

"Mediation and Other Stuff"



Colm Brannigan

Mediate.ca
Dispute Resolution Services

March/April 2011

Welcome to my newsletter about alternative dispute resolution from an Ontario perspective.

If you have a topic that you would like covered, please let me know.

Colm Brannigan

Preparing for Mediation

Like any other process, good results in mediation require preparation. Lawyers and clients who would spend hours, if not days, preparing for Examinations for Discovery, a Pre-Trial Conference or Trial seem to forget sometimes that mediation also needs a high level of preparation. Here is a list of 20 suggestions based on what I have seen over the last ten years which should

help you prepare you and your client to successfully participate in mediation:

1. Although it sounds so basic, sometimes counsel forget to explain to their client what mediation is all about including explaining the idea of caucus.
2. Make sure that your client understands the possible benefits of mediation and why you think it is worthwhile.
3. Tell your client who the mediator is and if possible have them read the mediator's resume.
4. Explain to your client that the mediator is an impartial third party who is not going to impose a solution on the parties.
5. Let your client know that the mediator is trying to facilitate a discussion that will lead to settlement but that mediation is not binding unless a settlement is made nor is it about settlement at all costs.
6. Have the decision maker, with the authority to settle, at the mediation session.
7. Know and explain to your client their BATNA (Best Alternative to a Negotiated Agreement).
8. Know and explain to your client their WATNA (Worst Alternative to a Negotiated Agreement).
9. Know and explain to your client their MLATNA (Most Likely Alternative to a Negotiated Agreement).
10. Let your client know that you will be letting the mediator take charge of the process. If you do not permit the mediator, with input from counsel, to determine how and when things occur, you are wasting the money used to buy the mediator's skill and expertise and the parties might as well go home.
11. Always remember that the parties are the centre of the process.
12. Listen to the other side.
13. Do not provoke an argument just in order to win it. You are not in court.
14. If you insist on proving your opponent wrong, you are taking a risk of having a useless debate which may ruin the mediation.
15. Make sure your client can face the other side and fully participate in the discussions. If not speak for him or her, just do not wait until the mediation to discover this.
16. Tell your client to be prepared to do some talking about their case during the mediation sessions.
17. Explain what the lawyer's role is in mediation and that you will deal with the legal issues and ideally the client

- will be able to talk about the personal issues.
18. As part of your preparation, work on brainstorming with your client for possible solutions in advance of the actual mediation session.
 19. Remember that the purpose of your presentation is to persuade the other side, not the mediator of the merits of your case.
 20. When in doubt or if you are not familiar with mediation ask other counsel for tips or read some of the material now available on mediation advocacy.

For previous editions of this newsletter, [please click here.](#)

Mediation Case of the Month

This month's very recent case again looks at the confidentiality of the mediation process. What makes it slightly different from the usual case is that in it, a tribunal, a Hearing Panel of the Law Society of Upper Canada not only ignored the confidentiality provisions of a mediation agreement but went on to look at what happened in the actual mediation session. The case is [*Law Society of Upper Canada v. Ernest Guiste*, 2011 ONLSHP 24 \(CanLII\)](#)

In paragraphs 6 through 27 of the decision, the Panel explains its position in terms of public policy but also goes through events from the mediation session including settlement offers. This went way beyond what anyone could expect. There was no expert witness called on the importance of mediation confidentiality as a competing public policy issue and the lawyer was actually refused permission to call the mediator as a witness.

Interestingly, in California, the Court of Appeal upheld mediation confidentiality even in the face of a negligence claim by one of the participants in the mediation against their former counsel.

In the absence of statutory confidentiality (although we now at least have the Commercial Mediation Act in Ontario) while most mediators might expect a court to

pierce confidentiality; do we expect an administrative tribunal to do so?

While no one could justify the lawyer's unprofessional behavior that lead to his being disciplined, the parts of the decision around the mediation process make for a very dangerous precedent and I hope it is appealed.

View my profile on
LinkedIn

Follow me on
Twitter

If you have any questions or comments, please contact me.

Colm Brannigan, LL.M.(ADR), C.Med., IMI Cert., Med.,
C.Arb.
Mediator and Arbitrator

Contact Information:

Phone: 905-840-9882
Toll Free: 1-877-440-9882
E-Mail: colm@mediate.ca

[Mediate Better Solutions](#)



IMI Certified Mediator



[Forward email](#)



This email was sent to colm@mediate.ca by colm@mediate.ca |
[Update Profile/Email Address](#) | Instant removal with [SafeUnsubscribe™](#) | [Privacy Policy](#).
Colm Brannigan - Mediate.ca Dispute Resolution Services | 4 Burwash Court | Brampton | ON | L6Z 4M3 | Canada