

## "Leading the Process"

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The traditional approach to mediation involves a staged joint mediation meeting in which the mediator conducts an introduction. After brief opening statements by the disputants or their legal counsel, a list of issues is developed, interests are identified, options for settlement are explored and reached.

Experience with this model proves that it is not linear and quite flexible. However, in my own work as a mediator, I have experimented with the use of a list of issues that is created following preliminary conferences and prior to the joint mediation process. I've found the list of issues useful in terms of expediting mediations involving relationship disputes such as family, small business dissolutions and child protection.

The notion of creating a list of issues before the joint meeting evolved over time. I commence most of my mediations using separate, in-person preliminary conferences with each disputant. In the course of qualitative research that I conducted for my Master of Laws, a positive connection between holding preliminary conferences, settling the dispute and significantly high participant satisfaction was affirmed.

As a consequence of this research, I changed my approach. Because of the preliminary conference, disputants understand their role and what to expect at mediation. Therefore the introduction to the joint mediation meeting became a welcome to participants who are eager to start working on solving the issues in dispute. Having already spent up to 2 hours telling me their perspectives of the events in separate preliminary conferences, participants appear to have little need to repeat their stories.

As I observed the impact of holding preliminary conferences on the mediation process, I noticed that I was able to generate a list of issues quickly and decided to experiment further. After the preliminary conferences concluded, I prepared a list of issues that I took to the joint mediation meeting. Initially, I distributed the list of issues with some trepidation. What if the disputants experienced the list as constraining of their conversation? What if the items on the list were incorrect? Suppose an issue had been missed? Would this list further marginalize a participant with literacy issues?

Although I refer to this as a "list of issues", I have found that mediation participants tend to treat it as an agenda. The list is distributed to everyone once we are gathered together. I read every question out loud slowly. It is my list - I own it. I invite the participants to change it, to add to it, to delete from it, or to ignore it. For some cases it is a goal statement in that once all of the questions have been answered, the day's tasks have been achieved. On occasion, we work through the list diligently moving from one question to the next. Other times, we bounce around the list dealing with issues as they come forth. Sometimes we review it, agree that the list comprehensively catalogues what needs to be addressed, then we set it aside and only refer

to it again at the end of the mediation to ensure that nothing has been overlooked.

I include questions of law and legal process such as, What are the consequences of a continuing custody order? and Who will do what on the next court date? All "issues" are framed neutrally. Fears about the mediation process or the other disputant become issues. For example, a concern over trust becomes What will happen if either disputant fails to do what they agree to do? Interests are issues e.g. What are [each disputant's] hopes about [a specific topic]? I tend to inquire about interests near the beginning of the list of issues.

I have been using this process for close to 15 months. Shorter lists - keeping them to one page - seem to be better received. I've noticed two responses when sensitive issues are included. When I introduce the list as my hunches after talking to everyone, persons who might have responded defensively to the issue had it been raised by the other disputant in joint session, are not defensive. And, as I read the sensitive issue out loud, I note that the body language of the person who raised it at the preliminary conference suggests reduced anxiety. Mediations seem to be shorter. Lawyers who are present and, as a consequence of the "legal" questions, actively involved, do a remarkable job of fairly and collaboratively answering the question. Participants keep the list in front of them throughout the mediation and check off each issue as it is dealt with - a sense of progress is built.

I have some continuing concerns about the list; specifically that by creating it, I have co-opted the opportunity for the disputants to develop their own list and that I may have inserted my perceptions of the issues into their dispute. This is balanced by the observation that disputants who come to a joint mediation meeting after a preliminary conference tend to proceed to interest exploration and problem solving behaviour faster than those who have not.

In the end, I have given myself permission to introduce the list of issues for several reasons. It appeals to my practical nature in that it summarizes and honours the work done in the preliminary conferences. And, although I "own" the list, I have no ego invested in its acceptance. In fact, working through changes to the list provides an opportunity to practice the skills that will be called upon throughout the mediation. Perhaps mutually hearing each other agree to work with the (edited) list creates the same "commitment" that occurs when, at the conclusion of the introductions, many mediators ask "So, you are here today to work on this together? Finally, I perceive developing and providing the List of Issues is truly "mediator work". It is leading the process.