

CONFERENCE OF ONTARIO BOARDS AND AGENCIES
COBA '98 - November 19, 1998
A Lawyer's Prospective on Pre-Hearings

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PRE-HEARING - SETTLEMENT/ MEDIATION MODEL

1. UNDERSTAND THE CASE, THE ISSUES, AND THE POSITIONS OF THE PARTIES
 - ! Read the file including the legal positions taken, preliminary issues raised etc.
 - ! If necessary, check statutes or caselaw if time permits.
 - ! Try to identify any gaps or anomalies in the case (e.g. grounds not raised, parties not added etc.).
 - ! Try to learn about the representatives you will be dealing with.
 - ! Try and think up some possible resolutions in advance of the pre-hearing.
2. ACQUAINT YOURSELF WITH EACH OF THE PARTIES, WITH THEIR POSITIONS, EMPATHIZE WITH THE PARTIES, GAIN THEIR CONFIDENCE AND TRUST.
 - ! Meet with the parties individually, Try to get a sense of their concerns: costs, reputation, setting a precedent, feelings about the opposite party, short-term and long-term consequences of settlement etc. Ferret out hidden agendas. Try to understand their point of view, go with the flow, work with that party and not against them in getting a deal. Know when to speak to counsel alone.
 - ! make sure that the people there have authority to make a deal or that the necessary authorization can be obtained by phone by the parties in attendance. If another person has to be summoned to join the meeting, see if this can be arranged before things get under way.
 - ! Make it clear that information told to the mediator in confidence will not be conveyed to the opposite party. Clearly distinguish between information to be

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shared with the opposite party and information that will not be shared. If you are in doubt, clarify this before speaking to the other party.

3. WORK HARD, BE CREATIVE, BE PATIENT, AND BE PERSISTENT TO GET A DEAL

- ! If a party's position is unrealistic, and you think they can be educated, use your expertise and work on their counsel to point out the legal weaknesses in their argument. You may want to speak to counsel alone first before raising these issues in front of the client. If a position or offer is unrealistic (given the particular case) say so. When appropriate, refer to items such as the "average" result in cases or new developments in the law.
- ! Be flexible and persistent but respectful to the parties. What works for this party may be totally unreasonable for another case. Keep a sense of humour. It helps to keep parties focused on compromise and in the right frame of mind.
- ! Don't starve the parties into submission by refusing to allow people to take meal breaks but feel free to keep them there till 3:00 am if this will get a deal. Don't let anyone leave if you can keep them around - tell them to summon help by phone or by asking an advisor to join them or fax material to them.
- ! Don't waste your time drafting language if you don't have to. Use counsel to do the drafting for you while you work on the opposite party. However, keep a file on hand of sample language to refer to or sample settlements (computer precedents on a laptop are helpful). It is particularly helpful to have a laptop computer and portable printer to type up and print out the settlement if possible.
- ! Identify cases where more time is needed and a deal is likely if the parties meet again (perhaps with another person present who must consent to the deal).
- ! If you can't get a deal try to at least narrow the issues or take some issues off the table. Alternatively, clarify issues that need to be better articulated.

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PRE-HEARING: TO DEAL WITH PROCEDURAL AND PRELIMINARY MATTERS ONLY

1. UNDERSTAND THE CASE, THE ISSUES, AND THE POSITIONS OF THE PARTIES
 - ! Read the file including the legal positions taken, preliminary issues raised etc.
 - ! If necessary, check statutes or caselaw if time permits.
 - ! Try to identify any gaps or anomalies in the case (e.g. grounds not raised, parties not added etc.).
 - ! Try and learn about the representatives you will be dealing with.
 - ! Try and think up some possible resolutions in advance of the pre-hearing.
 - ! Keep a checklist of items to be covered.

2. IDENTIFY AND ARRANGE FOR ALL THE ISSUES TO BE DEALT WITH
 - ! It is not unusual for preliminary matters to be addressed for the first time at a pre-hearing (despite a procedure which require such issues to be identified in advance). Make sure that there is full disclosure of all the preliminary issues including those raised by the tribunal. If potential preliminary issues are identified but are not ready to be dealt with set procedures and a deadline for these matters to be dealt with.
 - ! Pay particular attention to natural justice issues which may hold up the hearing like disclosure, particulars etc. If it is apparent that more hearing dates will be required, obtain additional dates and book them then and there - otherwise long delays may result. If rulings are required on preliminary matters before the hearing can proceed and a ruling cannot be made that day, indicate when a ruling will be made (be realistic) and set the hearing days after that date. This will avoid unnecessary delays.

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- ! Consider tying up "loose ends " - i.e. outstanding issues which cannot be resolved at the pre-hearing but must be dealt with briefly before the hearing proceeds (like disclosure) by scheduling a conference call, particularly if parties are coming from out of town. Depending on the circumstances consider scheduling the whole pre-hearing to be dealt with by conference call.
- 3. DEAL WITH THE ISSUES
 - ! Decide on a logical order to deal with the preliminary issues; some issues can naturally be grouped together by subject matter regardless of which party raised which issue. Listen carefully and give each party a chance to fully air their position on each preliminary issue. Avoid making a comment in advance that might signal how you intend to rule on a preliminary issue; this may get everyone off on the wrong foot by creating the impression that you are pre-judging the case. However, feel free to ask questions to clarify the preliminary issue raised or the position taken. Be patient, polite, and attentive when preliminary issues are argued.
 - ! An exception to commenting on a preliminary issue before it is fully argued is in cases where jurisdiction is in doubt. If the jurisdiction for the issue raised is in doubt, you may consider asking the parties to argue the jurisdictional question before dealing with the issue on its merits. Alternatively if the materials filed or opening statements indicate that the parties are not aware of a recent decision or amendment to a statute, share this with them in advance and ask them to address it in their submissions.
 - ! Try to encourage the parties (depending on the rules and procedures of the tribunal) to exchange expert reports, c.v.'s etc. in advance and to make mutual disclosure of the witnesses to be called and the order of those witnesses. This will save time for everyone. If there are rules which one of the parties appears to be unaware of, bring these to everyone's attention.
 - ! If you think that some of the issues raised could be settled informally, consider when it will not be effective to use the formal hearing process to do that. It may not be a good forum for settlement. If everyone is agreeable to discussing an informal settlement of the procedural issues, consider bringing the parties together in an informal setting (around a table or in a cafeteria) to try to reach a resolution. If another person is available to try and meet with the parties (other than the

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adjudicator) to encourage settlement of procedural issues , consider this option. If you have a three person panel, consider having side members meet with the parties individually and not the Chair. If you are trying to assist the parties in settling a procedural issue, be careful to set the parameters in advance of how the discussion will unfold.

- ! Experience will tell you the cases where settlement of procedural issues is an option and where such discussions are a waste of time. If it is obvious that issues will not be resolved informally, then listen to the arguments carefully and make a ruling. Be decisive. Be clear, and precise with deadlines etc. Don't hedge. Don't tell parties to work things out as a way of avoiding making a ruling where one is clearly required.
- ! All parties should come away from a pre-hearing with the view that it is time well spent and that clear progress was made.