

# A Mediator's Tips For A Successful Mediation<sup>1</sup>

## Mediation – Different than Litigation

Increasingly, commercial disputes are being resolved by other means than litigation. In particular, parties and their lawyers are resorting to mediation. Mediation and other forms of Appropriate Dispute Resolution (ADR) require a different approach to resolving disputes. Approaches that are successful in traditional litigation are not appropriate in mediation. Preparation for, and attendance at, mediation require a different mindset and attitude. Accordingly, I have put together tips that I hope parties and their legal counsel will find useful in preparing for and attending at commercial mediations.

## Choice of Mediator

Choose your mediator according to your needs. Generally, there are two types of mediators: **Evaluative** Mediators and **Facilitative** Mediators. What differentiates evaluative from facilitative mediators?

**Evaluative** mediators try to lead the disputants to a resolution that the mediator believes is a fair outcome. This mediator relies on his or her expertise and experience to assess situations and attempts to assist the disputants in examining the relative merits/risks of the positions the disputants are presenting.

**Facilitative** mediators try to facilitate the disputants in developing a resolution the disputants believe is a fair outcome. This mediator is a third party neutral who assists with the communication process, asks both disputants questions to assist with the examination of the dispute from different perspectives to develop a range of solutions. This is what is known as "interest based" mediation.

In categorizing mediators as evaluative or facilitative, I have risked falling into the trap of labelling styles of mediation. Suffice it to say that what really matters is that the mediator chosen by the parties and their counsel has the skill to maximize the opportunities for the disputants to negotiate a resolution of their dispute. It behoves parties and counsel therefore to learn about a mediator's style before choosing that person so there are no surprises at the mediation. Utilization of the Situation Assessment Meeting ("SAM") or the Preliminary Appropriate Dispute Resolution ("PADR") Meeting described later in this paper is a useful place to make that assessment. There are also ADR service providers who may be of assistance in identifying and selecting the appropriate mediator in a particular dispute. The role and the services offered by service providers are described in Appendix "A".

A number of mediation roster web sites exist, such as the mediation rosters offered by the Alberta Energy and Utilities Board (AEUB) ([www.eub.gov.ab.ca/BBS/public/ADR/roster.htm](http://www.eub.gov.ab.ca/BBS/public/ADR/roster.htm)), Alberta Arbitration and Mediation Society (AAMS) ([www.aams.ab.ca](http://www.aams.ab.ca)), the ADR Institute of Canada Inc. ([www.adrcanada.ca](http://www.adrcanada.ca)) and ADR Chambers ([www.adr.chambers.com](http://www.adr.chambers.com)), to mention only a few. These websites present the CV's of mediators to assist you to assess the qualifications of prospective mediators.

---

<sup>1</sup> Useful Reference Sources: Getting to Yes (Fisher and Ury), Second Edition, Penguin Books; The Mediation Process, Second Edition, Jassey-Bass Publishers; and Mediating Commercial Disputes (Allan J. Stitt), Canada Law Books Inc.

## Mediation Agreement

The Mediation Agreement among the mediator and the disputants sets the stage for the mediation. It should describe the respective roles of the mediator and the disputants. In particular, it should confirm the commitment of the disputants to mediate in good faith and on a confidential and without prejudice basis. These terms should be fully explained to your client as well as the mediation process in advance of the mediation to assure your client's commitment to the process and to assist it to be comfortable with mediation.

## Submissions

- Written submissions (mediation briefs) are effective. They should be short and to the point. They should contain the most persuasive reasons and arguments for your client's best case as if the dispute were proceeding to trial/arbitration/regulatory hearing.
- Submissions should inform the mediator about the facts (including disputed facts), the issues in dispute and the parties' positions on the issues.
- Submissions should avoid the use of argumentative, confrontational remarks – keep language neutral.
- Consider who will/should speak to the submission – an articulate client can speak effectively about facts and business goals and its interests (i.e. concerns, expectations, assumptions, priorities, beliefs and needs). By speaking, your client becomes committed to the mediation and gains confidence while speaking about matters of which it has particular knowledge.
- Submissions need not focus on opening positions and bottom lines – after all the mediation is to find a mutually acceptable resolution to a dispute through problem solving.
- Bring to the mediation all documents, records, charts, maps and other information and data that will assist negotiations and can be assessed by the disputants openly, confidentially and without prejudice.
- Submissions (mediation briefs) are not to persuade the mediator. They are to persuade the other side of what it can expect at a trial/arbitration/regulatory hearing of the dispute should the matter not be settled.

## Preparation for Mediation

- Preparation for mediation should be no less an effort than preparation for litigation, arbitration or a regulatory hearing.
- Prepare your client for interest-based negotiations (the elements of which are: alternatives, interests, options, legitimacy, relationships, communication and commitment).
- Establish your client's BATNA<sup>2</sup> (Best Alternative to a Negotiated Agreement) – the BATNA is what your client can do independently of the other side if mediation fails. It is the standard against which all settlement options/alternatives will be measured to determine whether your client should settle the dispute or walk away from the negotiations and pursue its best alternative.
- Encourage your client to articulate and understand the interests that underlie its position going in to the mediation (i.e. your client's concerns, expectations, priorities, beliefs and needs).

---

<sup>2</sup> Getting to Yes (Fisher and Ury) - "The reason you negotiate is to produce something better than the results you can obtain without negotiating. What are those results? What is that alternative? What is your BATNA – your Best Alternative To a Negotiated Agreement? That is the standard against which any proposed agreement should be measured. That is the only standard which can protect you both from accepting terms that are too unfavorable and from rejecting terms it would be in your interest to accept. Your BATNA not only is a better measure but also has the advantage of being flexible enough to permit the exploration of imaginative solutions. Instead of ruling out any solution which does not meet your bottom line, you can compare a proposal with your BATNA to see whether it better satisfies your interests."

- Spend time on guessing what may be the other side's interests as well.
- Anticipate what interests the disputants may have in common that can be addressed and lead to a durable, lasting resolution of the dispute.
- Where interests may diverge, consider what objective industry customs and standards may be relied on as persuasive to one side or the other.
- Brainstorm with your client about options (solutions) that may satisfy the interests of the disputants.
- Strategize about who will speak – what and how you will communicate – avoid confrontation – encourage relationship building.
- Make sure your client has authority to make commitments at the mediation (or can telephone someone who has greater authority to settle).
- Educate your client on the use of caucuses so that your client will not be disturbed when the mediator or the other party requests a caucus.
- A pre-mediation conference should be arranged between the mediator and counsel to review the mediation process and procedures.

### **Attendance at Mediation**

- Seek understanding of the other side's position and ask the other side to try and understand your client's position.
- Be prepared to ask questions – not to trap, embarrass or intimidate – but to discover "WHY" and "HOW" – why the other side is taking the position it is and how it will be better off if its position is accepted – discover underlying interests for which options and solutions can be developed.
- Clarify misunderstandings/information gaps – work from a common information base.
- Challenge data, information against objective standards/criteria – ask how a particular number or proposal is arrived at instead of another one.
- Ask for justification and be prepared to justify.
- Try to keep the focus of the mediation on problem solving – looking for options that will satisfy yours and the other side's interests and that are better than your BATNA.
- Listen to the other side – try to understand where it is coming from – look for creative options to create a win/win solution to the dispute.
- Refrain from the temptation to "cut to the chase" – "get to the bottom line" – "a final solution" too quickly.
- Model your behavior on how you expect to be treated by the other side.

### **Settlement Agreement (Minutes of Settlement)**

- Come to the mediation with a draft Settlement Agreement containing "boiler plate" provisions **BUT** with a big blank for completion with the substantive business terms of the settlement. Include provision for a discontinuance of existing proceedings be they court, regulatory or otherwise.
- Come also with a form of release if one is desired/necessary.
- Final step in the mediation process should be the completion of the Settlement Agreement – it should contain at least a summary of the substantive terms of settlement. It should be signed by all of the disputants before the mediation adjourns.
- Whenever possible, the parties or their lawyers – not the mediator – should draft the Settlement Agreement at the mediation.
- If necessary, a more complete and formal Settlement Agreement can be prepared afterwards.

## **SITUATION ASSESSMENT MEETING**

In preparing for mediation, a preliminary get together of the mediator and counsel (and the Parties) may prove beneficial in establishing the ground rules for mediation. This meeting has been described as a Situation Assessment Meeting ("SAM"). This meeting is an opportunity for Parties in conflict to discuss the dynamics of their dispute and jointly design a dispute resolution process appropriate to their unique situation. In essence, this enables the Parties to build a road map for resolution of their dispute, while ensuring that they do not harm or compromise their litigation/regulatory steps.

SAM's are flexible and generally<sup>3</sup>:

- are facilitated by a neutral dispute resolution expert;
- deal with process issues, not substantive issues;
- identify all the necessary Parties and address issues of authority;
- address planning, preparation, and logistics for the dispute resolution process;
- enable the custom design of the appropriate dispute resolution tool (*i.e.* negotiation, mediation, arbitration, litigation) and, if applicable, the selection of the appropriate neutral facilitator; and
- provide the Parties with the best opportunity to make an informed decision about continued participation in a future dispute resolution process.

Experience to date with the SAM has been very positive for a number of reasons:

- a) It's a safe and simple first step in stressful and conflicted situations. Most Parties agree to an invitation to a SAM because they have "nothing to lose".
- b) Parties tend to buy into and more fully commit to a dispute resolution process that they have helped to design. This has historically resulted in a higher settlement rate before litigation/regulatory hearing.
- c) The Parties identify roadblocks and preparation issues, and plan for these effectively, enhancing the success of their process.
- d) The Parties bring decision-makers to the meeting, which is set for a specific duration to maximize results.
- e) An informed "no" and a decision to proceed with litigation/regulatory hearing is a perfectly acceptable outcome."

The equivalent of the SAM in the Alberta Energy and Utilities Board's ADR program is the Preliminary Appropriate Dispute Resolution Meeting ("PADR")

**John F. Curran, Q.C.**  
**Mediator and Arbitrator**  
**4500, 855 – 2<sup>nd</sup> Street S.W.**  
**Calgary, Alberta T2P 4K7**  
**EMAIL: curranj@bennettjones.ca**

<sup>3</sup>

Excerpt from the annotation to Article 21.00 Dispute Resolution of the proposed 2004 CAPL Operating Procedure.

**Tel.: (403) 298-3244**  
**Fax: (403) 265-7219**

## **The Role of an ADR Service Provider in Conflicts**

### **What is an ADR Service Provider?**

A neutral organization with conflict management and dispute resolution expertise available to assist parties to better manage their resolution process(es).

What does a Service Provider do?

- Provides information and explanations about dispute resolution process options
- Custom designs with the parties appropriate dispute resolution processes to meet their unique needs
- Convenes Preliminary Appropriate Dispute Resolution meetings (PADR's) and other ADR events, including getting the right parties to the table
- Facilitates agreements about process issues prior to events
- Coaches and consults with parties about effective negotiations and ADR opportunities
- Provides project plans and reports, including regular reporting to the Regulator
- Manages all logistics for ADR events
- Facilitates open and effective communication and information exchange between the parties to support their management of the issue(s)
- Assists parties with their mediator or other ADR professional engagement

### **Why use a Service Provider?**

The Parties benefit:

- Custom designed ADR Project Plans with budgets to enhance the decision making process and ensure integration of the EUB/NEB dual-track to hearing
- Gets the right parties to the table with the required information for success, well coached and well prepared
- All logistics and administrative details are handled so that parties can focus on their negotiations
- Ongoing consulting, follow-through and management all along so you're never left stranded in your negotiations

The Parties and the EUB/NEB benefit:

- Industries choices for ADR services are accommodated and enhanced, resulting in better use of the EUB's & NEB's ADR program
- Coordination and file reporting to the Regulator for streamlined application/hearing paths

The Parties and the Mediator benefit:

- Respect for and understanding of mediator neutrality is supported and enhanced (i.e. the appropriate mediator for the unique attributes of your conflict)
- Selection and coaching of the mediator is facilitated
- The overall credibility and use of the ADR tools and processes is improved

- Managed ADR strategies designed with the parties, not for the parties to maximize the probability for success and minimize the resources utilized for efficient and effective resolutions

**Certus Strategies** – Dave Gould, Tim Robillard & Tom Mercik - 403-233-2209

For More information:

Alberta Energy and Utilities Board | Appropriate Dispute Resolution (ADR)

[www.certus-strategies.com](http://www.certus-strategies.com)

*Stop the story. Listen Differently.  
Decide together & get ahead of conflict.*