COOPER MEDIATION INC

**SETTING UP FOR SUCCESS AT MEDIATION -**
**TOP MISTAKES AND HOW TO AVOID THEM**
**(The Plaintiff Perspective)**

1. **Late Material / Reports** - In order for you to achieve the best possible result for your client at mediation, you need to ensure that two things which are technically beyond your control are managed to their best effect. These are reserves and authority. While it is preferable to have supplied defence counsel and the insurer with your experts' reports and the ancillary evidence long before the mediation, so that appropriate reserves are in place, timely delivery of these materials at least thirty days before mediation may allow some insurers to adjust reserves; sixty to ninety days in advance of mediation would be preferable. New experts' reports delivered less than seven days before mediation are unlikely to be read let alone affect reserves or authority.

   My suggestion is to work backwards. If your mediation is day zero, then experts' reports should be delivered sixty to ninety days in advance of this date. This will help get the reserves in place. Your mediation memo should be delivered at least seven days in advance (though two to four weeks in advance of mediation is preferable).

   Set out your opening demands in the brief where appropriate. Send two copies of the full, complete tabbed brief so that defence counsel are likely to have the time and inclination to send a copy to their insurance client. Also, give serious consideration to including a list of assessable disbursements (which can be updated in advance of or at the mediation).

2. **Conduct a Settlement Meeting with Defence Counsel Before the Mediation** – This is a technique that is underused and underappreciated. If used correctly, this gives you a chance to preview your opening demands which helps with reserves and authority. It gives you a chance to hear defence counsel articulate their position (which should assist you in the preparation of your brief, your opening statement or your reply). The pre-mediation settlement meeting may shine a spotlight on the holes in your client's case that you need to address.

Indeed, I would suggest that there is no reason not to put forward a settlement demand or settlement proposal early and often. The first occasion might be once defence counsel are appointed [particularly if you have a good relationship with this lawyer or this firm]. Another occasion might follow examinations for discovery. While some counsel may conduct informal settlement discussions at this juncture [and this is not a bad thing], I suggest that counsel for the plaintiff return to their office, reflect on the evidence and on how they plan to develop the case going forward. A written settlement proposal, with figures in keeping with an opening demand at mediation, may impact on reserves or ultimately on authority at mediation. It may give defence counsel and / or the insurer an opportunity to reflect on or reconsider their evaluation of the claim.

Lastly, and at the risk of causing irreparable harm to my business interests as a mediator, you may settle some of your cases at this early stage – before defence counsel or the insurer delve deeper into the matter in preparation for mediation.

3. **Know Your File** – Preparing for and conducting mediation to the best effect is comparable to prepping for and conducting a mini trial. Many have observed that since so few cases, in percentage terms, are tried, the mediation is the trial. Know the strengths and weaknesses of your client's case. Know your client's personal characteristics, their emotional and psychological strengths and weaknesses. Know your opponent's, weaknesses and tendencies. Know as much as possible about the insurer's practices and protocols for analyzing, reserving, adjusting and resolving claims.

4. **Know the Realistic Value of Your File** – It is amazing that there are an appreciable number of lawyers who are able to reference and cross reference a tremendous amount of evidence, documentation and data yet they have little to no idea how to assess, negotiate and effectively resolve the claim at mediation or otherwise. Realistically evaluating your client's claim 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 your client's claim. How would or should you value the claim as:

- Plaintiff counsel;
- The Plaintiff herself;
- Defence counsel;
- Insurance representative;
- Insurance management / claims committee;
- The judge at the pre-trial conference;
- The judge at trial;
- The jury;
- The appellate court.

If you practise this approach, I expect your golf scores will go down and your settlements will go up.

5. **Prepare Your Client for Mediation Early and Often** – Plaintiffs are the only true wild card at mediation. Everyone else should be a claims professional to some degree. Consequently, Plaintiffs need special handling in preparation long before the mediator's opening statement. Spend time with the client to explain the process and to gauge and manage their expectations. Prepare them for what they can expect to hear from the mediator and opposing counsel. Consider whether to and when to obtain what I would describe as "target settlement instructions". These are instructions which the client should understand are only a target – mediation is a dynamic process and the target may have to change, up or down, as the day unfolds. I suggest this process may have to take place in stages as it definitely should occur after you have the defence brief in hand and can either provide a copy to your client or discuss its content or both. Use the defence brief as a tool, as appropriate, to assist you in managing your client's expectations.

6. **Prepare Your Client for the Negotiation** – If you have done what I have suggested, above, then this task should be easier to accomplish. Explain the concepts that will drive the evaluation, negotiation and resolution of their claim. These concepts or

issues include non-pecuniary general damages, the cap on general damages (if appropriate), the deductible, the threshold, the evaluation of economic losses (past loss of income, future loss of income, present values and discount rates), future care costs, accident benefit claims and issues and so on. Explain where and why compromise is necessary and where and why certain claims have less certainty or predictability than others. Explain the concepts of the time value of money – not just present value concepts but the notion that a bird in the hand is worth two in the bush; specifically, settlement at mediation may be preferable to a trial in two years or an appeal in one to two years thereafter. Give a realistic view on the timing of the trial, its duration and your client's role and responsibilities leading up to and at trial. Talk about the anxieties of a trial – their anxieties, not your own – and the fear factor. If your client does not have the intestinal fortitude to weather a trial, better to know it at the time of mediation, and act accordingly, then to blindly push on to trial.

7. **Master the Math** – In personal injury and insurance cases, math, accounting, taxation and present value calculations are critical to understand. If you don't have a head for figures, hire appropriate experts who will not only supply reports but also spend time with you to understand the necessary concepts and component parts of the claim and how they fit together and move and change as negotiations unfold at mediation. A few examples are appropriate to consider:

    - Bill 198 – deductible applied before or after contributory negligence;
    - Income Replacement Benefits – deducted before or after contributory negligence in a tort claim;
    - Future Loss of Income with Income Replacement Benefits ongoing – if you deduct IRBs from gross weekly income and then perform your present value calculation, you will undervalue the claim;
    - Are LTD benefits flat or indexed – if they are indexed, at what rate?
    - What is the appropriate discount rate for IRBs?

8. **The Great Disbursement Debate** – There are competing views whether to supply your list of assessable disbursements with your brief. Some are concerned that

insurers with all inclusive authority at mediation will effectively "borrow" from dollars that would ordinarily be spent on claims to cover assessable disbursements if they know the magnitude of the disbursements early on in the process. If you subscribe to my theory to work hard, early and often, to help the insurer set and adjust reserves and obtain appropriate authority for the mediation, then you may see the wisdom in supplying your list of assessable disbursements (or at least an estimate of the total assessable disbursements) sooner than later.

9. **Outstanding Undertakings and Inappropriate Refusals** – You may wonder how this issue might make a list of mistakes at mediation. Let me put this in context. Insurance companies are suspicious of claims and claimants by their nature. Defence counsel are hired to be, among other things, suspicious. Production requests are made at or before examinations for discovery, and if they remain outstanding, then defence counsel and the insurer are bound to infer that the missing documents must be hurtful to your client's case and helpful to their case. Deal with the undertakings sooner than later. Eliminate the suspicion (or learn about the problems which arise from these productions and either neutralize them or re-evaluate your overall strategy and tactics for the claim). As defence counsel, I always felt that the only thing worse than an outstanding undertaking was a satisfied undertaking (since someone had to wade through the pile of papers, report on the documents and understand and analyze the implications, if any, to the claim). Think tactically about the timing for the delivery of these documents.

10. **Opening Statements** – Who is the audience? It is unlikely that your brief or your opening statement, even with the best case in the hands of the best counsel, will bring the opposition to their knees. Rather, determine what you can realistically hope and expect to accomplish and set off down that path. Avoid the temptation, however great, to denigrate opposing counsel, their experts, the insurance company or the positions taken on the other side of the case. If opposing counsel has been overly aggressive, tell them so in fair but firm terms. If their experts lack the appropriate expertise to opine on a subject, tell them so.

    Do not venture into the "my expert will beat your expert" arena unless there are clear and compelling reasons to do so. The fact that you recognize that the defence expert's reports are all alike does not mean that this information will be before a jury.

Follow the principles of primacy and recency – start and finish with strength or with what matters most. Don't ignore your weaknesses in the hopes that the opposition will overlook them or forget them – anticipate the arguments or evidence that is problematic and do what you can to neutralize the points or to put the points in perspective of the overall claim or, at minimum, plan to address theses weaknesses by way of a reply statement as part of the opening process.

11. **Timing and Quantum of Offers** – If you believe that some of what I have suggested makes some sense, you will have a good understanding of the value of your client's claim, you will have managed your client's expectations and you will be prepared to negotiate. There is no good excuse for a lengthy delay in preparing your first demand – these figures should have been delivered at the pre-mediation settlement meeting or in a pre-mediation settlement proposal or in the brief. Thereafter, the speed with which you respond to defence offers is subject to the "Goldilocks" principle – the wait should be not too long, not too short but just right.

    As for quantum, I can't 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:

    - Percentage changes;
    - Gross dollar changes;
    - Strengths / weaknesses of the component parts of the claim;
    - 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).

12. **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.

13. **Prepare! Prepare! Prepare!** – need I say more.

14. **Be True to Yourself** – Everyone has their own style of advocacy. It starts with television and the movies, moves into role models as we move through articles and progress as young lawyers. There is only one Wendy Moore Johns and only one Barry Percival. I know both and there is a world of difference between them and their styles of advocay.

    Your presentation and demeanour at mediation, and probably in all aspects of your life as an advocate and in all walks of life, have to suit your personality and makeup. Play to your strengths and know and compensate for whatever weaknesses you may have.

15. **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; seldom is this person the mediator.

16. **Collegiality** – You will have an easier time at mediation and generally in your practice if you can have civil, cordial or amiable relations with the opposition. This applies not only to your relations with defence counsel but also insurance adjusters. Be or appear to be interested. Be sincere – whether you mean it or not.

17. **Your Beliefs / Thoughts Don't Matter** – It matters not what you believe. It matters most what you can prove or make a judge or jury believe. Many tend to express their own views or opinions at mediation (or in submissions at hearings of one sort or another). It is preferable to explain how and why the trier of fact will come to a view. Which of the following is more persuasive:

    > My client is very credible. I have known her for the past five years. I attended with her at discovery. She answered all of the questions in a direct, candid and forthright manner. She will make an excellent witness at trial.

    **or**

A jury will find my client credible. She is bright and attractive. She was always very industrious and hardworking and jurors will relate to her pre-accident work ethic. If there were credibility problems, over and above those set out in the defence brief (such as surveillance or investigation), I would have heard about them through the discovery process. While there are no sure things in front of a jury, I expect my client to be very well received in court.

**18. Mediation Survivor:** Outlast / Outsmart / Outwit