

## **THREE TOP TIPS: PREPARING FOR A SUCCESSFUL MEDIATION**

Set out below are three top tips (not necessarily THE three top tips, as I am not sure there are such things) to help set your client up for success at mediation. While there are many additional preparatory steps you can take to set the stage for a successful mediation, these three tips are almost universally applicable and will always work in your client's favour.

**TIP #1:** Talk to your client about risk.

In the pre-mediation meeting with your client (and indeed throughout the handling of the case), instead of talking about how strong their case is, how you are going to wipe the floor with your opponent, how every argument by the other side is wrong or unsupported, talk to the client about where their case has some weak spots and where your opponent's case has strengths. Talk to the client about what it looks like if their case goes badly at trial. Yes, tell them how it could go well but please don't just be a cheerleader for your client's case. You are paid to bring your professional judgement to bear on the case and to be an advisor. And the best advice you can give before a mediation is not only how the case can go well but also how it can go badly. That way, your client will arrive at the mediation ready to make the compromises and judgment calls that are critical for successful resolution.

**TIP #2 :** Obtain lay witness information.

Unless the only witnesses in the case are the named parties, there are other people out there who have information about liability or damages that will be entered as evidence at trial. And often those people are lay witnesses who can be approached by either side in the dispute and can be spoken to about what they saw or did or heard. So do it. It is easy and cheap, can be done over the phone or by email, and the information you obtain can be synthesized and disclosed in your mediation brief. And if done, you now have some of that critical information that fills in gaps, supports other evidence, and strengthens your case. And of course, if you speak to a lay witness and find out information that undermines your case, wouldn't you like to know that before your opponent does? And wouldn't you like to factor it into the risk assessment you provide

to your client? So take the steps necessary to obtain law witness information before mediation.

### TIP #3 – Serve everything early

And by everything, I mean everything. Expert reports, witness information, surveillance, answers to undertakings, new productions, your mediation brief. Everything. If the documents or information are likely to form part of your case at trial, what value can there be in holding onto it until just a day or two before the mediation? Nobody involved in litigation likes surprises and there is no better way to derail a mediation than by serving something new and important at the last minute. It erodes trust, undermines the assessments of the case that have been undertaken in preparation for the mediation, and often necessitates obtaining more and new information by way of response. And if you think something important will be coming in at the last minute, tell opposing counsel about it, and even consider rescheduling the mediation so that all the appropriate cards can be on the table in sufficient time for them to be digested and properly included in everyone's risk assessments.