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NOT ALL MEDIATION MEMORANDA AND OPENING REMARKS ARE CREATED EQUALLY (NOR SHOULD THEY BE)

The objectives of one's written mediation memorandum compared against one's opening remarks during the joint session of the mediation may be the same and may be very different. This paper will examine those objectives and make suggestions regarding the content of written and oral presentations and the tone with which they are delivered. The objectives of the written memorandum and of the oral remarks depend on the target audience and may vary, depending on the subject matter of the case or the issues under consideration or discussion.

PLAINTIFF MEMORANDUM:

The plaintiff brief must be delivered to defence counsel with sufficient time in advance of the mediation for defence counsel to forward the brief to his or her instructing client. If there are a number of important attachments, then two hard copies of the brief should be delivered to defence counsel. If there are only a few important attachments, then the memorandum and those attachments should be sent by email as it can easily be forwarded to the instructing client. Even if you are delivering hard copies, an email copy of the text of the memorandum should be sent to defence counsel as soon as practicable so as to expedite delivery of this material to the instructing client. For reasons I have addressed in other papers, last-minute reports should be avoided like the plague as they are viewed negatively and are highly unlikely to impact upon monetary settlement authority at mediation.

Defence counsel should encourage their instructing client to read the plaintiff brief as thoroughly as possible so that defence counsel and their client can discuss issues that arise from the brief in advance of the mediation. In addition, defence counsel can tailor or adjust their oral remarks, having regard for the input of the instructing defence client.

If there are claims dependent on mathematical calculations, those calculations should be set out in the text of the memorandum. The instructing client on the other side of the case should have an appreciation, as soon as possible, as to what you say may be their exposure in relation to claims for loss of income, past or future, future care costs and the like.

There are competing views as to whether counsel for the plaintiff should set out the defence "exposure" in the memorandum. I do not see any realistic harm in doing so. However, if the exposure represents the plaintiff's very best day in court, with defence counsel forgetting to attend the trial, failing to adduce any evidence or suffering a massive head injury with laryngitis all at the same time, then care should be taken to characterize the exposure as simply that. If so, consider setting out an opening demand in the memorandum which is a reduction from the exposure. There are competing views as to whether your actual first demand at mediation, following the joint session and first caucus session, should be the same as or less than the demand in the memorandum. Some suggest that if the first demand is set out in the mediation memorandum, then the "ball" is in the defence "court" for a responding offer. Technically, this is a fair position to take. Practically, it is not terribly effective as the typical defence response is to the effect that if they wanted to accept the offer in the brief, they would have called counsel for the plaintiff in advance of the mediation, said so and cancelled the mediation. I believe the best course of action is for counsel for the plaintiff to plan to present a further demand following the first caucus session and to work backwards from that demand when considering the figures to be included in the memorandum in relation to either exposure and/or an opening demand.

DEFENCE MEMORANDUM:

Despite my views to the contrary, the defence brief may never be read by the plaintiff. I have been told by very experienced and very capable counsel for plaintiffs that the defence brief serves as one of the best tools to manage expectations of the plaintiff client. Far too often, the defence brief arrives too late to be forwarded to the plaintiff or to be read by the plaintiff and discussed with counsel for the plaintiff. If you want the plaintiff to read your memorandum, you should deliver two hard copies to counsel for the plaintiff well in advance of the mediation or send the text of your memorandum and copies of critical attachments to counsel for the plaintiff by way of email so that these documents can be forwarded conveniently to the plaintiff.

There may be cases where it is unrealistic to expect the plaintiff to read the memorandum. Language barriers, educational limitations or varying levels of sophistication may make it impossible for the plaintiff to understand your written submissions. In these cases, draft the memorandum for the lawyer. However, always remember, and don't ever forget, that your oral remarks in the joint session must be interpreted for the plaintiff and expressed in terms that they are likely to understand.

If you expect the plaintiff to continue to read the memorandum, it should avoid inflammatory language and extreme rhetoric. If there are tough messages that need to be delivered, they should be delivered in a matter of fact fashion. Real issues which impact directly on the plaintiff's credibility should be addressed in the memorandum. Do not weaken your submissions by straining to find issues of credibility where they do not exist.

If there are legal issues, they should be explained in a manner that is likely to be understood by the plaintiff. However, there are some legal issues which require discussion in the memorandum and which do not lend themselves to simple explanation. In these cases, it may be appropriate to use a heading to alert the reader to the fact that this portion of the memo is likely to be more understandable to counsel and the mediator. If the matter is going to be tried by a jury, then you will have to explain the theory of your case to the jury. You will want to make submissions to the jury about the law or the findings of fact underpinning certain legal conclusions. If you cannot explain these issues to the plaintiff in the memorandum, you are probably going to have difficulty explaining these issues and making submissions to the jury. If you cannot make your submissions, particularly oral submissions, understood by the plaintiff, you are going to have difficulty making your submissions understood by the jury.

COMMENTS APPLICABLE TO BOTH PLAINTIFF AND DEFENCE MEMORANDA:

If you want someone to read your written submissions, they should be well organized, well displayed, free of spelling mistakes and grammar errors. They should be persuasive. Set out the theory or theme of your claim or defence. Tie the evidence and your submissions back to that theory or theme.

A mediation memorandum is not a factum. It should not be devoid of argument. To the contrary, it should urge the reader to come to a conclusion, on an issue or on the case itself, based on a fair and reasonable characterization of the evidence, reasonable inferences to be drawn from the evidence and a fair, balanced application of the law.

The memorandum should demonstrate that you have given appropriate thought to your client's claim or defence, have a full appreciation of the relevant evidence and law and have the ability to communicate your client's position in a comprehensive, cogent and persuasive manner.

The use of headings is critical. Photographs, charts and graphs can be very persuasive. Photographs of property damage or an absence of apparent property damage and charts depicting income as reported on income tax returns, with a clear "before and after" picture, are two examples which come to mind.

It is not useful nor is it necessary to summarize every document produced and exchanged in the litigation. Use good judgment and discretion and discuss documents which are truly important to the matter and which are likely to drive the discussions and negotiations at mediation. The same applies to the evidence of witnesses, be they the parties, lay witnesses, experts or otherwise.

If you expect someone to read your memorandum and understand it, it should be reasonably brief. The Goldilocks principle should apply: it should be not too long, not too short, but just right. For the plaintiff in particular, it should be presented in language which you believe the plaintiff will understand.

The length of a well-crafted mediation memorandum depends upon the nature of the case and its complexity. I suggest that a tight, well drafted memorandum should probably run in the order of 8 to 12 pages of text and that it would certainly be an exceptional case to require more than 20 pages to discuss the issues in dispute and the evidence most relevant to those issues. This has nothing to do with my aversion to reading the mediation equivalent of War and Peace but everything to do with the notion that "less is more". If the memorandum is shorter, it is more likely to be read and its content is more likely to be remembered.

Despite my hope that plaintiffs and decision-makers on the defence side of the table will read the memoranda, some suggest that the target audiences are opposing counsel, who should be informed about the case facing their client, and the mediator, who should be provided with the evidence and tools with which to work at the mediation. If so, I would still recommend that the memorandum be prepared, both as to form and content, so that it can be read and understood by lay people.

The memorandum should not ignore evidence that is damaging to your client's position. A few examples will help demonstrate this point. In a case where there is a need for attendant care, the issues in dispute may turn on the quantum of care [be that hours per day or cost per hour]. The memorandum should acknowledge the competing positions and may offer some thoughts as to how this issue might be addressed through negotiations. This latter suggestion may be

better addressed in opening remarks during the joint session. If there is a liability dispute arising out of a motor vehicle accident and if there are witnesses whose anticipated testimony will hurt your client's position, acknowledge the evidence, deal with it to the extent possible and move on. There is nothing to be gained by ignoring the evidence or, even worse, by misstating the evidence.

There is probably little to be gained by denigrating the quality or character of expert evidence marshaled by opposing counsel. However, if you have first-hand experience of calling the expert as a witness or cross-examining the expert or if the expert has been the subject of judicial or tribunal commentary, positive or negative, some comments in the memorandum may be helpful.

ORAL REMARKS BY COUNSEL AT THE JOINT SESSION:

There appears to be a custom of starting remarks with a thank you to those on the other side of the table for attending at mediation. If that is your practice, look at the people who you are thanking and say it as if you mean it. I give credit to my colleague, Jon Fidler, for his sage advice, "Be sincere, whether you mean it or not". Please refrain, to the extent possible, from using your PDA or looking at your watch or clicking your pen impatiently while someone else is speaking.

I am a proponent of two important guiding principles applicable to oral remarks. The first is to identify points of agreement and points of disagreement. The points of agreement could be as simple as the agreement to come together to mediate, to discuss the issues earnestly and to use your best efforts to try to achieve settlement. Obviously, if agreement can be acknowledged on more substantive issues, inform the decision-maker on the other side of the table. Settlement agreements generally do not materialize out of thin air; rather, they are the result of hard work and momentum. You can establish immediate credibility and momentum by acknowledging agreement and starting to build the "settlement bridge". You or your client can establish rapport and demonstrate your reasonableness with the decision-maker on the other side of the table.

Where possible, the points of disagreement should be limited to three or four at most. When you discuss the points of disagreement, you should fairly set out the evidence and arguments on each side of the issue and give consideration to proposing a methodology whereby compromise may be possible on the issue. As an example, if early retirement is an issue in play

in the case, there may be a dispute about the plaintiff's intended age of retirement. Counsel may wish to establish the competing evidence, whether from the plaintiff, the industry, statistics or otherwise, establish the goal posts and give some suggestions as to possible approaches to attempt to bridge the gap.

When you give thought to the identification of which issues in dispute which are worthy of discussion, I suggest that those should be issues which are likely to truly impact on the negotiation. A seriously contested dispute over liability in a motor vehicle accident will have a material impact on settlement negotiations. This issue, with the most applicable evidence, may need to be reviewed with the decision-maker on the other side of the table. By contrast, if counsel take a realistic view on non-pecuniary general damages or the threshold or statutory deductible, in the case of motor vehicle accidents, then this subject is hardly worth much, if any, discussion in the course of the oral opening.

The second principle consists of two concepts - primacy and recency. Your remarks should start and finish with matters that are most important to communicate as they are more likely to be remembered. This principle should apply to your remarks generally and as you work through the three or four major points of disagreement.

If counsel on one side of the table can provide opposing counsel with assurances that the other side's brief has been read by their client and discussed as between the lawyer and the client, this may obviate an unduly lengthy opening from counsel. If plaintiff counsel have reviewed the threshold and the deductible with their client, does defence counsel really have anything to gain by reviewing these subjects with the plaintiff? If defence counsel has reviewed the plaintiff's brief with their instructing client and if the brief reviews, perhaps too extensively, all of the medical evidence, does counsel for the plaintiff really have anything to gain by reviewing this medical evidence, chronologically or otherwise, with the instructing client? The answer to both questions is obviously no. Ask the opposing decision-maker to speak with the mediator as the negotiation evolves about subjects such as the threshold, the statutory deductible, the vagaries of a jury trial, offers to settle, the costs of a trial, the physical and emotional pressures of a trial and cost consequences, particularly following a rule 49 offer to settle. The mediator can raise these subjects in caucus at the appropriate time and in a less confrontational manner and environment.

The oral opening statement should target the decision-maker on the other side of the table. As counsel, this may be your one and only opportunity to speak to the decision-maker. Your remarks should be brief, earnest and impactful. On the subject of brief, less is more. On the subject of earnest, if you sincerely believe that you will crush the opposition at trial [destroying the plaintiff's claim or recovering a judgment well in excess of insurance limits are two extreme examples], then you should tell the decision-maker exactly that and explain how your approach at mediation will offer them a life raft. Conversely, extend an olive branch and use empathy or other emotions to demonstrate how you will work to achieve settlement through the process of mediation. On the subject of impact, say what you mean and mean what you say. I recall the advice of Mr. Justice Laskin in relation to oral submissions at the Ontario Court of Appeal which are equally appropriate at mediation: "Spare the windup; throw the pitch".

One must always remember that your oral remarks, presumably intended for the decision-maker the other side of the table, will automatically be viewed as suspect. Psychologists refer to this as reactive devaluation. This is the cognitive bias that occurs when a proposal is devalued if it appears to originate from an antagonist. I have frequently observed that the plaintiff views defence counsel as something akin to the devil. In some cases, this may be exactly what defence counsel hopes to achieve. However, I believe this is the exception rather than the rule. Given that you want the decision-maker on the other side of the table to consider your submissions, they should be presented fairly and in a digestible format. Please refrain from telling the decision-maker on the other side of the table, "What you need to understand is _____". I suggest a better approach may be to ask, rather than tell, the decision-maker, "What you may want to consider is _____" or ask the decision-maker to consider that the trier of fact may come to a particular conclusion, based on the facts, evidence and law, which is not in their favour. The advice I received from my veterinarian in relation to giving a pill to a dog is apt; wrap it in cheese. If you would like the decision-maker on the other side of the table to open their mind to the possibility that what you are saying may occur in court, present that possibility in a digestible format. Don't force it down their throat.

The easiest way for you to motivate the decision-maker on the other side of the table to demonstrate flexibility in the course of the negotiation is for you to demonstrate that you are willing to be flexible. Thus, if you can make concessions, acknowledge points of agreement, areas of strength on the other side of the table or areas of weakness on your side of the table, you acquire negotiation credibility which enhances your prospects for a successful negotiation. To put the point another way, you cannot expect the decision-maker on the other side of the

table to compromise unless and until you demonstrate some compromise. To quote one of the learned authorities on mediation and negotiation, Billy Madison, "It takes more than two to tango, or something like that".

Your advocacy skills are on display at the mediation. If you want to impress opposing counsel or the decision-maker on the other side of the table as to your skills in this area, your oral remarks should be well organized and delivered with confidence. Avoid "um, aw, you know, etc.". These filled pauses in spoken conversation are unimpressive. If oral advocacy is not your strong suit, then prepare your oral remarks in writing and practice, practice and then practice some more. In a worst-case scenario, read your remarks as would a TV newscaster - looking up frequently and making eye contact with others at the table as appropriate.

If you are going to use medical terms, you should be able to properly pronounce them and use them in their proper context.

Avoid legalese wherever possible. According to Geoff Adair, "Never use a two syllable word if a one syllable word will do". Your opening remarks should not be viewed as an opportunity to demonstrate the depth or breadth of your vocabulary. Your words should be well chosen so that you present your remarks in the most persuasive and powerful manner possible.

Do not lose your cool. If someone on the other side of the table says something inflammatory, do not take the bait. Do everything possible not to visibly demonstrate your feelings. Wait until they have concluded their remarks and respond in a polite, professional but firm manner. Exchanges of this sort are similar to penalties in a hockey game - the instigator frequently is overlooked and the retaliator is penalized.

ORAL REMARKS BY THE DECISION-MAKER:

This subject could probably be the subject of a separate paper. For these purposes, I suggest that the plaintiff should be encouraged to speak if their counsel believes that they are a persuasive speaker and that they have something of value to say. At minimum, they should look the decision-maker on the other side of the table in the eye and sincerely thank them for attending at mediation and express the hope that a reasonable resolution can be achieved. If there is an important issue likely to be materially impacted by the plaintiff's evidence at trial, then the plaintiff may wish to speak about this issue. This should not be a formal examination in chief or appear rehearsed. It should allow the decision-maker on the other side of the table to

evaluate the content, tone and demeanour of the plaintiff as this should have a positive impact on the negotiation process. Obviously, if the plaintiff is not up to the task, then this should be avoided.

The decision-maker on the defence side of the table should be encouraged to make brief opening remarks, provided that they are "on message". Defence counsel may have addressed substantive or procedural subjects [threshold, deductible, vagaries of jury trials, ability of the defence to absorb an adverse verdict or judgment, etc.]. I do not think the defence decision-maker has anything to gain by repeating these remarks or by making those remarks if not made by defence counsel. I have seen the defence decision-maker demonstrate empathy and effectively connect with the plaintiff on an emotional level. I have heard the defence decision-maker explain that they do not receive a bonus for settling cheaply nor are they penalized for settling on a more generous level; they simply perform an analytical task strive to settle the dispute for a reasonable sum, having regard for what they believe will happen in court.

There is an actual an obvious power imbalance between the abilities of a plaintiff versus an institutional defendant to absorb an adverse result after a trial. This fact of life, when stated in a heavy-handed manner, comes across as a threat or as bullying. I observed an insurance company representative explain this situation in a very non-confrontational and very digestible manner to the plaintiff. They confirmed my opening remarks that something in the order of 98% of all claims are settled short of judgment or verdict. They explained that the insurance company tries to take the same approach to the analysis and evaluation of all claims. This allows them to settle the vast majority of all claims. Given that they take the same approach to all claims, the non-settled claims which proceed to trial will produce some wins and some losses for the insurer. The results will average out. The plaintiff in any particular claim does not enjoy this luxury. This should motivate the plaintiff to look very seriously at any offer in or about the zone of reasonable.

CONCLUSION:

Mediation advocacy is exactly that - it is a process which aims to influence the decision-making process with persuasion which may appeal to the mind or the emotions of the decision-maker. It may be a call to arms, an impassioned urging or a cold and calculated statement. It may be based on the facts, the evidence or the law or it may appeal to motivations and desires such as certainty and closure. It is certainly not "one size fits all". Great care and thought should be devoted to the preparation of one's written memorandum and one's oral remarks delivered at the joint session.