

Prepare! Prepare! Prepare!

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Lawyers, mediators and mediation services engage in a wide range of activities prior to the first joint mediation meeting. This article will briefly catalogue pre-mediation activities and then focus on one pre-mediation activity, the preliminary conference. In addition to advancing a definition, I will discuss some arguments both against and in support of holding preliminary conferences. I will report on my recent empirical research outcomes as these relate to preliminary conferences. My conclusion will emphasize the merits of holding preliminary conferences from the perspective of the disputant.

Introduction

As a starting point, I adopt Lord Caradon's advice as reported by Ury:

... Before every meeting, prepare. After every meeting, assess your progress, adapt your strategy, and prepare again. The secret of effective negotiation is that simple: prepare, prepare, prepare.

Preparation for mediation encompasses:

1. Intake – identifying the disputants and how they can be reached;
2. Initial Screen – determining whether the matter is suitable for mediation;
3. Information – providing adequate information about mediation to permit disputants to make an informed dispute resolution decision;
4. Administration – scheduling the mediation in a venue at a time and with amenities conducive to productive problem solving;
5. Analysis - of the dispute to confirm the continued appropriateness of mediation and allowing the mediator to anticipate interventions specific to the disputants and the dispute;
6. Process Design and Data Exchange – by agreeing on the terms of the Agreement to Mediate, confirming authority to settle and exchanging the data necessary for each disputant to make decisions;
7. Participation – by selecting the mediator best suited to work with the disputants and arranging for the attendance of those persons who need to be present to resolve the dispute; and
8. Commitment – at the preliminary conference by educating the participants about the mediation process that their mediator will use together with their role in that process and by building trust and rapport with the mediator.

Definition

The preliminary conference is a meeting between the mediator and the disputants held prior to the joint mediation meeting. It is known by other names: pre-mediation conference; orientation meeting; preliminary meeting; intake meeting; pre-mediation session; and pre-mediation conference. The preliminary conference can take various forms. Some mediators hold one meeting with all lawyers and disputants present. Other mediators hold a series of separate meetings with each disputant and lawyer. Still other mediators meet separately with each disputant, but not with their lawyers. When separate preliminary conferences are held, the discussions may (or may not) be treated as confidential discussions with the mediator not to be shared

with other disputants. Preliminary conferences can be held in person. They can also be held via tele-conference, video-conference or e-mail.

The timing of the preliminary conference varies. Some mediators arrange for disputants to arrive at the joint mediation meeting at staggered times permitting the mediator to meet separately with each lawyer and disputant just before the mediation. Other mediators hold the preliminary conference months in advance of the joint mediation meeting. Still other mediators hold the preliminary conference in the weeks just prior to the mediation.

The reasons for holding a preliminary conference are at least as varied as the forms that the preliminary conference can take. Preliminary conferences held pursuant to British Columbia's Notice to Mediate (General) Regulation have pre-determined, legislated organizational goals requiring the participants to consider: whether the pleadings are final and complete; what the issues are; the exchange of information; the exchange of documents; the exchange of expert reports; scheduling; and time limits.

Mediators may use the preliminary conference to:

- a. review and sign the Agreement to Mediate;
- b. provide more detailed information about the mediation process to the participants;
- c. describe how the mediator will facilitate the participants' communication and review any procedural rules that the mediator may recommend;
- d. assess the level of conflict and the negotiation styles of the participants;
- e. identify other participants;
- f. discuss the roles that participants will fill during the mediation;
- g. prepare the parties to participate: by allowing participants to vent their anger and frustration separately and in advance of the mediation; by exploring procedural modifications to enhance each party's confidence and participation in the mediation meeting; and, in mediations where representatives of constituents speak at the mediation, by assisting the constituents and representatives to develop processes that provide reliable and effective representation;
- h. rehearse the disputant's story and objectives;
- i. discuss the extent of authority to settle;
- j. plan the exchange of information and documents prior to the mediation;
- k. confirm the commitment to mediate;
- l. determine whether mediation through a specific mediation service or with a particular mediator is appropriate for these participants at this time;
- m. build rapport and trust and reduce anxiety;
- n. explore a party's interests; and
- o. identify a party's position.

Arguments for and against Preliminary Conferences

The foregoing list includes many activities that can and often do occur during the mediation itself. In fact, it can be argued that preliminary conferences are unnecessary; that a competent mediator can achieve these

goals during the first stage of mediation. There are other arguments against holding preliminary conferences. Not only does it take time to organize and prepare for preliminary conferences, each conference consumes at least one hour out of every participant's day. As an additional procedural step, preliminary conferences increase the cost of mediation. Preliminary conferences, particularly joint conferences for large, multi-party disputes, pose the same scheduling challenges that mediations do. There is the risk that the matter will settle as a direct consequence of the preliminary conference thereby depriving the mediator, the mediation service and the lawyers of the mediation fees. Where the mediator holds separate preliminary conferences and keeps secrets among disputants, there is the risk that disputants may fear what is said in their absence and may be more ready to perceive mediator bias.

There are arguments in favour of holding preliminary conferences. The mediator is able to describe the process that she will use as well as each participant's role. In doing so, the mediator can address specific procedural concerns raised by disputants. Meeting with the mediator allows the disputants to build rapport with the mediator, trust in the process and reduce participant anxiety. Documents, data and reports that will be needed at the mediation to inform decisions can be identified during preliminary conferences, thereby avoiding delay or adjournments of mediations. Mediators obtain verbal and non-verbal information about the disputants during in-person preliminary conferences that allow the mediator to assess the appropriateness of mediation. Information obtained during the preliminary conferences will inform mediator interventions and the design of the mediation process to encourage productive negotiations and avoid harmful situations.

My Research Outcomes

Earlier this year I approached mediators in Australia and in Canada. I asked them to complete questionnaires and to invite lawyers and disputants to complete questionnaires at the conclusion of their mediations. 50 completed questionnaires from personal injury, commercial, wills/estates and family disputes were ultimately returned to me. Several of my questions related to preliminary conferences.

My most dramatic research outcome was that a complete resolution of the dispute was reached in every mediation in which a preliminary conference was held. For those disputes where a preliminary conference was not held, 3 did not resolve and 1 partially resolved.

22 of 26 lawyer and disputant respondents for disputes where preliminary conferences were held indicated that the mediator's pre-mediation involvement was either essential or important.

2/3 of the disputant respondents for disputes where preliminary conferences were held indicated that they were either very satisfied or satisfied with both the pre-mediation work done by the mediator and with the mediation itself.

The majority of mediation participants in which preliminary conferences were held did not perceive mediator bias, even when the mediator held separate preliminary conferences. The only respondents to perceive mediator bias were some of the disputants engaged in family disputes for which the mediator held separate preliminary conferences and kept secrets. As there may be other explanations for the perception of bias, further research is called for.

While the majority of mediators who held preliminary conferences described themselves as facilitative or interest-based mediators, evaluative and settlement mediators also reported holding preliminary conferences. Although my research did not detect correlations between the mediation model used by the mediator and the design of the preliminary conference, these may exist.

Mediator respondents expressed various reasons for holding preliminary conferences. One mediator observed that:

[Information obtained in advance of the joint mediation meeting] assisted me in defining a draft list of issues and a draft list of matters agreed. The draft matters agreed list was discussed with the participants in their respective preliminary conference. My educated guess is that this saved about 2 hours (or more) of discussion. Behind this legal action there were several possible others. So we agreed, in effect, to deal with this action and the ones that might follow.

Conclusion

Disputant respondents related positive outcomes from preliminary conferences that were different from those listed by mediator respondents. Disputants tended to refer to two aspects of the preliminary conference: one of receiving knowledge about the mediation process; and another of putting the disputant at ease. One disputant referred to both:

Help to give an understanding of the process and feel comfortable with the mediator.

Significantly, another 10 disputants listed the receipt of knowledge about the mediation process as the useful feature of the preliminary conference. One commented:

Outlining what to expect and how it is conducted.

Three respondents referred to how the preliminary conference had addressed their anxiety. One said:

Calm me down.

These comments suggest that the essential features of preliminary conferences *from the perspective of the disputant* are to provide detailed information about the mediation process used by the mediator and to reduce anxiety. These are only 2 of the 15 possible preliminary conference uses listed earlier in this article. However, the 15 preliminary conference uses were prepared *from the perspective of the mediator*. It may be that the remaining 13 preliminary conference uses, while important, need not be incorporated within a preliminary conference. In all likelihood, which of the other 13 uses are ultimately utilized in a specific preliminary conference will depend upon factors such as the nature of the dispute, the characteristics of the disputants and the procedural preferences of the mediator or mediation service.

Given the strong correlation between reaching a resolution of the dispute at mediation and holding preliminary conference, I encourage lawyers, mediators and mediation services to hold preliminary conferences. Moreover, I predict that holding preliminary conferences will increase both resolution rates and client satisfaction.