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ROLE OF COUNSEL AT MEDIATION

Pre-Mediation Preparation and Positioning

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One of the most important aspects of preparation for mediation is pre-mediation positioning. It really is true that where you wind up has a lot to do with where you start off. In my opinion, careful attention to the aspect of your opening position is vitally important to a successful resolution of your dispute at mediation.

The purpose of this paper will be to share some ideas which may assist you in your efforts to manoeuver yourself into the best possible position before the mediation.

1. General Preparation.

It is trite to say that thorough preparation is essential to effective work at a trial or a mediation. However, you should consider this; at trial you have several days, or even weeks, to educate and persuade a Judge who has absolutely no knowledge of the case before starting. On the other hand, in a mediation, you will only have a matter of hours to educate and persuade a judge (the other side) who probably has as much knowledge about the case as you do. When that mediation starts, you should be ready to immediately get to the matters that are really in issue and present strong arguments as to why those issues will be resolved in your favour. To do that effectively, you must have complete knowledge of the facts and law relevant to your case, *and* you must understand and be able to refute the facts and law that the other side will undoubtedly be relying on.

You should make decisions about the documents you are willing to disclose prior to the mediation and what should be kept confidential. You should also determine what additional documents and discoveries you may require from the other side as a pre condition to attending a mediation.

I will deal with this in more detail later, but for now I will simply say that you should develop your starting position and a realistic goal.

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2. Preparation of the Client

Once you have done all the preparation referred to above, I recommend that you meet with your client and discuss the entire process in detail. This discussion should include review of the following:

(a) Explain why you believe mediation may be beneficial in this case.

(b) Explain the mediation process in detail.

(c) Advise the client of his or her role in the mediation.

(d) Advise the client what your opening position will be and why.

(e) Advise the client where you realistically expect that a settlement can be reached.

(f) Thoroughly review evidence and arguments you intend to present.

(g) Thoroughly review the evidence and arguments you expect the other side to present. Make sure your client totally understands the strengths and weaknesses of both side's positions.

(h) Make sure your client is completely comfortable with plans to proceed to a mediation and that the client has complete confidence in the battle plan you have prepared and your ability to carry it through.

3. Arrangements for Mediation.

I recommend that you first raise the possibility of mediation with opposing counsel by way of a telephone call. You can gain valuable clues from the dialogue that will likely occur. Does the other side seem eager to settle? Are they prepared for a mediation in the near future? Have they analysed the strengths and weaknesses of their case?

Use this opportunity to convey to the other side that you are certainly willing to try the case, but that you are also willing to try to resolve it by way of mediation. Don't send a signal that you are eager to settle.

If you need further discoveries or production of documents from the other side before you can proceed to a mediation, alert them to this now. If it looks like you are going to get resistance, decide whether to apply for orders.

You should also discuss possible mediators and locations for the mediation.

Very soon thereafter, you should disclose any further material you intend to rely on so that the other party

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will have sufficient time to determine whether any expert rebuttal reports or other evidence will be required. Nothing derails a mediation faster than a party who surprises the other side by presenting a lot of new documents and reports at the mediation. A natural response from the other side is to want to adjourn the mediation until they have had an opportunity to fully consider the contents.

At this time you should also carefully identify your own information needs. Do not simply assume that the other side is going to provide you with everything you will need to know about their case. Make specific requests. Make sure you get all the information you can well in advance of the mediation.

4. Positioning.

(a) **Should I make the First Offer?**

(i) **Advantages**.

(a) By presenting a detailed explanation of what you are looking for and why, you can reduce “sticker shock”. By making an early, well reasoned offer, you give the other side an opportunity to get comfortable with it. Ideally, your offer will cause them to change their expectations and create a focal point for future negotiations.

(b) Occasionally, you might get a response indicating that your offer seems reasonable.

(ii) **Disadvantages.**

(a) Your offer will give the other side important information. They will have a better idea of where to attack.

(b) Assuming that the other side will respond by staking out a position of its own before the mediation, at the mediation you will probably be the party who has to make the first concession. This may create a slight disadvantage and you have to be very careful how you handle the first move at the mediation.

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(b) **How Much is Too Much?**

There are obviously no hard and fast rules when it comes to the issue of what the first offer should be, but there are two rules that are very close to hard and fast:

1. Never start with a final offer

2. Never give ranges. This simply invites the other side to start at the low end of your range and seek concessions from there.

For convenience, from this point on, I am going to speak from the perspective of the plaintiff. I believe the points apply equally to the defendant.

(i) **Disadvantages of an Opening Offer that is too High.**

(a) It may provoke an equally irrationally low counter offer

(b) If the other side thinks that is what you really want, they may be discouraged from negotiating at all.

(c) It may cause the other side to think that you are incapable of properly evaluating your case, weakening your credibility.

(d) It makes it very easy for the opposition to simply say “no” and feel that they have nothing to lose by simply proceeding to trial.

In my opinion, the opening offer should be “optimistic but realistic”. It should be sent with a detailed, well-reasoned explanation that will convince the other side that you have carefully analysed your case and that your figure is realistic enough to put them at significant risk Hopefully, this sort of offer will provoke an equally well-reasoned response.

5. Conclusion

This sort of pre-mediation positioning generally will lead to productive use of time at the actual mediation. A

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lot of the posturing will have been dispensed with and the parties can quickly get to a meaningful dialogue on the few remaining points in issue then move into a principled negotiation.

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