COOPER
MEDIATION INC

THE PROBLEM -
INEFFECTIVE, UNPRODUCTIVE, COUNTERPRODUCTIVE OR CANCELLED MEDITIATIONS

Counsel for a party delivers one or more reports from experts which are or are perceived to be late in the day in relation to the upcoming mediation. Counsel for the other party does not have sufficient time to respond to the reports.

Counsel for the defendant communicates with his or her client shortly in advance of the mediation and learns, precisely or generally, that the monetary authority available for the mediation has no realistic likelihood of allowing for settlement at mediation.

Counsel for the plaintiff communicates with his or her client shortly in advance of the mediation and learns of new facts or of a material change in some aspect of the plaintiff's claim such that it is extremely unlikely that the defence will have adequate authority to allow for settlement at mediation.

In any of these circumstances, it is not unusual for the mediation to be cancelled [which provides no benefit to the parties and further delays the progress of the matter] or for the mediation to proceed with one side or the other or both leaving the mediation without a settlement and with a high level of dissatisfaction in relation to what transpired on the day [which can often do more harm than good in relation to the future course of the matter and the ability of the parties to ultimately resolve the matter].

The Cause of the Problem:

It is my belief that this problem is principally due to the failure on the part of one party or both parties to understand and manage the expectations of either their own client or the expectations of other parties to the matter.

I do not have [nor should I have] much to say about how counsel manage the expectations of their own client. From the plaintiff perspective, this involves regular and effective communications and appropriate time spent with the client in advance of the mediation [which, in my view, should never be left until the morning of the mediation]. From the defence perspective, this involves regular and realistic reporting and evaluation of the matter as it progresses [which is expected by all institutional clients].

Expectation management across the "litigation fence" is trickier. Counsel for the plaintiff needs to do their best to ensure that the defence understands and appreciates the theory of the plaintiff's claim and that the defence has the plaintiff's evidence in hand a sufficient time in advance of the mediation so that this evidence can be assessed and evaluated [and be addressed by way of responding evidence to the extent necessary] so that reserves and authority are appropriate.

Counsel for the defendant needs to inform counsel for the plaintiff regarding the issues which are truly in dispute and the defences which are going to be seriously contested at the mediation and in the matter. Perhaps most importantly, counsel for the defendant needs to educate counsel for the plaintiff in relation to the insurer's processes and protocols in relation to the authority granting process.

The origins of the cause of the problem – "What we've got here is failure to communicate"[1] [or "We never talk anymore"]

This subject has been a recurring theme in a number of papers which I have written. In my experience, previously as counsel and currently as a mediator, it is rare for counsel with carriage of a particular matter to speak directly or in a meaningful manner. Events in the matter are scheduled by associates, law clerks or assistants. Associates frequently attend at examinations for discovery. Settlement discussions, which used to routinely

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1 The phrase "What we've got here is (a) failure to communicate" is a quotation from the 1967 film *Cool Hand Luke*, spoken at different points in the movie first by Strother Martin (as the Captain, a prison warden) and later Paul Newman (as Luke, a young prisoner).

The context of the delivery of the line is:

Captain: You gonna get used to wearing them chains after a while, Luke. Don't you never stop listening to them clinking, 'cause they gonna remind you what I been saying for your own good.
Luke: I wish you'd stop being so good to me, Cap'n.
Captain: Don't you ever talk that way to me. (pause, then hitting him) NEVER! NEVER! *(Luke rolls down hill; to other prisoners)* What we've got here is failure to communicate. Some men you just can't reach. So you get what we had here last week, which is the way he wants it. Well, he gets it. I don't like it any more than you men.

occur after examinations for discovery, simply do not happen with any regularity. Often, the first time that counsel with carriage of the matter speak or meet is at the mediation.

I certainly subscribe to the theory that counsel should put their time to its highest and best use. That said, I believe counsel are mistaken when they fail to either create or seize upon opportunities to speak directly with counsel on the other side of the matter.

The Solution

During the last number of years of my practice as counsel, I developed and implemented a practice such that immediately upon being retained by an insurer, I wrote to counsel for the plaintiff and unilaterally suggested a date and time which I proposed as a teleconference which I would initiate in approximately 45 days. I would invite counsel to reply to either confirm the date and time or to suggest an alternative date or time. In a small percentage of cases, I would hear back from counsel with the plaintiff in one fashion or another. In a small percentage of cases, I would call at the self-appointed date and time and counsel was not there. In approximately 80% of cases, counsel was in their office, took the call and we had productive discussions in relation to settlement, the progress of the matter, issues in the matter, evidence that needed to be obtained, next steps, time tabling, etc.

I suggest that counsel give very serious thought to the foregoing and consider adopting it as a practice in virtually all of your cases [since there always will be exceptions to any rule]. It matters not who suggests the call. I believe a number of benefits to counsel and their clients are there to be had.

- Settlement can be discussed [or there can be a discussion as to what needs to occur for meaningful settlement discussions to take place].

- Information can be gathered or exchanged. Invariably, counsel will learn something about their case or about the case of the other side that they did not know or appreciate before the call took place.

- The matter can be effectively timetabled. Often, examinations for discovery are scheduled only to be cancelled at the 11th hour when it becomes apparent that some other party was not consulted in relation to the date or other parties are added to the proceeding [by way of third party claim or otherwise] or that there are companion matters which should proceed in common. There can and should be a fulsome discussion about the timing for and duration of examinations for discovery.

- Timetabling is underestimated, undervalued and underused. If counsel put their minds to the work that needs to be done after examinations for discovery, it will allow for all of the important work to be done in advance of the mediation so that the mediation is likely to be of maximum benefit to the parties. Time needs to be allowed for satisfaction of undertakings, plaintiff medical legal assessments and defence medical legal assessments.

- Perhaps most importantly, this call provides an opportunity for defence counsel to educate counsel for the plaintiff in relation to the involved insurer's evaluation and authority granting processes. The involved insurer may always want or never want defence medical assessments in advance of the mediation. This impacts on the timing and scheduling of the mediation.

- Moreover, defence counsel can explain the insurer's timeline in relation to the authority granting process. Defence counsel can explain why reports from experts cannot and will not be considered beyond a certain date in advance of the mediation. Counsel for the plaintiff simply needs to adjust the horizon of their timeline and work to a new due date. Likewise, defence counsel can request that the plaintiff's mediation memorandum be delivered by a certain date [so that the memorandum can be put before, reviewed and considered by the authority granting person or body]. Alternatively, counsel for the plaintiff can consider doing so, whether requested by the defence or not, with a view toward putting their client's best foot forward to the true decision maker [who or which is frequently not at the table at mediation].

- If this approach is taken, counsel will find that they are scheduling a mediation 12 to 15 months from the time they speak. This should allow counsel to schedule their mediation with virtually any mediator they wish [as many mediators are very popular and, as a result, very busy with limited availability in the near or medium term].

- A brief example will demonstrate the previous point. Depending on who will be attending at examinations for discovery and their availability, examinations for discovery are typically scheduled some 2 to 6 months down the road. Undertakings require at least 3 to 4 months to be satisfied. Medical assessments, by one side or the other or both, require a further 3 to 4 months or more. Time needs to be allowed for expert reports to be considered and evaluated by both sides [and for responding expert reports to be obtained where appropriate] and for the insurer evaluation process to take place. I suggest at least 2 to 4 months be allowed in this regard. As you can see, on a very optimistic basis, the mediation should not take place any sooner than 10 months from the time of the call and perhaps no sooner than 18 months from the time of the call.

The Solution PLUS

Cooper Mediation Inc. seeks to be part of the solution and to offer value to our clients [over and above the mediation session per se].

If counsel wish to schedule a mediation with Cooper Mediation, we are prepared to participate in one or more pre-mediation teleconferences [typically at 8:30 AM – 9:30 AM or from 4:00 PM – 6:00 PM] to assist counsel and their clients with the timetabling process. This will culminate with a date being set [subject to availability].

In addition, we are willing to participate in one or more pre-mediation tele-caucus sessions in advance of the mediation. This will allow counsel to alert the mediator to any particular concerns or sensitivities on their part with a view toward maximizing the effectiveness and productivity of the mediation session.

Cooper Mediation Inc. will provide this time and service AT NO COST to the parties [over and above the cost of the mediation booked with us].