



PREPARING YOUR CLIENT FOR MEDIATION – A CHECKLIST FOR LAWYERS BY: MARC BHALLA AUGUST 2013

When lawyers participate in mediation, they may be looked to do many things for their client from lending moral support and ensuring that key points are made to providing instant legal analysis of various options which may come to light in the course of the session. To ensure that their clients make the most out of the opportunities that mediation presents, it is important for lawyers to sufficiently prepare them.

The following is a preparation checklist for lawyers in the course of readying clients for condominium mediation:

Process overview. Even if it is your first mediation and your client has participated in past mediations, it is important to remember that your client is likely going to have some anxiety and uncertainty about what to expect. One way to help ease a participant's mind is to review with them the general process. Feel free to contact the mediator in advance if you have any questions or concerns as, for example, confirming who will be speaking first can help your client in preparation.

As you review the process in general terms with your client, it may also be worth reviewing with them the confidential and without prejudice nature of the proceedings. Some mediation participants tend to approach the process in a guarded manner and you can help your client make the most out of the mediation opportunity by clarifying with them that they will not be on the stand and rather will have the opportunity to speak openly.

Options overview. A good mediator recognizes that not all mediations should result in settlement and that their role is to help parties in conflict generate potential resolution options to consider. It is then up to each party to weigh such options against their other possible avenues for addressing the conflict and make the most appealing selection. Ensuring that your client has a full understanding of their options outside of mediation is very helpful in equipping them to make an informed decision to take or pass on settlement options proposed. Even if your client is determined to settle at mediation, it is important for them to know what their BATNA (Best Alternative to a Negotiated Agreement) is. The more a participant understands about his/her legal rights, options, potential costs, timeline of resolution, etcetera, the better equipped he/she is to proceed in their own best interest.

Depending on the nature of your retainer and the time you have available to prepare and consult with your client prior to the mediation, you can provide anything from a general overview of the reality of the situation, various risks and anticipated costs to a detailed analysis of all available options.

Reality check. In addition to reviewing your client's options with them, it is also worthwhile to ensure that your client has a realistic idea of the other party's options. While you may not be aware of all factors that the other party has considered, you can draw on your observations, insight and expertise to help ensure your client has a realistic idea of the general range of settlement terms which may be plausible.

Brainstorm. You know that at some point in the course of the mediation, you or your client will be asked to suggest potential settlement ideas. It cannot hurt to consider such ideas in advance and even engage your client in a brainstorming session to see if you can bring some creative options to the table. Your client may feel comforted to have some settlement offers in his/her back pocket and you can have a better idea of what may be appealing.

Review resolution parameters. Particularly in respect of condominium conflict, resolution possibilities are not limitless – they must fit within the parameters imposed by the *Condominium Act, 1998*. Ensure that you are familiar with applicable section(s) of legislation and the condominium corporation's declaration, by-law and rules. This will help you in the course of providing your client with sound legal advice, ensuring he/she is aware of such parameters at the outset of mediation and can avoid time being wasted on proposed solutions which are not legally feasible.

Develop signals. While you will have the ability to call for a break or private meeting with your client at any time during the mediation, particularly if you suspect that the joint session will be emotional, consider developing a signal or other communication plan that will let you easily gauge how your client is doing. That way, you will be able to quickly and easily determine if a break is warranted or if your client is comfortable proceeding with the discussion.

Decision making. It is worthwhile to ensure that your client is aware that he/she will likely need to make a decision at the mediation. If your client is a corporate entity, it is important to consider in advance how a decision will be made and to communicate any obstacles to avoid the other party misinterpreting a ratification requirement as bad faith. Some Boards of Directors grant full autonomy to their representatives at a mediation in respect of settlement, some only provide guidelines and others will require any proposed settlement to be ratified after the session. It is important for you to be clear on this and perhaps also to ensure that appropriate authority has been granted. Our office provides standard forms of resolutions which speak to settlement authorization for use by condominiums and corporate entities.

Communicate with the mediator. If you have any questions or concerns about the mediation process, contact the mediator in advance for clarification. Whether it be a strict time constraint placed upon you or a sensitivity of your client which can be accommodated, feel free to let your mediator know in advance. Similarly, if you feel strongly about the style of mediation that you would like in terms of the availability of an evaluation or the participation of the mediator in generating settlement options, voice them so such can be clear from the outset.

This is not intended to be an exhaustive list but rather considerations to assist in preparing your client to make the most out of their mediation opportunity. Remember that each mediation is different and the various issues, relationships and personalities involved can have a profound impact on both the mediation itself and how you can best prepare. While the role of the mediator is that of a neutral facilitator of the process, the process is best served if all participating parties are comfortable. Whether it be by ensuring all are aware in advance as to who will be participating in the session or where to park when you arrive, address your questions and concerns in advance.

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Marc actively manages condominium conflict and advocates for mediation in the early stages of condominium disputes. He earned an Honours Bachelor of Arts at the University of Toronto (Trinity College), holds an Executive Certificate in Conflict Management from the University of Windsor Faculty of Law and is a member of the ADR Institute of Ontario, the ADR Institute of Canada, the Toronto & Area Chapter of the Canadian Condominium Institute, the Association of Condominium Managers of Ontario and the Institute of Law Clerks of Ontario.

Marc brings unique insight in mediating condominium conflict through the knowledge and experience he has gained as a condominium director, resident and law clerk. His mediation practice is focused exclusively on condominium disputes.

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