COOPER MEDIATION INC

TOP 10 DO'S AND DON'Ts FOR EFFECTIVE MEDIATION

1. DON'T mediate as a matter of course

In some judicial venues in Ontario [Toronto, Windsor and Ottawa], the parties must mediate in advance of the pre-trial conference. In all other jurisdictions, mediation is optional. Direct settlement negotiations should always be thoroughly considered before proceeding to mediation as mediation will invariably entail delay, prolong stress and worry on the part of the plaintiff and require considerable effort and expense on the part of all counsel to properly prepare for and attend at mediation. I had the opportunity to mediate with a plaintiff lawyer whose practice is split between London and Windsor. She told me that she is able to settle the same percentage of her cases in both jurisdictions. Interestingly, only about 50% of her London cases required mediation whereas some 90% of her Windsor cases proceeded to mediation. This observation begs the question as to whether mediation helps the parties settle their dispute or whether it is a self-perpetuating phenomenon.

Mediation invariably requires compromise. In some cases, which I suspect are few and far between, your client may occupy the litigation "high ground" and you or your client may be disinclined to compromise to any great extent. These cases may not lend themselves to mediation and maybe more suited to a judicial pre-trial conference.

If direct settlement discussions are to occur as between counsel for the plaintiff and either defence counsel or an insurance representative, those discussions should proceed with caution. I have written a paper that goes into some detail about the potential benefits and pitfalls of settlement discussions in advance of mediation. For these purposes, it is sufficient to note that whereas counsel for the plaintiff is very likely to obtain instructions from his or her client in accordance with the recommendations of counsel, the same cannot be said of defence counsel or the insurance representative as the settlement decision is frequently made by management or a committee who may or may not share the views of the person with whom you are negotiating.

2. DO consider the timing for the mediation

Once again, the judicial venue will have a significant bearing on your choices in this regard. In Toronto, Ottawa and Windsor, mediation must take place in advance of the pre-trial conference. Mediation in Toronto frequently occurs at least two years in advance of the anticipated trial date. The parties and their counsel do not face the same pressures and concerns as compared to mediation held in close proximity to trial. Frequently, there is a belief that holes in the case can be plugged and flaws can be fixed between the time of the mediation and the time of the pre-trial conference or trial. While my experience tells me that the substantial majority of cases mediated in Toronto, where I conduct most of my mediations, do settle at the time of or shortly following the mediation, I believe that settlement is achieved in a greater percentage of cases if they are mediated close in time to the pre-trial conference or trial.

There is a potential trade-off in this regard as mediation is delayed [increased stress for the plaintiff], expenses are increased [reports of experts and other assessable disbursements incurred by both sides] and there is the potential for positions to be galvanized and less amenable to compromise. There is also a risk that if the insurer is working within an inflexible all-inclusive authority figure, it will be eroded by increased assessable disbursements on the part of counsel for the plaintiff which, in turn, means a lesser recovery for the plaintiff and the possibility that counsel will have greater difficulty obtaining instructions from the plaintiff.

3. DO diarize the date for the mediation and all of the necessary steps leading to the mediation

The mediation is likely to take place several months from the date it was booked. This should provide you and your staff with ample time to do all which is necessary to maximize your prospects for a successful resolution at mediation. I am a strong proponent of the notion that one needs to "work backwards" from the target date or event.

Defence counsel should inform counsel for the plaintiff as to when they require reports from experts and the plaintiff's mediation memorandum with a view toward maximizing the opportunity or likelihood that this material will be reviewed by the authority granting body in advance of the mediation. This should not be viewed as a sign of weakness or divulging corporate secrets; rather, mediation works best when there is a full, frank and fair discussion of

the issues which must, by necessity, be preceded by a full exchange of information and documentation.

Mediators will frequently request that briefs be delivered two to seven days in advance of the mediation. If the plaintiff's mediation memorandum contains new information or new documentation, particularly reports from experts, and if it is delivered to defence counsel a few days in advance of the mediation, there may be some prospect that the insurance representative attending at the mediation will read this material but there is little to no likelihood that the authority granting body will consider this material when deciding on the amount of authority to provide to the insurance representative attending at the mediation.

At minimum, I suggest that counsel for plaintiffs establish a diary date at least 30 and preferably 45 days from the date of the mediation for purposes of delivering your mediation memorandum and all experts' reports. This obviously impacts on the timing of up-to-date medical assessments and reports from experts such as engineers, accountants, occupational therapists or life care planners in relation to cost of care. I cannot stress or emphasize enough the importance of working backwards in this regard.

Similarly, I suggest that defence counsel send their mediation memorandum at least 7 days in advance of the mediation and that counsel for plaintiffs forward the defence memorandum to their clients. I have been told by a great number of very senior and well respected counsel for plaintiffs that the defence memorandum is one of the greatest tools available to counsel for the plaintiff to assist them in what can be a tricky task of expectation management. If expectation management is properly performed, it works to the benefit of both sides in the claim. Moreover, I cannot imagine any good reason why counsel for the plaintiff would want the plaintiff to hear, for the first time and without rehearsal or preparation, about the problems or perceived problems in the plaintiff's claim or about the risk of an adverse cost award or potential pitfalls to the claim. The plaintiff, who is the one true newcomer to the mediation process, is apt to react in an unpredictable manner. This situation can and should be managed as best possible.

I suggest that defence counsel disclose the results of their investigation and surveillance in advance of the day of mediation. This can be done through correspondence, as part of the litigation process, or as part of the mediation memorandum and, as such, on a without prejudice basis. Defence counsel should appreciate and understand that to the extent that late plaintiff reports frustrate the assessment and evaluation process [convenient euphemisms for reserves and authority],late defence productions [another convenient euphemism for sandbagging

counsel for the plaintiff at mediation with surveillance, investigation, social media productions and the like] will hamper and potentially frustrate the ability of counsel for the plaintiff to manage the expectations of their client at the mediation.

I encourage counsel for plaintiffs to produce a list of assessable disbursements in conjunction with their mediation memorandum. If the list is likely to change between the time it is delivered to defence counsel and the time of the mediation, I recommend that you give some indication of the reports or documents you expect to receive and the approximate associated costs. As I have already indicated, the current climate is such that insurance representatives attend at mediation with all inclusive authority. If they have mis-estimated your assessable disbursements, they will attempt to "borrow" from the claims amount to cover unanticipated or mis-estimated disbursements. This will result in less money for the claim, less money for the claimant, less money for fees and more difficulty getting settlement instructions.

4. DO meet with your plaintiff client several days in advance of the mediation

Mediation may be the single most important event in the life of the claim for the plaintiff. It is frequently their "trial day" as very few cases actually proceed to trial. It may provide them with an opportunity to vent or for catharsis. However, they are likely new to the process. As a result, their behavior / presentation and their expectations at the mediation need to be managed.

On the subject of the former, the plaintiff should be advised regarding appropriate dress and grooming. Plaintiffs should be pleasant, whether they mean it or not, and should be able to shake hands with all those on the other side of the table, make appropriate eye contact and listen, or appear to listen, to all of the opening remarks and submissions. Plaintiffs should be advised as to what they can expect to hear from the mediator and, more importantly, from defence counsel. I encourage counsel for plaintiffs to provide their clients with a copy of the defence mediation memorandum so that they are not surprised by the submissions of defence counsel at the mediation. I appreciate that defence counsel frequently deliver their mediation memos at the 11th hour. In this case, you should discuss the anticipated defence arguments with your client and e-mail them a copy of the memorandum as soon as it is received.

Likewise, the behavior / presentation of the insurance representative should be discussed with defence counsel. As I have said in the past on many occasions, I think it is important that the insurance representative be sincere, whether they mean it or not. The insurance representative should be or appear to be interested in all of the submissions. The insurance representative

should be encouraged to speak at the mediation, if they are so inclined, but their message should be screened in advance of the mediation so that it complements or reinforces the message of defence counsel. At minimum, the insurance representative should indicate a willingness to work hard to try to achieve a reasonable and realistic resolution of the matter.

On the subject of expectations, I cannot emphasize sufficiently the importance of managing the plaintiff's expectations. I certainly appreciate that this function can and should be augmented by the mediator's efforts at mediation. However, if the plaintiff has gone to bed the night before the mediation with "sugarplum fairies dancing through their head" or relied on the advice of a friend or neighbor and their experiences or advice, counsel for the plaintiff and the mediator will have great difficulty managing and revising those expectations on the day of the mediation.

5. DON'T read your mediation memorandum as your opening statement

While this advice may appear trite and while it is true that very few counsel actually read their memorandum verbatim, most counsel follow the form and organizational structure of their memorandum when delivering their opening remarks. This is perceived as tantamount to reading or regurgitating the memorandum and is a lost opportunity. Counsel should make every possible effort to say something about their client's claim or about the defence position or both which is both new and constructive. I suggest that you identify the key points of agreement, the key points of disagreement and suggest strategies or ways or means to resolve those points of disagreement. In a contested liability case, counsel for the plaintiff can acknowledge that the plaintiff faces a risk of meaningful contributory negligence and that the plaintiff is prepared to acknowledge that risk by way of a discount in their settlement demands. In a case where there is a real and documented need for attendant care, counsel for the plaintiff can acknowledge a real risk in relation to the number of hours of care or the hourly cost of care and acknowledge that the plaintiff will discount their settlement demands to take into account the arguments and the evidence adduced by the defence. Similarly, defence counsel should acknowledge that which is plain and obvious [for example, liability in an MVA flowing from a prior conviction while contesting contributory negligence in appropriate cases or threshold and / or non-pecuniary general damages exceeding the $100,000 threshold such that the statutory deductible is avoided]. With few exceptions, counsel on the other side of the case may have been born at night but it probably wasn't the night before the mediation.

At minimum, you should assemble the most important points made in your mediation memorandum and "shuffle the deck". You should address the most important points at the beginning of your remarks. Unlike a jury trial, where principles of primacy and recency may apply, the remarks of counsel are directed at insurance representative or at the plaintiff as the case may be. My belief is that both the insurance representative and the plaintiff have declining or diminishing levels of interest in your comments. Make the submissions that matter most at the beginning, work through the balance of your comments in declining importance and conclude by reinforcing the important points at the end. In addition, your concluding remarks should be conciliatory and indicate how you foresee compromise occurring, from both sides, with a view toward working out a mutually acceptable solution to the problem common to the parties.

6. DON'T personalize your opening statement / remarks

Once again, this advice may be trite or obvious but bears repeating. Always remember and don't ever forget that the dispute is that of your client and not yours. Treat opposing counsel and the plaintiff or insurance representative in a polite and respectful manner. Do not denigrate their position or the evidence upon which they rely. If counsel has chosen one of the "usual suspects" as an expert, it probably does little good to criticize them on this basis. As a starting place, you have probably retained an expert of the same nature, kind and quality favorable to your client's claim. While I do not profess any great familiarity or expertise in relation to the New Testament, the expression "Let he who has not sinned cast the first stone" comes to mind.

It would be far more effective to compare and contrast the expertise and presentation skills of the experts with reference to their resumes and clinical experience or having regard for prior judicial or arbitral commentary, positive or negative as the case may be. If counsel has taken a good position or advanced a good argument, acknowledge it as such and assure counsel and the insurance representative or plaintiff that this will be taken into account in your settlement demands. That said, if counsel has taken a position for which there is no or no reliable evidence or no likely prospect for that position to gain traction at trial, acknowledge that counsel has tried to do their job by advancing all of the claims or defences available to them but, for the cogent reasons which you will enunciate, you are not prepared to advise your client to compromise much, if at all, in this regard. Overall, the tenor of your remarks should be firm but fair with a strong dose of conciliation and a desire to work with those at the table to find a mutually acceptable solution to the problem.

7. DO ask the mediator for advice and feedback before and during the mediation

The mediator must be neutral and respect the nature of any confidential communications. Each mediator has their own approach as to whether discussions in caucus, whether before or at the mediation, will be treated as confidential by default or as capable of being shared if productive to the settlement process. Once the ground rules have been established, use the mediator as a sounding board or negotiation coach. The mediator may be able to assist you in presenting your opening remarks in a more digestible format. You may view certain aspects of your claim to be strong; the mediator may have insight gained from discussions with opposing counsel which can assist you in structuring your demands or offers to enhance the prospects of achieving resolution. Subject to matters of strategy and tactics which are important if settlement is not achieved at mediation, I submit that it is less important how you reach the appropriate result and more important that you achieve that result.

8. DO your homework

According to Sun-tzu, a Chinese general & military strategist (~400 BC), "Keep your friends close, and your enemies closer". Everyone, be that an individual or a corporation, has a negotiating style. There are insurance companies which embrace mediation, even when held two years in advance of the anticipated trial date, and make an earnest effort to resolve claims at mediation. There are other insurance companies which treat the mediation as the legal equivalent of "exploratory surgery". There are other insurance companies which take very hard lines at mediation: in some cases, the lines soften as trial approaches; in other cases, the lines remain in place to and through the trial. Similarly, defence firms and the individual lawyers within the firm have their own negotiation styles. Some will start the negotiation aggressively with low offers and move into the "settlement strike zone" as settlement demands from the plaintiff do likewise. Others will start low and stay low. Some defence counsel will never make an offer in the "settlement strike zone" which, barring the plaintiff snapping at "low hanging fruit," will drive the matter to a pre-trial conference and possibly to trial. Some defence counsel will pound their chests and threaten trial: some routinely go to trial and some do not. One can speculate on the motivations for these behaviors. The important point is to understand your adversary and prepare yourself and your client for what you anticipate in the upcoming mediation.

Similarly, there are counsel for plaintiffs who may not embrace the mediation as a serious or earnest settlement opportunity. They may be performing a reconnaissance function to determine your views on the weaknesses of their case with a view toward attempting to plug those holes and repair those weaknesses going forward. They may be trying to determine your best offer at mediation with a view toward creating a floor for discussions and negotiations going forward.

All of that said, I encourage all who attend at mediation to suspend their disbelief and preconceived notions and, at minimum, proceed with cautious optimism with a view toward achieving resolution at mediation.

9. DON'T expect the mediator to work miracles

If counsel for the plaintiff has not laid the foundation or groundwork for expectation management in relation to the plaintiff, the mediator will be hard pressed to assist you at mediation. Similarly, if the insurance representative attends with authority which is significantly below that which was recommended by defence counsel or originally sought by the insurance representative, the mediator will have great difficulty performing miracles [if indeed that is part of mediator's job description].

If counsel did not perform their due diligence before launching what turns out to be a problematic claim or asserting a defence without appropriate supporting evidence or law, the mediator will be hard pressed to remedy this situation at mediation. A couple of examples will help demonstrate this point. Chronic pain claims are not all created equally. Obviously, the credibility of the plaintiff is key. However, the most credible plaintiff is unlikely to save a claim which is problematic by reason of extensive pre-accident medical complaints and attendances, a poor or checkered pre-accident employment history, undeclared income or inconsistent or sporadic post-accident medical attendances and treatment or damaging post-accident social media evidence. These problems can rarely be overcome by retaining a well-qualified or well-respected medical expert as their opinions are only as good as the foundational evidence.

Conversely, counsel for the plaintiff may have developed very favorable foundational evidence but if you do not have opinions from respected experts and if the insurance representative is likely to require that expert evidence, the appropriate settlement authority is not likely to be in place.

Surveillance and investigation, whether disclosed in advance of the mediation or sprung upon counsel and the plaintiff at mediation, must be realistically evaluated. If it is truly devastating to the plaintiff's claim, the claim is unlikely to be repaired and the mediation should be viewed as a salvage operation. If counsel for the plaintiff has not had the opportunity to review this evidence and if counsel has reason to believe that the evidence is being overstated or that its importance is being magnified, then adjourning the mediation to allow counsel, the plaintiff and the experts to review and respond may be appropriate.

10. DO utilize the mediator after the mediation if the matter does not settle at the mediation

The mediator should be prepared to conduct a post mortem assessment of the mediation, subject to appropriate considerations of neutrality and confidentiality. The mediator will not necessarily be inclined to provide an evaluation of the matter but should be prepared to drill down further on the strengths, weaknesses and risks associated with the claim and the defence. The mediator should be prepared to make post-mediation efforts to assist counsel and their clients to move the matter forward toward resolution. This does not necessarily mean a resumption of the mediation; rather, the mediator should be prepared to follow-up through phone calls and e-mails to explore settlement prospects once the impediments to settlement at mediation have been identified and addressed. For example, the defence may have viewed outstanding undertakings as a stumbling block to settlement. Once those undertakings have been satisfied and analyzed, there may be further opportunities for settlement discussions.

11. DON'T adhere to anyone's list of "DO's and DON'Ts"

The best rule applicable to mediation is that there are no rules. Be creative, thoughtful and innovative. Do not be a slave to prior precedents, be that written material or opening remarks. Mediation is a dynamic process which should test your skills of adaptation. Be curious – why are the parties apart at mediation and what can be done, at the mediation or thereafter, to address the situation. Be passionate about your client and their claim but, at the same time, be realistic. Be prepared to roll with the punches and, above all else, embrace and enjoy the process.