court or at arbitration and what is the client's worst day;
- Discuss the best alternative and the worst alternative to a negotiated settlement.

6. Explain costs of trial or arbitration.

- Estimate and explain the real cost of going to trial or arbitration;
- Prepare a litigation budget or bill of costs; include estimate of expert's fees, disbursement and taxes;
- Explain partial and substantial indemnity costs;
- Explain offers to settle and Rule 49 and the risk of being on the wrong side of an offer to settle;
- Discuss, if the client is awarded damages, how much will go into the client's pocket;
- Explain adverse costs orders; if the client losses, client will be ordered to pay some portion of the other party's costs.

7. Explain appeal and standard of review.

- Explain the possibility or risk that even if the client is right, the judge or arbitrator will get it wrong;
- Explain losing party's right of appeal;
- Appeals are inherently difficult to win;
- Not role of appellate court to rehear or retry the case;
- Explain standard of appellate review:
    - Error of law - standard of review is correctness;
    - Error of fact – standard of review is pulpable and overriding error (high degree of deference to findings of trial judge);
    - Error of mixed fact and law – standard of review between correctness and overriding error;
    - Discretionary order – a highly differential standard of review is mandated;
- Explain limited grounds to challenge arbitral awards on appeal or to set aside award – questions of law only; appeals on questions of mixed fact and law will not be heard.

8. Manage client's expectations.

- Understanding the client's objectives and expectations is crucial to the management of preconceived and unrealistic expectations;
- A successful discussion of risks is more easily achieved if client's expectations have been shaped from the beginning;
- At the start counsel and clients don't yet have a good understanding of the strengths, weaknesses and risks of their case and the other side's case, therefore better to under-promise and overdeliver;
- Client may have unrealistic expectations about the outcome of their case, including costs, time and result;
- Temper client's expectations by explaining weaknesses in the case, and ensuring client understands that a settlement is a compromise and that the best case scenario can only be achieved at a trial;
- Provide advice and assessment on the likely outcome of the case on an ongoing basis at various stages of the action:
    - At the start of the matter;
    - At completion of the investigation stage;
    - At completion of pleadings;
    - At completion of documentary production and document review;
    - Following examinations for discovery;
    - Following exchange of experts' reports;
    - Before the mediation (comprehensive realistic assessment of the case, including the probabilities of success on both sides as discussed above);
- If counsel has given reasonable range of outcomes from the outset, client may be more willing to accept counsel's recommendations at mediation.

9. Managing client's emotions.

- Advise client that it is normal to be nervous and stressed;
- Properly preparing the client for mediation (items 2-9 above) will ease the stress and alleviate client's fears;
- A client who has a strong emotional reaction to what has happened to him or her may want to speak directly to the other side – consider whether a joint session would be appropriate for that purpose in the circumstances;
- Diffuse negative emotions, especially hostility;
- Client's calm state of mind is important to rational and clear thought and meaningful instructions;
- Prepare client to be conciliatory and empathic;
- Emphasize goal of mediation is to persuade the other party they have risk and to compromise;
- Emphasize that personal attacks, insults, accusations, confrontation or outrage are counterproductive to persuasion to compromise and to settlement.

10. Managing the narcissistic, "its never my fault" client.

- Narcissistic personality clients are characterized as self-centered, chronically adversarial, inflexible, unreasonable, lacking empathy, unaccepting of criticism, accepting no responsibility for their behaviour and having difficulty in compromising because they feel they have done nothing wrong and have not contributed to the conflict;
- Counsel must provide risk assessment (item 6 above), but focusing on the strengths and weaknesses of the case, or on whether the client is right or wrong, may not work. Counsel should reframe the reasons for compromise. Focus on such things as:
    - Generic problems with cases, without necessarily focusing on the particular flaws with the client's case;
    - Inherent problems or difficulties with cases such as the client's case, i.e. certain types of personal injuries;
    - Even if the client is right, the risk that the judge will get it wrong (explain appeals, Item 8 above);
    - Where there are competing experts, the risk the that the judge will favour the other party's expert over the client's expert. This is not a direct criticism of the client;
    - How strong or weak will other witnesses be; again, this is not a direct criticism of the client;
    - The benefits to the client in reaching settlement;
    - The cost of preparation for trial and of the trial;
    - The client's time commitment for preparation for trial and for the trial;
    - The time it will take for trial and to exhaust appeals and the cost of money.

11. Develop negotiation/settlement strategy for the mediation.

- Important that client understands negotiation strategies and tactics and aren't lead to believe in exaggerated strengths and weaknesses in the parties' cases;
- Negotiations should be planned with the ultimate goals (but not with any notion of "bottom line") and concessions in mind;
- Prepare the client for compromise;
- Discuss with the client negotiation and settlement strategies, tactics and principles, including:

    - Persuasion (supported by facts/evidence, not just argument) and negotiation are inextricably tied;
    - Obtain maximum leverage in the negotiation process by persuasion;
    - Opening offer and response to opening offer;

- Parties are generally hesitant to make the first offer, and when they do, they often make both sides know is not reasonable;
- Unreasonably high demand or unreasonably low offer not based on provable relevant facts, are non-starters and not helpful to the negotiations;
- Consider how other side will react to unreasonably high demand or unreasonably low offer;
- Consider how reasonable opening offers and counter-offers should be;
- Offers should have a rational relationship to damages suffered and what the case is worth, supported by provable facts;
- Don't rush the negotiations;
- Move in small increments; large movement may signal weakness or lack of confidence;
- Don't get fixated on the "bottom line"; goal of the negotiation should be to get in the range;
- Avoid describing an offer as "last offer" or "bottom line", as it may close door to a close counter-offer;
- Consider creative solutions that meet the needs of both parties; keep open mind to non-monetary settlements, i.e. a simple acknowledgement of wrong or an apology may go long way to satisfy emotional needs of the other party, or payment in kind in a defective products case or in a construction deficiency case.