

Best Practices for Preparing for and Conducting a Mediation

On Behalf of a Plaintiff

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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

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 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 produced to defence counsel and the insurer

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

- status of the companion claims [LTD, accident benefits, etc.]
- outstanding claims of third parties [health care providers, litigation loans, etc.]
- have you produced all recent reports and records
- have you produced a list of assessable disbursements
- do you have answers to the defendant's undertakings which matter [particularly in relation to investigation and surveillance]

5. Meet with the plaintiff

- manage expectations
- review the mediation process
- explain the risks of trial, the nature of a jury trial [if applicable], costs, the implications of a Rule 49 offer to settle [so as to attempt to pre-empt the defence speaking on the subjects]

- review the defendant's mediation memorandum [give consideration to providing the memorandum to the plaintiff]
- educate the plaintiff as to what they can expect to hear from the mediator and from defence counsel
- consider whether you will want the plaintiff to speak at mediation and, if so, what you will want the plaintiff to speak about
- obtain "hip pocket" instructions from the plaintiff in advance of the mediation - this is typically a predetermined target which allows you to structure or organize a series of offers pointing toward this target - explain to the plaintiff that while you will try to meet or exceed this expectation or target, the mediation process is dynamic and subject to change - you may well need to obtain further settlement instructions from the plaintiff as the mediation involves and unfolds

6. Carefully review the defendant'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 descent and the defendant's rate of ascent [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>