

## **Client's Guide to Preparing for Mediation**

### **Introduction**

Mediation provides parties with the chance to settle their dispute outside the strictures of litigation. Mediation provides the opportunity to reach a flexible, and broad-ranging settlement that addresses issues that may not otherwise have been dealt with at trial. Mediation is not intended to decide which party is right or wrong. Rather, it is intended for the parties to reach a private settlement that gives each side what they need, as opposed to what they want.

Reaching a settlement at mediation requires an open mind and a willingness to compromise. However, the best success is reached at mediation when the parties have a clear understanding of the facts of the case, the risks of litigation, and what they need to achieve in order to put the matter behind them.

### **Step 1 – Review Your Case**

Your lawyer will likely have provided you with copies of court materials as they were prepared and filed with the court. Before attending mediation, briefly review court documents so that you are familiar with the basis of the litigation, the facts in dispute, and what each side is hoping to achieve from the litigation. You should be able to answer the following questions before going into mediation:

- What event(s) triggered the litigation? Who started the litigation?
- What was the original relief sought?
- Have any new issues been raised since the litigation started?
- What facts are in dispute?
  - Estates disputes frequently involve conflicting versions of events. Although all of the disputed facts are of personal importance, not all of the disputed facts have legal significance.
  - It is important to be able to set aside some disputes while at mediation to keep the negotiation process moving forward efficiently. Your lawyer should be able to advise you which facts are important to your case and which are part of the background.
  - The most important factor is the evidence that you have to support your case.
  - The goal of mediation is not to convince the other side that you are “right.” Rather, the goal is to reach a sustainable solution that works for both sides. This may mean leaving certain disputes over facts unresolved, in other words, agreeing to disagree.

### **Step 2 – Determine Your Goals**

Once you have finished your review of the court materials, you should have a basic understanding of:

- What you are seeking from the other side.

- What defences or claims the other side has raised.
- What the other side is seeking from you.
- What defences you have raised.

You should decide whether there are other issues that are important to you that have not been raised in the court materials. If so, discuss them with your lawyer.

Once you know what you are trying to achieve, you should decide what your most important goals are. These are the goals that if you do not achieve them, you will not be able to move forward from the litigation (either financially, emotionally, or practically). These “minimum” goals may be general (for example, “my mother needs to be moved into a better care facility”) or specific (for example, “I need at least \$x in order to pay for my ongoing needs”). Keep in mind the practical realities of your situation as well (for example, although the hope is that family relationships will repair themselves after litigation ends, often the best way is to end having to work together).

The “minimum” goals are meant to establish your bottom line, not represent what you hope to achieve. As a result, it may be helpful to come up with a “best case” and “worst case” scenario for settlement.

Review your goals with your lawyer. He or she will help you understand whether your goals are achievable and whether you have realistic expectations for mediation. If not, your lawyer will be able to help you come up with alternatives and solutions that meet your needs. Once your lawyer knows your goals, he or she will help ensure that the mediation progresses in the right direction.

### **Step 3 – Know The Risks of Litigation**

Your lawyer should be able to provide you with the following information before going to mediation:

- An estimate of how long and how expensive it will be if the matter goes all the way to trial.
- The possible range of results if you win at trial.
- The possible range of results if you lose at trial.
- The general strength of your case (keep in mind: what is “fair” or “right” is not always the same as what the law allows).
- What would happen if you walked away from the litigation now (if possible).

Litigation is uncertain and your lawyer will not be able to predict the outcome if you go to trial. However, your lawyer should be able to help you understand the risks of going to trial and the costs of doing so.

Knowing your risk is important. The point of reaching a settlement before going to trial is to obtain certainty: you are agreeing to accepting less than the full amount of your claim or what

you want in order to avoid the time required to obtain a judgment from the court, the risk of losing, and the cost involved in going to trial.

### **Your Lawyer's Role at the Mediation**

During the mediation, your lawyer will be able to evaluate any settlement offers made to you, offer you advice and ideas about making settlement offers of your own, and continue to protect your interests. Your lawyer will also communicate and negotiate through the mediator on your behalf and on your instructions in order to reach a settlement.

### **Getting to Mediation**

- **Select the Mediator**

- The mediator should have knowledge and experience mediating in the relevant area of law
- Both sides should agree on the mediator and the location of the mediation
- The mediator's fees should be known before mediation (although the parties are free to reach an agreement as to payment of the mediator at the mediation)

- **Exchange Mediation Briefs**

- Each side should exchange concise statements of the facts, issues and positions of the parties
- Any court order referring the parties to mediation should be provided to the mediator

- **Discuss Mediation With Your Lawyer**

- Your lawyer will likely wish to review your goals, expectations, and understanding of mediation before attending
- Your lawyer will also be able to describe the mediation process to you and answer any questions you may have

- **Attend at Mediation**

- Keep an open mind, be flexible, and be willing to compromise. Reaching a private settlement outside the courtroom allows you to move on both financial and emotionally from the litigation.