

**BEST PRACTICES FOR PREPARING FOR AND CONDUCTING
A MEDIATION ON BEHALF OF A DEFENDANT OR INSURER**

1. Scheduling the mediation
 - when do you want / need to conduct the mediation
 - who do you want to conduct the mediation
 - special considerations [location of the mediation, technical support, etc.]

2. What do you need to do to be ready for the mediation – long term
 - what reports do you need
 - are all of your undertakings satisfied [or are they likely to be satisfied sufficiently far in advance of the mediation]
 - are the undertakings of the other side which truly matter satisfied
 - what reports can you anticipate receiving from counsel for the plaintiff and what do you plan to do in response
 - what are the insurer protocols in relation to mediation [and to what extent should those be made known to counsel for the plaintiff]

3. What do you need to do to be ready for the mediation – intermediate term
 - has anything changed in relation to the plaintiff or the plaintiff's claim or your defence which is likely to jeopardize or impair your ability to negotiate at mediation
 - changes in medical condition
 - changes in employment status
 - changes in the need for care
 - catastrophic impairment designation [in automobile cases]
 - changes in the status of any companion claims or actions [LTD, accident benefits, etc.]
 - are reports up to date
 - are you expecting further reports in advance of the mediation - will they be delivered in sufficient time to be reviewed and considered by you and your insurance client - to the extent that the reports truly impact on assessments and

valuations, will you and your client have sufficient time to allow for the reserve and authority processes to take place

- do you have answers to the plaintiff's undertakings which matter

4. What do you need to do to be ready for the mediation – short term

- status of the companion claims [LTD, accident benefits, etc.]
- have you produced all recent reports and records
- what do you plan to do about investigation and surveillance to the extent that you have such evidence and to the extent that you believed that such evidence may or should impact on the assessment of the claim by counsel for the plaintiff and/or on counsel for the plaintiff performing their expectation management function
- have you requested and received a list of assessable disbursements
- do you have answers to the plaintiff's undertakings which matter

5. Meet with or conference with the insurance representative

- are your views, as defense counsel, shared by the insurance representative to whom you report
- more importantly, are your views shared by the authority granting individual or body
- manage expectations [particularly if you are anticipating issues or fireworks in the course of the general session]
- ensure that your client reads, at minimum, the text of the plaintiff's memorandum which is likely to review medical evidence and other evidence at some length [so as to attempt to pre-empt counsel for the plaintiff from speaking on the subject]
- give the insurance representative a copy of the plaintiff's mediation memorandum [preferably the entire brief so that they can read the actual reports but, at minimum, the text of the memorandum]
- educate the insurance representative as to what they can expect to hear from the mediator and from counsel for the plaintiff to the extent necessary
- confer with the insurance representative as to what they expect you to say as part of your opening at mediation - make sure you are on the "same page"

- consider whether you will want the insurance representative to speak at mediation or whether they want to speak and, if in either case, what you will want them to speak about [this is very important and should not be underestimated; you do not want the plaintiff or counsel for the plaintiff to receive mixed messages; you do not want your message to be undermined or contradicted or confused by your client]
- try to obtain "hip pocket" instructions from the insurance representative in advance of the mediation - while many insurance representatives may be reluctant to explicitly advise their defence counsel as to their ultimate authority, it is very beneficial for the insurance representative to give the defence counsel a settlement target or zone - this allows defence counsel to plan a series of offers

6. Carefully review the plaintiff's mediation memorandum

- read the brief both for what is there and what is not there
- look for points of emphasis
- look for areas of commonality or agreement
- plan to acknowledge points well made
- plan to set out the points or issues which separate the parties and the ways and means which may be used to bridge gaps or differences

7. Master the math

- life expectancy [to life and to age 65]
- present value calculations [having regard for the potential for different discount rates]
- collateral benefits

8. Consider the need for pre-mediation caucus with the mediator

- prior to the date of mediation
- before the mediation commences

9. Plan the structure and sequence of your offers

- magnitude of moves [whether in dollars or percentages]
- concessions where due

- concessions where not due but out of respect for an interest or position
- "keep your eye on the prize"
- consider your rate of ascent and the plaintiff's rate of descent [and changes to that rate as the negotiation unfolds]
- consider your BATNA [best alternative to a negotiated agreement]
- consider your exit strategy
- keep a list of "holes to be plugged" and "things to do" on the assumption that the mediation does not produce a settlement

10. Consider when, and to what extent, you confide in the mediator

- in the course of the mediation
- post mediation
- frequently, mediation is a destination which culminates in settlement; sometimes, mediation is but a step in the process and the mediator can and should be used after the mediation to continue settlement discussions

Secret world of mediation [humorous]

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>