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FAILED MEDIATIONS – MAKING LEMONADE OUT OF LEMONS

There is a common view that when mediation produces a settlement, it has been successful and, conversely, where mediation fails to produce a settlement, it has been a failure. Needless to say, mediators, me included, would prefer not to characterize a mediation which does not produce a settlement as a "failed mediation". I believe there are benefits to be gained from any attempt at mediation.

Learn More about your Case and that of your Opponent

As a starting point, I have assumed that counsel and their clients have attended the mediation with a sincere intention to resolve the dispute. I will have more say about insincere or disingenuous mediation, below.

Mediation should provide you with an opportunity to assess those parts of your claim or defence which resonate with the other side and those which do not. You should be able to leave the mediation with a better understanding of the component parts of your claim or defence which appear to have strength, as perceived by the other side, and those parts which are perceived as weak or problematic. This should give counsel an opportunity to attempt to strengthen or buttress the weak parts of their claim or defence and consider jettisoning or minimizing the import of those parts of their claim or defence which may weaken the overall presentation of the matter, particularly in front of a jury.

Mediation should provide you with an opportunity to assess the strength of your opponent's claim or defence and your perception of your opponent's capabilities as an advocate. While I would certainly not suggest that mediation advocacy and trial advocacy are one and the same, you should be able to gain some insight into the abilities of your opponent to think on his or her feet, their oral advocacy skills, their commitment to one or more aspects of their claim or defence and their potential "likability" in front of a judge or jury.

You should also be able to form an impression as to whether the matter is more or less likely to settle in the future. For example, in some cases, missing reports, records, employment documents, income tax returns and the like stand as an impediment to resolution at the

mediation but, with such records being produced, there is potential for resolution in the not too distant future. In other cases, it becomes apparent that there are at least two diametrically opposed views on one or more issues which are sufficiently critical and pivotal such that resolution is unlikely and trial more likely.

Mediation affords counsel and their clients a reconnaissance feature. Each side should leave the mediation with a list of things to do (undertakings to satisfy or pursue, evidence to procure, holes to be plugged, etc.).

Counsel should leave the mediation with a better understanding of the real and meaningful issues that remain in dispute which will drive the litigation going forward. Further and better efforts can be made to assess the damages and the risks associated with the claim with a view toward moving forward, at some later date, to achieve a reasonable settlement.

In what I believe to be a small percentage of cases, one side or the other or both attend mediation without a sincere or genuine intention of resolving the matter. Counsel or their clients view the mediation as a fishing expedition with a view toward finding out how low a plaintiff may go, how high an insurer may go or to gain a better understanding of the weaknesses in one's case as disclosed in their opponent's mediation memorandum or the remarks made by opposing counsel at mediation. While I would like to believe that this occurs in a very small percentage of mediations, it does happen from time to time. That said, this is a legitimate by-product of a failed mediation.

Preview a Witness

In personal injury matters, it is frequently said that the most important witness is the plaintiff. This is certainly true for personal injury claims which cannot necessarily be proven through obvious, objective means [chronic pain and mild brain injury claims come to mind]. If the plaintiff is likely to be a strong witness at trial, they should be encouraged to speak at the mediation. This will afford defence counsel and their client with the ability to assess the reception the plaintiff is likely to receive from the trier of fact. The plaintiff should be discouraged from reading from a prepared script. If necessary or appropriate, counsel for the plaintiff can conduct a miniature examination in chief on one important or impactful aspect of the plaintiff's claim. This should never be about pain complaints or treatment but, rather, should be about some important

aspect of the plaintiff's life that has been changed by virtue of the accident or circumstance which gives rise to the claim.

Two examples come to mind. In one case, the plaintiff suffered a high above knee amputation. He and his health care professionals were continuing to struggle with the prosthetic fitting process. The plaintiff, who was a male well into his 50s, had been heavily involved in sports while raising his children and continued to play recreational softball in two leagues at the time of the accident. When he spoke at the mediation, he talked about his commitment to rehabilitate himself, master his prosthesis and play at least one more softball game so that he could retire on his terms rather than on the terms foisted upon him by reason of the accident.

Another example arose in an occupier's liability case where liability was very much in dispute [at least as far as the defence mediation memorandum was concerned]. Counsel for the plaintiff conducted a miniature examination in chief and asked his client, with proper open-ended questions, to deal with what the defence had raised as liability problems. The quality and content of the plaintiff's answers were impressive; liability was no longer an impediment to resolution as the mediation went forward.

There is no reason why the defence could not bring its insured to the mediation if liability is in issue and proceed as I have described, above. That said, the insured has already undergone an examination for discovery and counsel for the plaintiff has had the opportunity to evaluate both the content and quality of such evidence so this is probably redundant.

Finally, each side could consider bringing one or more additional witnesses to the mediation. This could be a lay witness, an employer, a co-worker or an expert. In cases where there is truly an issue of causation as between the accident and the primary medical condition giving rise to the claim, a well-qualified and well prepared expert could make a significant impact at mediation.

Present the Theory of your Claim or Defence in an Unfiltered Manner

At mediation, it is frequently said that this is the one opportunity for counsel to speak to the decision maker on the other side of the case. This is true and this is an important opportunity which should not be squandered or treated lightly. You have no way of knowing what the decision maker on the other side of the matter has been told about the strength or weakness of

their position or of your position. Mediation gives you an opportunity to rectify this situation in two fashions.

First, counsel should deliver a mediation memorandum that is well-organized, thoughtful and impactful and deliver it sufficiently far in advance of the mediation so that it is likely to get into the hands of the opposing decision maker. If you want the plaintiff to read the memorandum and you have doubts about their level of sophistication and understanding, tailor the memorandum [or at least parts of the memorandum] for them. It should not be so long as to discourage the intended reader from embarking on such task.

The opening statement is the only thing that you can be sure is being received by the opposing decision maker. As my colleague, Jon Fidler, has said, "Be sincere, whether you mean it or not". The presentation of counsel, and the plaintiff or insurance representative if they choose to speak, should be or appear to be sincere, heartfelt and meaningful. If you are going to start your oral remarks by stating that you are happy to have the chance to meet someone and try tor resolve the matter, you should look at that person and at least appear to be happy. This statement, if presented by rote, falls flat. Similarly, if your opponent is speaking, appear interested and make some notes. It is rude, at mediation and elsewhere, to be looking at your watch or your hand held device, while someone else is speaking at mediation.

Finally, present your claim or defence in a new format or from a new perspective. Thankfully, very few counsel actually read their mediation memorandum to the other side. However, many counsel follow the same format, structure and organization of the memorandum and present the same content, albeit in a condensed or limited form. This is a lost opportunity. Before you make your oral remarks at mediation, you have the benefit of having received and reviewed your opponent's memorandum. With both documents in hand and in mind, you should be able to identify the critical or pivotal issues or pieces of evidence. Every effort should be made to tailor the opening statement with this additional knowledge in place, whether to focus on areas of agreement or disagreement or both, evidentiary strengths, weaknesses or gaps, etc.

A technique employed by some counsel is to identify the points of agreement and the points of disagreement. If numbers or ranges can be attached to the points of disagreement and if those points can be quantified, every effort should be made to do so. For example, in a claim where attendant care is obviously required, counsel for the plaintiff can make significant headway by taking the defence approach, whether as to hours, rate of payment or otherwise, and produce a

present value assessment of the defence position. This should set the floor for the defence opening offer in relation to this aspect of the claim. Similarly, the defence could do the same with the plaintiff's income tax returns [as compared to the assumed annual earnings in the report of an accountant or economist] or with a realistic discount for labour market contingencies or retirement age in the case of a future income loss.

Narrow the Issues

Frequently, issues that were perceived to be contentious leading into the mediation may be found to be either less contentious or non-contentious. There may be opportunities to agree upon liability (or a liability split). On some occasions, there may be an opportunity to forge a limited agreement in relation to economic loss. As an example, the defence may concede that the plaintiff cannot return to work but the stumbling block may be causation (a subsequent, intervening act or medical condition which the defence contends is the primary or sole cause of impairment leading to the inability to work). Other examples include the need for 24/7 care (or some lesser quantity of care) or the rate of care.

Agreed Statement of Facts or Agreement regarding Evidence to be Filed or Admitted

In some cases, there may be a willingness to pursue agreement on a collection of facts which will reduce the length and resultant cost of a trial. I concede, as counsel, that this concept was always more attractive in principle than in execution. That said, thought should be given to the idea and effort should be devoted if there is potential for an agreement to be reached. In addition, agreement can be reached in relation to documents to be filed and the content and preparation of a joint documents brief. Finally, there can be discussion and potential for agreement [subject to the discretion of the judge] as to the evidence to be adduced and/or limitations or circumscription on certain evidence. Two examples that come to mind include medical reports produced in a companion claim or action [such that the Rule 53 certificate is not available to counsel], experts who may offer opinions which stray from their area of expertise.

Motions

Certain cases may lend themselves to one or more motions which may help the parties further limit or narrow the issues in dispute or streamline the litigation. Consideration should be given to motions for summary judgment (partial or otherwise) or determination of a legal issue which may impact in a significant sense on the final result. Mutually convenient dates or the

approximate time frame for "housekeeping" motions can be agreed upon. In this regard, I am speaking about motions for undertakings, trial together, change of venue, etc. In some cases, defence medical assessments have yet to be conducted and there should be discussion about the experts intended to be retained by the defence, with reference to area of expertise, and counsel for the plaintiff can take a position as to whether all or some or none of those assessments are agreeable. In certain cases, there may be terms associated with expert assessments which are required and which can be negotiated. One quick example which comes to mind is engineering assessments in product liability claims

Trial Management

In some jurisdictions, trial scheduling forms are required. These forms should be brought to the mediation and, if the mediation is not going to produce a settlement, then effort can be devoted to completing these forms. In jurisdictions where this is not required, effort can be made in a similar vein. Counsel can discuss a realistic timeline and timetable for remaining events in the litigation to be conducted (further discovery, medical assessments, outstanding undertakings, etc.) and establish a realistic timetable as to when the matter can and should be reached for trial. Counsel can strive to agree upon dates for trial or the appropriate trial sitting.

Absence of Reports of Experts

It is not uncommon for one side or the other or both to not have all of the experts' reports in hand at the time of the mediation. My view is that this is generally for cost saving purposes (though there can certainly be other explanations, legitimate or otherwise). I suggest that one must seriously question whether those reports, if obtained, will have a genuine, meaningful and significant impact on the evaluation of the claim and its potential for resolution. Counsel for a plaintiff can undoubtedly obtain reports addressing the cost of future care, the threshold (in motor vehicle cases) and accounting reports. Counsel for the defence can readily obtain reports negating the plaintiff's claim for chronic pain.

I suggest that if one side or the other puts great weight or stock into the notion that their case will be significantly improved through the retention of one or more experts, this thought should be carefully reconsidered.

I concede that there are many cases where reports of experts are invaluable. Frequently, there are issues of medical causation that require the use of and benefit from a considered opinion

from an expert. However, I find such cases to be the minority; in the majority of cases, the underlying facts and the source evidence (ambulance call report, hospital records, clinical notes, consult reports of treating health care professionals, etc.) are more likely to drive the evaluation and resolution of a claim than the reports of the proverbial "hired gun".

Consequently, careful thought should be applied before coming to the conclusion that the absence of reports of experts stand in the way of settlement at mediation. Frankly, in smaller cases, if some or all of the saved costs can be applied to efforts at resolution at mediation, settlement may well be possible.

Defensible Claims

There are cases where the insurer has no intention of making an offer (or no offer in excess of nuisance value). As a starting place, I wonder about the use of resources (time spent by counsel preparing mediation memoranda, expense of counsel and the expense of the mediator along with the opportunity cost of all who attend at the mediation). In such cases, thought should be given to conducting a telephone mediation without exchanging memoranda or using a roster mediator and exchanging perfunctory mediation memoranda.

By the same token, my experience tells me that there are opportunities to resolve such claims. On some occasions, the insurer may believe that they have an unassailable liability defence. This view can be changed by an impressive plaintiff who speaks at the mediation or by a thoughtful or creative presentation by counsel for the plaintiff (referencing the evidence that has been mustered and giving the insurance representative an unfiltered, fair and realistic view of the case).

In other cases, where the threshold is in play, counsel for the plaintiff may be able to move the insurance representative to the "right number" for reasons apart from non-pecuniary general damages (focusing on past or future income loss where there may be an impairment which is either not serious or not permanent or both) or identifying other pecuniary claims which are not dependent upon proving a threshold calibre injury. In other cases, counsel for the plaintiff will have a better understanding as to the evidence that needs to be obtained to overcome these obstacles; in other cases, the plaintiff will gain insight and understanding as to why their claim is not amenable to settlement and better understand the upside opportunity and downside risk associated with proceeding further with the matter.

Conclusion

Most who participate in a mediation seek to settle their claim; where this proves to be beyond reach, counsel and their clients lose an important opportunity to achieve other results and secure other benefits as an incident of the mediation process. In order to do so, counsel and their clients must approach the matter with creativity and ingenuity. Mediators can, should and will assist them if afforded such an opportunity.