COOPER MEDIATION INC

TIPS BEFORE AND AT MEDIATION - AN INSURANCE COMPANY PRIMER

1. TIMING

In the olden days, when dinosaurs roamed the planet and I had hair [while the part about the dinosaurs is true, I haven't had an appreciable amount of hair on the top of my head for the vast majority of my life], there was a pilot project in Toronto whereby one out of ten civil actions pending in court (excluding certain types of claims such as family matters) were randomly selected for mediation. This was a court annexed project which, if memory serves me correctly, was funded by or through the court system. The parties and their counsel were required to attend before one member of a panel of mediators and conduct mediation at dreadful premises located on Grenville Street in Toronto. I appeared there frequently as counsel and the results were mixed. I cannot comment on the success or failure of the pilot project but, while the court-annexed model for mediation was jettisoned, mediation remained in place.

Then, as now, preparations for mediation were as much about organization as about the development of one's client's case.

There is no good reason not to have conducted oral examinations for discovery in advance of the mediation (assuming that such discovery evidence is viewed as a critical component of the mediation). Just as organization was critical under "front end loaded" mediation, it remains the case under the current practice for mediation.

- Consider early mediation when the plaintiff or claimant is represented by inexperienced counsel.
- Consider later mediation, after the defence has been fully developed, when dealing with more experienced counsel acting for plaintiffs or claimants.

For a fairly detailed discussion of the current incarnation of mandatory mediation in Toronto, the Regional Municipality of Ottawa-Carleton and the County of Essex (Windsor), please refer to my paper titled "MEDIATION UNDER THE AMENDMENTS TO THE RULES OF CIVIL PROCEDURE (EFFECTIVE JANUARY 1, 2010)".

2. SELECTION OF THE MEDIATOR

- Who do you like or trust?
- Who will your counsel like or trust?
- Who will the other side like or trust?
- From the insurer perspective, is there a list of approved mediators which you need to consider? If there is no such list, should there be such a list?
- Are there issues in relation to timing (since those who are most popular in certain areas of practice are frequently booking up to or more than 12 months into the future)?

3. MEDIATION PROTOCOLS

- Should the insurer agree to pay 100% of the cost of the mediation, regardless of whether the matter settles or not?
- In cases where the insurer agrees to pay 100% of the cost of the mediation, regardless of the settlement (and perhaps in all instances), should there be rules which are strictly followed in relation to the timing or delivery of reports of experts and/or mediation briefs?
- It is remarkable and astounding how often we receive last minute reports from experts for the plaintiff. It is impossible, on a practical or logistical basis, for the defence to respond to the reports. Moreover, it is probably impossible for an insurer to properly consider the opinions as they might impact upon reserves, authority conferred at mediation or settlement targets at mediation.

- If there are mediation protocols which would allow for your counsel to cancel the mediation upon breach of the protocols, make sure that those protocols and rules are well known to the other side and to the mediator (so that there is no question as to who will bear the cancellation account of the mediator if the mediation is cancelled by reason of a breach of protocols).

4. OTHER CONSIDERATIONS

- Mediation is not new or innovative. It is part of the litigation process and should be planned for (just as you plan for other events in the litigation).

- Are there advantages or disadvantages to conducting mediation before oral examinations for discovery in your particular case?

- Should mediation take place sooner than later in the litigation process?

- Are there others, beyond the parties, who should attend the mediation? What do their schedules dictate in relation to timing?

- Are there "extra-litigation" considerations, beyond the strengths or weaknesses of the case, which will impact on the timing of or conduct of the mediation?

- Ask your defence counsel to conduct a settlement meeting with opposing counsel before the mediation. This is a technique that is under-used and under-appreciated. If used correctly, this gives you a chance to receive a preview of the opening demands of the other side which should help with your reserves and request for authority at mediation. It gives you, through your defence counsel, an opportunity to hear counsel for the plaintiff or claimant articulate their position (which should assist you and your counsel in the preparation of the defence brief and the preparation of the opening statement at mediation). The pre-mediation settlement meeting may shine a spotlight on the holes in your case that you need to address. Lastly, you may very well settle some of your claims at this early stage – before opposing counsel delves deeper into the matter in preparation for the mediation and without incurring the costs of the mediation (both paid to the mediator and to your counsel).

- Know the realistic value of your file. It is very much an acquired art as to how to assess, negotiate and effectively resolve your claim at mediation or otherwise. Realistically evaluating the claim which you are facing can be compared to putting on a golf course. The best putters look at a putt from several directions. They look at the surrounding contours of the landscape. The same approach applies to the valuation of the claim which you are facing. How would or should you value the claim as:

    i. counsel for the plaintiff or claimant;

    ii. the plaintiff or claimant himself;

    iii. the judge at the pre-trial conference;

    iv. the judge at trial;

    v. the jury;

    vi. the appellant court.

- If you practice this approach, I expect your golf scores will go down and your settlement rates and outcomes will improve.

- Master the math – In personal injury and insurance cases, mathematics, accounting, taxation and present value calculations are critical to understand. If you do not have a head for figures, make sure that your counsel does and/or hire appropriate experts who will not only supply reports to assist in the defence of the claim but will also spend time with you and your counsel to understand the necessary concepts and component parts of a claim and how they fit together and move and change as negotiations unfold at mediation. It is critical to understand which claims are indexed and/or will increase with inflation or productivity and which claims are flat. It is equally critical to understand what is an appropriate discount rate to be applied in each instance.

5. THOUGHTS AND STRATEGIES

- In some cases (and with some counsel or parties), mediation is most effective when held in close proximity to the pre-trial or trial dates. If this applies to your claim, then you should consider an abbreviated mandatory mediation to comply with the Rules of Civil Procedure or Practice Direction (as applicable) and plan for a full blown private mediation which addresses your issues, concerns or strategies.

- Work backwards from the mediation date. Make it clear to your defence counsel when you will be meeting with individuals or the committee within your company to obtain authority to deal with the matter at mediation. Sufficient time in advance of that date must be allowed for you to receive a report on examinations for discovery, a report on or receipt of documents provided in answer to undertakings, experts' reports, mediation memoranda and the like.

- Ask your counsel to provide you with a complete copy, with tabs, of both the plaintiff's brief and the defence brief. You should be thoroughly familiar with not only the text of the mediation memoranda but also the backup documents. Your insights into and comments on the claim, whether shared privately with your counsel or at the mediation table, can provide valuable assistance to the defence effort.

- Where possible, whether by way of your mediation protocols or otherwise, demand a listing of assessable disbursements from counsel for the plaintiff in advance of the mediation (even if it is out of date by the time of the mediation though, if counsel for the plaintiff are adhering to your protocols relating to late reports, there should be no additions to the list of disbursements). This will assist you in obtaining appropriate authority to deal with the claim (since assessable disbursements can be a surprisingly large and challenging number with which to contend if only appreciated at the mediation).

- Ensure that your counsel (or, where appropriate, you) have prepared the necessary closing documentation and have it in hand at the mediation (or prepare it in draft and have it ready to be finalized by your counsel's assistant or emailed or faxed to the mediation venue). This would obviously include full and final releases, releases and settlement disclosure notices (in the case of first party statutory accident benefit claims), consents to dismissal, minutes of settlement and the like.

- If a structured settlement is likely to be considered, ensure that your defence counsel is aware of your company's structured settlement protocols. For example, are there a limited number of structure brokers available to be used in the case? Is the structure to be owned by the casualty insurer or is it to be assigned? Who will bear the cost of the assignment? Is there a restricted list of life insurers acceptable to the casualty insurer? Is it appropriate and advisable to have a structured settlement broker at the mediation?

- If a structured settlement is likely to be considered, provide the structured settlement broker with the appropriate medical reports and records so that they can secure an impairment rating. This can improve the return the plaintiff will see on their structure or, put another way, will minimize the principal cost to fund a structure that will address recurring claims or losses in the future.

- Timing and quantum of offers – An insurance company representative at mediation is a professional (as compared to the plaintiff who is very much in the hands of their counsel). As a claims professional, you will have a good understanding of the value of the claim which you are facing and should be prepared to negotiate. Subject to tactical considerations, there is no good excuse for a lengthy delay in responding to the first demand. These figures should have been discussed at a pre-mediation conference with your counsel. Thereafter, the speed with which you respond to offers from the plaintiff or claimant is subject to the "Goldilocks" principle – the wait should be not too long, not too short but just right.

As for quantum, I cannot say that there is a right or wrong approach or formula. The change in the quantum of your offers depends on a number of factors:

i. percentage changes;

ii. gross dollar changes;

iii. strengths/weaknesses of the component parts of the claim;

iv. perceives strengths/weaknesses of the component parts of the claim as reflected in the movement of offers made by the other side;

v. overall total value of the offer.

I believe the key to a series of offers is to project to the opposition or to the mediator where you are going (be that an accurate projection or otherwise).

- To share or not to share – As defence counsel, I believe that your reserves are none of my business. However, I am of the view that there are generally more advantages than disadvantages in sharing with your defence counsel the authority you have with which to deal with the claim at mediation and, more importantly, the target figure set as the objective to conclude the matter at mediation. I believe that most defence counsel strive to "allow you to give change back to your mother and father", meaning that most defence counsel would like to be able to help you to resolve the matter for a figure less than the authority conferred.

- Listening Skills – My late grandfather had two expressions of which I remind myself from time to time: "You have two ears and one mouth. Use them in those proportions;" and "You can never listen yourself into trouble." Listen for cues and clues as to where the opposition may be going and how you can successfully steer the mediation.

- Courtesy – Please don't look at your watch or Blackberry when someone else is speaking. Try to look at the other speaker periodically when they are making their opening statements. When you are speaking, direct your comments to the person who you wish to motivate and influence.

- Collegiality – You will have an easier time at mediation and generally in your professional life if you can have civil, cordial or amiable relations with the opposition. This applies not only to your relations with plaintiff counsel and also with the plaintiff or claimant themselves. Be or appear to be interested. Be sincere – whether you mean it or not.

Mediation appears to be part of the litigation landscape in this Province and the landscape shows no signs of any immediate or radical change. Many have said that for the litigants, mediation is their "trial" (since the number of cases that actually proceed to and through trial is quite limited). Consequently, approach mediation seriously and thoughtfully, having regard for the ultimate objective you wish to achieve for your company. Mediation is a rewarding and satisfying (and relatively low stress and low cost) means to resolve a lawsuit.