

## BEST PRACTICES FOR PREPARING A MEDIATION MEMORANDUM ON BEHALF OF A PLAINTIFF

Those who prepare and write great mediation memoranda are not born to do so. Rather, they have worked long and hard at their craft, they have received tutelage, training and direction from colleagues and they continue to refine their skills. This is good news as each person who sets about the task of preparing and writing a mediation memorandum has the potential, with hard work, thoughtfulness and good effort, to be a great writer.

### 1. Who is the target audience

- Mediator
  - give the mediator the information, facts, evidence and law to assist the mediator in their understanding of the issues and so that the mediator can reinforce your arguments with the other side in caucus
- Defence Counsel
  - less important audience
  - you may assist in the expectation management process as between defence counsel and the insurer [though, by the time you deliver your mediation memorandum, it is probably too late]
  - you can assist in focusing defence counsel on what matters to the fair and reasonable evaluation and settlement of the claim [and, by contrast, what does not matter or what you view as non-negotiable]
- Insurance Representative
  - more important audience
  - opportunity to present the plaintiff's claim directly and without editing or comments
  - opportunity to reach the decision maker [who should be reasonably informed and intelligent]
  - opportunity to present the facts, evidence and law in a compelling fashion

- Plaintiff
  - careful attention to details [date of birth, date of marriage, names, employment chronology, etc.]
  - manage expectations

## 2. Timing

- mediator likely has a preferred timeline [typically 2 days to 7 days in advance of the mediation] - allow more time if there are multiple parties or complex issues or a large quantity of documentation which you expect the mediator to read and digest
- defence counsel should be able to deal with the mediation memorandum in the same time frame allowed for the mediator
- insurance representative should receive a complete copy of your mediation memorandum - send 2 copies to defence counsel - consider sending the text of the memorandum by fax or email to defence counsel as soon as it is ready
- if the memorandum contains new reports or new facts or information which you expect should have a bearing on the defence assessment of the claim and the ultimate settlement value, then the memorandum should be sent at least 2 weeks in advance of the mediation and preferably 4 weeks or more in advance of the mediation - allow time for the memorandum to be read, digested and for the new information, etc. to filter through the insurance process so as to increase reserves and authority

## 3. Tone and Style

- be persuasive
- be polite
- be concise [less is more]
- Goldilocks principle [not too much, not too little, just right]
- find a compelling theme
- primacy and recency
- use of headings, quotations and bolding
- point-first writing [tell the reader why what they are about to read about is important]

- editing by one or more individuals [other than the writer]

#### 4. Introduction / Overview

- set out the theme
- discuss the most important and impactful aspects of the claim
- acknowledge any real flaws or weaknesses to the claim
- highlight points of agreement
- highlight what you believe are the most important points of disagreement which may stand in the way of settlement and how those points or issues may be addressed or negotiated
- discuss what is likely to drive the value and ultimate settlement of the claim and acknowledge claims of lesser strength or value which are unlikely to drive settlement or stand in the way of settlement

#### 5. Content / Nuts and Bolts

- tell the story [whether chronologically or by topics]
- give the mediator and the insurance representative what they need [they need different things]
- the insurance representative should already have a good understanding of the medical reports and records, the employment documents and care needs [and presumably the costs associated with those needs] though you should focus them on points of emphasis or import
- anticipate and deal with real issues impacting on the plaintiff's credibility
- anticipate and deal with real issues of causation [as distinct from those you perceive to be manufactured by the defence were based on limited and isolated inconsistencies]
- the insurance representative will need a clear of understanding of why the various claims for damages will succeed and the realistic and accurate present day values for the claims
- the insurance representative will need to understand why the defence theory on liability or damages or both is flawed or unlikely to be accepted by the trier of fact
- if the law or the facts or both are on the plaintiff's side, explain what the law and the facts are and how they apply to the case

- the mediator needs a working understanding of the facts, evidence and law
- if liability is in issue, the mediator needs to understand the relevant evidence applicable to the issue and any applicable law
- the mediator needs a working understanding of the facts and evidence that support the various claims for damages
- dates of birth, present value calculations, summaries of income tax returns, employment information and the like, costs associated with care or housekeeping and burn rates are all important
- avoid the temptation to produce every medical report and medical document and to summarize each and every one of these documents
- use headings, bolding and italics
- use lists or bullet points
- be scrupulously honest and accurate when setting out the facts or when referencing the findings, opinions or conclusions of experts [yours or theirs]
- deal with not only the facts and opinions that help but also those that hurt
- deal with the facts and opinions that matter [there are a great many facts and opinions that don't enhance the understanding of the audience or assist you in making your case]
- highlight areas of agreement
- organize the facts in such a way as to fit within your themes and tell a compelling story
- describe the parties, witnesses, health care professionals, employers and all of the other actors in the claim in a consistent manner and in a fashion that will allow the reader to follow the story
- use acronyms that are well known [AB, LTD, IRB, etc.] - if the acronym is not commonly used, it is better not to shorten the name or the expression
- edit, edit some more and then edit some more - strive to eliminate unnecessary detail
- use charts, graphs, timelines or diagrams
- include photographs where appropriate [the accident scene, damage to vehicles, scarring, etc.]
- do not overreach

- avoid using long quotations from medical reports or case law - if a longer quotation is appropriate, introduce the quotation with a sentence to explain why the quotation is important and add emphasis to the quotation [through italics or bolding] to highlight what truly matters in the quotation
- if there are a great number of tabs to the brief, consider using two-sided copying - remember that you want the mediator and the insurance representative to carry the brief, take it home, read it and bring it back to the office and to the mediation
- consider using a highlighter to draw the reader's attention to certain portions of the memorandum or of the attachments
- do not be a slave to precedents
- if it's not broken, don't fix it

Secret world of mediation [humorous]

[www.youtube.com/watch?v=JmKcTBtAWF8&feature=youtu.be](http://www.youtube.com/watch?v=JmKcTBtAWF8&feature=youtu.be)

Mediation 911 [serious]

An 11 minute video, entitled Mediation 911, to help young lawyers prepare for their first mediation, which was assigned this afternoon, and is happening tomorrow morning at 9 am. This is the introduction to an online course Negotiation Mastery for the Legal Pro. This is a 9 hour on-line course with 48 lectures. It's pretty much soup to nuts on distributive negotiation.

<http://legalpronegotiator.com/mediation911>