Mediation Cancellations – A New Perspective on an Old Problem

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Imagine staring up at the flight board at the departure gate in a airport. You'd hope to see the list of flights awash in green lettering saying "On time." But if you cast your eyes up and see a peppering of "Delayed" or "Cancelled," your heart sinks as your eyes search for your flight number.

Lately, many of my mediation colleagues have noticed an increase in the frequency of cancellations on our own 'flight boards'. Mediation cancellations invariably lead to cancellation accounts which mediators do not like to render and clients do not like to receive. Is this a statistical aberration or a sign of the times? The answers or explanations as to why these mediation sessions are being cancelled before take off are likely many, complicated and complex. In this blog/paper I have come up with a number of possibilities for why there is a failure to launch these mediation sessions and provide my thoughts and suggestions for ways to avoid cancellations and to make best of the mediation you have scheduled.

1. Matters Are Settling In Advance of Mediation

There is no need for a flight when you've already landed at your desired destination. This is commendable. Lawyers should be encouraged to negotiate directly with each other or with the insurance claims professionals before commencing an action or during

a waiver of defence. Interestingly, this happens less in jurisdictions where mediation is mandatory [Toronto, Ottawa and Windsor]. Indeed, I was discussing this issue with a plaintiff lawyer who has practices in London and Windsor. Approximately 90% of the Windsor matters proceed to mediation; less than 50% of the London matters proceed to mediation.

The key to avoiding a cancellation account is to diarize the cancellation date as well as the mediation date. Human nature is such that we work to diary dates and deadlines. I believe that the mediation date, with the need to prepare for the mediation, draft a mediation memorandum, etc., serves as a trigger or prompt to review the matter. It's rare for something to transpire in the last few days leading up to the mediation which gives rise to a settlement opportunity. I suspect that it is the mediation event itself, and the necessity to review of the matter, which prompts one side or the other or both to explore resolution. If counsel were to undertake the same process in advance of the "no fee" date for cancellation, the same outcome could be achieved without incurring a cancellation fee.

Alternatively, if the matter is reviewed in advance of the "no fee" date for cancellation and one side or the other comes to a realization that the matter should not proceed to mediation at this time, the mediation can be cancelled and rescheduled without incurring a cancellation fee. If counsel speak or communicate in advance of the "no fee" date for cancellation, they can discuss resolution or discuss real and significant impediments to resolution at this time. Hopefully they can come up with a timetable or a process or both

to address those impediments and obstacles in a constructive way. There are very good and not so good reasons to cancel a mediation. The balance of this paper will attempt to identify and discuss the latter.

2. Late Breaking Reports From Experts and Late Evidence

This is a pet peeve of most mediators. As a starting place, there is no good reason, but for an expert letting down counsel, for this to happen. The mediation has likely been booked for months if not more than a year. If you need the report of an expert, it is imperative that you work backwards from the mediation date, consult with your expert and inform him or her of your deadline so that the expert's report can be delivered well in advance of the mediation. If the expert's report is likely to "move the needle", one way or the other, it must be delivered at least 30 days and preferably 60 days in advance of the mediation so that it can be considered, evaluated and responded to if that is necessary. All of that said, if you are on the receiving end of a late expert's report, the instinctive reaction is to cancel the mediation so that your client can obtain a responding report. Before you do so, consider whether the late expert's report **materially affects your evaluation of the matter**. I suspect this is an infrequent occurrence.

In a personal injury matter, is it really necessary to obtain a responding report to deal with chronic pain? With the greatest of respect to the experts who earn tens of thousands or hundreds of thousands of dollars in the field, the answer is a resounding **NO**! The usual suspects provide the usual opinions. When is the last time that the defence accepted a plaintiff's offer when accompanied by a plaintiff expert report? When

is the last time that the plaintiff accepted a defendant's offer when accompanied by a defence expert report? The answer to both questions is the same – **NEVER**!

Likewise, an accounting report is, with a few exceptions, nothing but arithmetic with assumptions. If the assumptions are unreasonable and cannot be proven, the opinions are worthless. If the assumptions are reasonable, then the mathematics should be straightforward. Given that every smart phone has a calculator and access to present value calculators provided by structured settlement brokers, is it really necessary to cancel a mediation by virtue of a late served accounting report? I think you'll agree that the answer is obvious.

3. Conduct Pre-mediation Conferences, With or Without The Mediator, and Create Rules

A pre-mediation conference can be invaluable. For example, the lawyers could speak once there is a realization that mediation is necessary and appropriate for a given matter. At that time, they could identify a number of mutually convenient mediators, a number of mutually convenient dates and establish a timetable for completion of necessary steps in advance of the mediation with a view toward creating the optimal environment for resolution at mediation.

As for rules, the defence could commit to pay 100% of the cost of the mediation, regardless of the outcome, on condition that the plaintiff's evidence [experts' reports, answers to important undertakings, etc.] is delivered at least "X" days in advance of the mediation and that the plaintiff's mediation memorandum is delivered at least "Y" days in

advance of mediation. Completion of this work on schedule will improve the ability of defence counsel to get the evidence and the memorandum to the insurer in sufficient time to complete their evaluation, adjust reserves and grant authority for the mediation. If the plaintiff breaks the rules, the defence would have the ability to cancel the mediation at the sole expense of counsel for the plaintiff.

Conversely, the defence would be obliged to pay 100% of the cost of the mediation, regardless of the outcome, or of the cancelled mediation if the defence provides late evidence [defence medical assessments and surveillance / investigation come to mind] less than “Z” days in advance of the mediation. Another rule could be created for the timing for delivery of the defence mediation memorandum with similar consequences.

Many very experienced and well regarded plaintiff lawyers have told me, time and again, that the defence mediation memorandum is one of the best tools they use to manage the expectations of their clients. Unfortunately, mediation memoranda delivered on the day before the mediation makes this task impossible.

4. Kick The Can Down The Road

Previously, I noted that we are all creatures of habit and we tend to respond to diary and due dates. I suppose the corollary of this observation is that we are all prone to procrastination. This is particularly true if we are about to undertake an unpleasant or undesirable task. One side or the other or both may communicate in advance of mediation to the effect that prospects of resolution are dim and, as such, there may be no point mediating at this time. Frequently, this is avoidance of a difficult matter, a

difficult conversation or of a difficult issue in a particular matter.

For example, if defence counsel in a personal injury matter indicates that his or her insurance client is unlikely to be bringing any meaningful settlement authority to the mediation, this does not necessarily mean that the mediation should be cancelled. If counsel for the plaintiff takes a long, hard look at their client's claim, it may be that the insurer may not be wrong, having regard for the facts, evidence and current state of personal injury trials in Ontario, particularly in front of juries. If the mediation is cancelled, the problem it is not addressed but merely deferred. The problem is certainly not solved by obtaining an expert's report if the underlying facts and evidence are unlikely to be accepted by the trier of fact.

On the other hand, if counsel for the plaintiff believes that defence counsel or the insurance representative have misapprehended the realistic evaluation of their client's claim, mediation is a perfect opportunity to speak directly to the insurance representative. This discussion will give them a perspective they may not have previously received, give them an opportunity to personally view and, if appropriate, hear from the plaintiff and give the insurance representative an opportunity to appreciate the advocacy skills of counsel for the plaintiff. It may not lead to resolution at the mediation but this mediation sets the stage for discussions and negotiations down the road.

At minimum, the participants to the mediation should benefit from the process, the discussion, reality testing and the like. This is an opportunity to evaluate what you perceive to be the strengths of your case and get meaningful feedback from opposing

counsel and from the mediator. This is also an opportunity to understand or better understand your weaknesses and realistically evaluate whether those weaknesses can be undone or repaired. If you do not proceed to mediation, your chances of resolving the matter are 0%; if you proceed to mediation, your chances must be statistically greater.

5. Change In Personnel

From time to time, counsel for the plaintiff will admit, with some embarrassment, that they have lost their client. Obviously, a lawyer is not a shepherd and cannot control a client who moves without providing new contact information. That said, in a day and age of email and cell phones, this is surprising. Moreover, it is symptomatic of a larger problem which I suspect stems from a lack of regular contact between the plaintiff and their legal representatives. I suggest it is essential for the legal representative to stay up to date on the evolution of their client's claim. In a personal injury matter, a change in symptoms and complaints, treatment, or the lack thereof, a return to work or the inability to continue with work are essential pieces of information throughout the course of the matter and, in particular, when approaching a mediation.

From the defence perspective, regular contact between a lawyer and the insurance representative is essential. Most insurers have protocols and procedures such that they expect regular, routine and frequent reporting. If a lawyer is not adhering to those protocols, this creates problems for the lawyer and for the relationship between the law firm and the insurer. If the lawyer is not receiving a response to their reports, emails and voicemail messages, this may mean that the insurance representative has been away

from the office for an extended period of time or may have moved on to another company. If this circumstance is discovered just before the mediation, it is unlikely to find a new insurance representative, particularly a representative fully versed in the matter with appropriate authority, to attend the mediation on short notice. Moreover, there is a lost opportunity to foster and maintain relations between the lawyer and the insurance client.

If the defence lawyer with carriage of the matter moves on to another firm, it is essential that his or her calendar of events are transferred to a new lawyer as soon as possible. If the plaintiff lawyer or insurance representative has any doubts in this regard, the time to make inquiries is sooner rather than later with a view toward the mediation proceeding as scheduled or being cancelled in advance of a cancellation fee being incurred if that is necessary and appropriate.

6. Changing Courses; Changing Horses

There is considerable variability in terms of experience and expense amongst mediators. It may be that the matter was originally considered to be simple and straightforward such that a less experienced and lower-priced mediator was retained. The matter may have increased in complexity or exposure. The converse may be true such that the matter is scheduled with a more experienced and higher priced mediator. The time to evaluate the appropriateness of the mediator for the matter, as it has evolved, is in advance of the date to cancel the mediation without incurring a cancellation fee.

Ultimately, I believe the choice of a mediator for a particular matter involves a number of

considerations. Obviously, experience and expense are important. The ability of mediator to interact with the personalities involved in the matter cannot be underestimated or undervalued. Some clients will need to hear from a retired judge; others will be receptive to the well-honed facilitation and mediation skills of millennials. There is no question, to my mind, that the selection of a mediator is not an application of “one-size-fits-all”. Each matter is entitled to a tailor-made solution. The question should not be the fee charged by the mediator; rather, the skills employed by the mediator and the value received by the parties from the mediator should be determining factors.

Conclusions

Mediation cancellations happen. Sometimes the reasons for cancelling the session are strong and undeniable. Other times, lapses in planning or breakdowns in communication lead tp cancellation accounts that could have, and probably should have, been avoided. A combination of planning, thoughtful reflection and thorough consideration will minimize the need for cancellations and the receipt of cancellation account. Mediators do not like to send cancellation accounts; but full-time mediators do not have a law practice to fall back on if a mediation is cancelled and a day or part of the day suddenly becomes available. Clients do not like to receive a cancellation account as they are paying “something” and receiving “nothing”.

ABOUT THE AUTHOR

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To schedule a mediation with Vance, visit:

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