COOPER
MEDIATION

Mediation Guide:
The Insurance Claims Professional Perspective

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Is there such a thing as too much of a good thing when it comes to mediation? In January 1999, the Ontario Mandatory Mediation Program was launched in certain judicial venues (Toronto, Windsor and Ottawa). Initially, this program/process may have lived up to the government's intent: "to help parties involved in civil litigation and estate matters attempt to settle their cases before they get to trial, thereby saving both time and money."

These days, it seems mediation for some matters can be seen as more of a hindrance than a help. In this article, I would like to give a fresh perspective on what appears to be a recurring and frustrating issue among insurance claims professionals involved in these cases. Hopefully, these tips and insights will help you make the most out of any mediation in which you're involved.

PREPARING FOR A MEDIATION

1. Making A Serious Attempt At Resolution

When I'm retained and a mediation is scheduled, I send out a mediation agreement that everyone signs before we commence any discussion about the case. The very first clause states:

> *Mediation is an informal settlement process by which the Parties try to reach a solution that is responsive to their interests. The signing of this agreement is evidence of the agreement of the Parties to make a* ***serious attempt*** *to resolve the outstanding issues.*

I believe my job as a mediator, as fellow IAM member Steve Rottman puts it, is to help the parties in conflict find their way to a resolution that makes more sense than continuing with litigation. Mediation doesn't always have to end in resolution, but a serious attempt should be made to understand the cost-benefit and risk of settling versus continuing litigation. If it doesn't make sense for one party or the other to resolve the matter at mediation, don't.

There are some key questions to ask yourself. Where is the value of the case likely to go? Will it get better for your side over time? Will it get worse? Do you have enough evidence in terms of medical reports, surveillance and any other required proof to make an informed decision today? [If you answered No to any of these questions, consider using Cooper Mediation's Complimentary Case Managed Mediation Service to ensure you have everything you need on the day of mediation]. What is the value of this case on the best, worst and average days in court? Is it worth the risk of losing in court and having to pay higher fees, costs, and disbursements? The process of answering these questions and others I will pose in this paper will give each party the best chance of resolution.

Recently, a lawyer I have worked with many times brought the “serious attempt” clause to my attention. The lawyer thought that a position taken by the defence not to indemnify the plaintiff does not constitute a “serious attempt” to resolve the outstanding issues. Is an attempt to settle only serious if money is involved? Resolving the outstanding issues in a claim or matter does not necessarily need to be accomplished by monetary means - at least not initially. At some point, most of the time, it will likely take money to resolve claims in personal injury, long term disability, employment and contract law, these being the areas of my own mediation practice. However, other outstanding issues can also be resolved at the mediation even if money matters remain unsettled. If nothing else, the parties should leave the mediation with a better idea of the strengths and weaknesses of proceeding with the lawsuit. Before you leave the mediation, ask yourself: Is there anything else I can do to help the other side make a fully informed decision? Have I put my cards on the table? Does it make sense to continue with the litigation? I can say confidently that most, if not all, insurance claims professionals I meet at mediation, do not arrive at mediation looking forward to saying no or giving a $0 offer to a plaintiff. Nevertheless, these professionals have various policies and procedures in place set by management, influenced and affected significantly by laws applicable to the claim and a careful evaluation of the facts and evidence, all of which must be satisfied before they can make offers to settle that involve money.

If a plaintiff can produce evidence that shows an insurance claims professional tangible exposure to risk, defendants will be far more likely to agree to resolve claims by paying money to the plaintiff. However, if documents or evidence to substantiate a claim for general damages are not produced or are not persuasive, how can a plaintiff realistically and seriously expect an insurance professional to put their own neck on the line? If their file is audited and the necessary evidence is absent, an insurance claims professional could face serious consequences for making such an offer.

A plaintiff lawyer should be aware of what evidence is necessary before a mediation can delve into potential monetary settlements. This doesn't mean obtaining an expert report just to tick off a box. It means that the plaintiff should provide the necessary documents that the defendant requires. What is the best way to ensure you have this information well in advance of the mediation? Think about it this way; as Tom Cruise's character in Jerry Maguire says, "Help me, help you." A solid piece of advice for all insurance claims professionals is to outline your requirements and timelines from the outset. This is the only way you will likely have everything you need on the day of the mediation to make an informed decision. Let's start with some other points to consider before the mediation date is even set.

2. Court Case Wait Times

With the Supreme Court of Canada decision in *R. v. Jordan*, we saw wait times for personal injury court cases increase. Moreover, with trials being significantly disrupted

due to COVID-19, wait times for trials will likely be even longer. Long wait times are a major strain on our justice system. To keep the administration of justice from collapsing under the weight of such backlogs, mediation, negotiation and settlement discussions need to be at the forefront of plans for easing the load on the justice system. Ask yourself: does this case need to continue for two to three years or more, or can you settle it now and get one more item off your to-do list. Timing is important; and so are the relationships you will forge among the parties and their counsel.

3. Forge Strong Relationships and Processes

Relationships matter. As you will learn, if you haven't already, it's rare to have a "one and done" case with a plaintiff lawyer. More likely, you will meet each other at mediation and in court periodically. The key to having strong, authentic relationships is clear communication. As soon as a claim comes across your desk, make a vow to yourself that you will get off on the right foot. Have a process set up with your lawyer that details what you need and when you need it for each matter. For example, what do you need in terms of medical reports and assessments? Set clear and attainable expectations and timelines.

For simplicity's sake, fast forward to the day when the examination for the discovery process concludes. If you aren't in attendance for the examination, ask your lawyer to speak with the opposing counsel (privately) to discuss the way your organization generally views and evaluates cases. Without giving away trade secrets, your lawyer

should be able to give the plaintiff's lawyer a rough idea of what typically flies and what certainly doesn't.

Let's take past loss of income as an example. It should be quantified with near certainty. What evidence needs to be produced for you, and your organization, to be satisfied that a past loss of income exists and can be linked to the loss at hand? If the lawyers are on the same page prior to the mediation in terms of productions, there is a much better chance of resolution without further, potentially lengthy and expensive, proceedings. I would say it's rare, almost "not possible," for a claim **not** to settle at a mediation because of the calculation of a past loss of income. Assuming the parties are aware of the same set of facts and information, without issues of causation and liability, math is math, and the loss should be able to be quantified without the need for an income loss report. Save the tougher battles / disagreements for the more speculative claims, without crystal balls like future care needs and future economic losses. This should help keep disbursements low and allow you more room to negotiate if you choose to do so.

4. Saving The Date And Choosing A Mediator

Scheduling the mediation can be the start of the parties demonstrating an interest in working together to find common ground. They may discuss timelines for when they want or need a mediation to be held, who they would like to propose as a mediator, and whether there are any special considerations such as location (including via videoconference), technical support, or whether wheelchair accessibility is needed.

Choose dates convenient to you and your lawyer, but give a range of options to the opposition. Once dates have been narrowed down, move on to whom the parties would like to serve as mediator. Mediator availability, cost, and experience are always part of this decision. But think about relationships and a mediator's communication style as well. Who would be able to get through to a plaintiff? Who do you like to work with? Most importantly, who do you and/or counsel trust? There is no "one size fits all" approach that works.

Here's a trick that works to get a mediator you want while also earning goodwill from the plaintiff's counsel. If you ask opposing counsel for a list of three to five mediators they think would be well suited to mediate the matter, at least one of those names will be on your list as well. Rather than telling opposing counsel when and who you are going to mediate with, give them options to make a decision that does not feel forced on them. When it comes to your mediation list, a tip is to select mediators based on the case details. Have a list for routine cases (roster-rate mediators, such as my colleague Logan Cooper), more complex cases (senior mediators, like me) and the most complex cases (such as my colleague Vance Cooper). Being prepared allows you to make a good first and lasting impression each time.

5. An Incentive For All Sides?

In terms of your mediation protocols, I would like to propose what may sound like a crazy idea, but one that may provide an incentive for each side to arrive at the mediation

with all the information they will need to make informed decisions. What if defendants agreed to pay for 100% of the cost of the mediation, regardless of its outcome, in situations where opposing counsel fulfilled all undertakings and provided the defence with everything they require well before the actual mediation date?

Imagine preparing for a mediation where there are no late reports, nothing coming in at the last minute (for the most part, knowing that sometimes it's out of our hands). We could build a process that is structured and has a foundation of trust attached.

As an insurance professional, if you set a timeline where the defence receives this information 45-60 days prior to the mediation (30 days would likely be the absolute minimum), you can set the reserves and receive authority that is in line with the evidence produced in a timely manner. Insurance professionals tell me time and again that their job "is to assess risk based on the evidence." Without access to all of the supporting documentation/evidence, why would an adjuster try to connect the unconnected dots? If the file gets audited, the insurance professional should be able to clearly explain why they paid what/where/when they did. Expert reports served right before the mediation date can often throw a wrench in the works. Typically they do more harm than good. Therefore, let plaintiff's counsel know that anything received after the 30 day period prior to the mediation will not be considered. This 30-day window, if used properly, should allow the parties to make key decisions well before a mediation.

If necessary, most of the time the parties should be able to cancel mediations with advance notice. I never feel good about sending out a cancellation account, but my policy, which is fairly common with other mediators, is that any cancellations within 30 days of a mediation date attracts a cancellation fee. It bears repeating: make sure your organization's protocols and rules are well known to the other side and to the mediator so that there is no question as to who will assume the cancellation fee if the mediation is cancelled by reason of a breach of protocols.

Finally, when thinking about timing, protocols and rules, and workback schedules, it bears repeating - consider having your mediation case managed by the mediator (read our blog post Case Managed Mediation: A Complimentary Service to Get Your Case Ready for Mediation). This service would allow the parties to mediate the matter early on, set the matter down and have a second mediation closer to the date of pre-trial, which may prove useful for matters in jurisdictions where mediation is mandatory (Toronto, Windsor and Ottawa).

6. Strategy and Planning

Working backwards from the mediation date, if necessary, make it clear to all parties (including plaintiff counsel as well as your own representation) when you will be meeting with supervisors or management within your organization to obtain authority to deal with the matter at mediation. Sufficient time in advance 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, expert reports and mediation memoranda. Special attention should be made to the plaintiff's list of assessable disbursements prior to the meeting (even if it's slightly out of date by the time of the mediation). This will assist you in obtaining appropriate authority to deal with the claim and the disbursements separately so you don't have to borrow from one to satisfy the other.

If schedules and timing allows, plan for a meeting or conversation with your counsel prior to the mediation to discuss strategy and tactics. In the plaintiff's room, there is usually an unfamiliar decision maker. The less time a mediator spends in-between caucus rooms, waiting for defence offers or private conversations between insurance representatives and defence lawyers, the better. The mediator will need time to explain the offer to the plaintiff and provide context that will help smooth over issues that arise at mediation and facilitate the plaintiff's decision-making process. You don't have to have every offer or dollar figure you plan on making charted out prior to the mediation, but if you are on the same page as your lawyer, making offers throughout the mediation can be done with ease.

While a half-day mediation typically is scheduled for three hours, I have found in the last five years that most half-day mediations end up lasting 4 hours. This often leads to a last-minute shuffle and rush to ensure all parties can make it to their next meetings. The final hour is often crucial to negotiations as parties have worked through the details of the case and are in the thick of finalizing the deal and reaching a settlement. It is with

this in mind that I changed my half-day meditations from three hours to four hours. Consider making this one of your criteria when selecting a mediator. You may find that your settlement rates increase.

MAKING THE MOST OF YOUR MEDIATION

7. When The Mediation Day Arrives

In my experience, there are a couple of important things in mediation that are easy to do, but also easy to do poorly or entirely forgotten.

While it's important to be personable by inquiring about a person's life and showing an interest in their situation, in your opening remarks, it's best to avoid relating your life to that of the plaintiff. Each person's situation is different. If you do feel the need to talk about how you've dealt with pain or a previous car accident, please don't begin by saying, "it's not personal." To the plaintiff, it is personal. Opening statements in a plenary joint session are a great opportunity to start the mediation down a path that leads to compromise and positive negotiations. However, they can also be a major reason very little can or will be achieved throughout the mediation process.

Ultimately, think about what you are going to say, what outcome you are trying to achieve and how you can best get your point across. Don't forget that the opposing decision maker is almost always less knowledgeable about insurance claims than you are. Therefore, make the message digestible, understandable and relatable.

I have never seen or heard of a mediation settling because one party convinced the other that they were right, the other party was wrong, and that party then agreed to put the lawsuit to rest. Most often, mediations resolve because the numbers line up and the parties work together to come to a mutually acceptable settlement. Typically, the numbers get close enough where it might not make sense for one party, the other, or both to continue with the litigation. With this in mind, if you plan to make monetary offers at a mediation, using an hour of your already short half-day mediation to explain why the other party's case isn't worth any money is not the best use of time.

If you have provided a good roadmap to the plaintiff lawyer that allows them to understand how your organization assesses claims and risk, you will not need to spend too much time on this component. However, you may need to dedicate some time to describing how your organization might move through the remaining steps in the litigation cycle (from mediation through to a trial) to the plaintiff. Depending upon your organization's structure, this could involve post-mediation committees, the evaluation process post-mediation to and including the pretrial conference and trial.This should allow them to understand the road ahead from both their own perspective and the perspective of the opposition. There is an additional benefit in that the plaintiff may be more inclined to understand you and your role as an insurance claims professional simply trying to do the right thing and to satisfy the demands of your employment. Be

straightforward - tell it like it is and make it digestible. If you can provide this ahead of time to plaintiff counsel, this explanation may not be as involved at mediation.

Finally, starting with an apology can help put the plaintiff at ease or may disarm the plaintiff of all of the anger and frustration they might be feeling from the lead up to the mediation, whether liability is an issue or not.

8. Joint Sessions: Yay Or Nay?

I belong to a professional group of commercial mediators called the International Academy of Mediators (IAM). A common topic of discussion among members is the use of joint sessions in mediation. If you have yet to run into a joint session, this could be because mediators are using them much less often these days. Joint sessions occur when all parties are in one room to hear opening remarks and speak directly to the other parties. This is the only opportunity for a conversation to happen between the plaintiff lawyer or plaintiff directly to the insurance professional and from the defence lawyer or insurance professional directly to the plaintiff. There is usually little benefit to be gained but much potential for loss right from the get go, especially if things become adversarial. On the occasions when it is used properly, it can greatly assist in the early stages to build bridges between parties in conflict. You will have the opportunity to explain to the opposing decision maker how or why you have assessed the case the way that you have.

In Toronto, in Ontario generally, and in the employment litigation world, more mediators are choosing to dispense with joint sessions to get straight into the negotiation. There are many reasons for this shift. For example, there may be previous relationships between the parties in a wrongful dismissal case or a sexual harassment claim. In these examples, there is a high likelihood that opening statements would do more harm than good. In the area of personal injury, rarely would the named defendant personally be in the room with the plaintiff. It's almost always a representative from the organization or an insurance provider who stands behind the insurer / defendant.

9. Offer Process

Most mediations involve monetary offers to settle the case. When is the right time to begin negotiations and start looking at offers? In my experience, 99% of the time, the plaintiff presents the opening offer. The challenge that I encounter and attempt to mitigate is the time it takes to get an initial offer from the plaintiff lawyer. Moreover, the initial offer can be, in the insurance claims professional's opinion, so unrealistic that it makes them uptight, uncomfortable or scratch their head thinking, "it took them that long to come up with this"? The bread and butter of thoughtful negotiations throughout a mediation is the exchange of offers which can be as much about the timing of the exchange of offers as the magnitude of movement, by way of gross dollars or percentages or otherwise.

I’m sometimes asked to “go work your magic” in either the plaintiff room or the defence room. Mediators aren’t magicians that can pull a rabbit out of a hat. We work with what we’re given. Of course, we do have one clear advantage. As a neutral person, who is not entrenched in a position, we can help the parties understand what might be some of the weaknesses in their case and encourage them to consider resolution from a position of compromise. A mediation colleague once said, “I have mediated over 4,000 cases in my lifetime. I have settled none of them.” We, as mediators, don't settle cases. We help the parties discuss options, try to build bridges, and find overlap where an agreement might make more sense than continuing with the litigation ending up with a trial.

During offer negotiations, ask yourself if it makes the most sense to run with a file all the way through to a verdict or judgement. As long as you have considered the options and are aware of the highs and lows of the litigation road moving forward, a decision to run a trial could be the appropriate move. A neutral third-party facilitator is available to help you look at the case more objectively.

Most of the time, if the parties looked at the case objectively (as though they weren’t involved in it), they would find they could come up with a range of damages (highs and lows) for each head of damage. Having an idea of the realistic value of your file on a good day in court versus a not so good day in court might help you resolve your claim at a mediation. If you’re an avid golfer or enthusiast like me, imagine this task as if you were on the putting green of a golf course. The best putters look at the putt from several

different directions and take note of the surrounding contours of the landscape. The same approach applies to the valuation of the claim.

While in the throes of the mediation, consider taking some advice from my Grade 7 math teacher and “show your work for part marks.” If you can explain to the mediator how you calculated the value of the claim or reached your numbers, the mediator will be in a better position to explain the math to the opposition. If you are very confident that the opposition is being unrealistic or unreasonable in their assessment, consider showing what you think your best day at trial would look like and what your worst day at trial would look like. Describe where the current offer at mediation fits (or doesn’t fit) and why the opposition should consider making a substantial move in the direction of settlement. At some point, it does end up being about dollars in versus dollars out. Moving to all-inclusive dollars can be helpful; but, do consider at some point in the negotiation process explaining to the plaintiff how you evaluate and assess the claim.

Sometimes it makes more sense to move to all-inclusive offers right from the start. Imagine that you receive an offer from the plaintiff and see certain heads of damage you were going to make offers toward and others that you weren’t. If the plaintiff lawyer mis-categorized or put values under the headings that don’t align with yours, you may not want to shine a bright light on the disagreement. Moving to an all-inclusive offer buries the disagreement on an item by item basis and moves the talk to the value of resolving a file on a dollar for dollar basis.

10. Zones of Potential Agreement

Frequently, I hear from defence counsel and insurance professionals that the first few offers they typically receive from a plaintiff are so far out of the realm of possibility that they question the point of entertaining them seriously. Frustrated, upset and angry, if they think each move is a complete waste of time, they will just as frequently respond with similarly unrealistic low ball offers. This might be cathartic but is it productive? Would you expect the plaintiff to respond any more favourably than you did?

I'm not suggesting you make your end-of-the-day, final offer as a first response to a silly opening demand. Consider responding with a realistic assessment of the low-end range of what you think might happen at a trial. To compare it to a microscope, make your first or second offer the coarse adjustment. Show the plaintiff the range you see in the case. From there, let the plaintiff know that moving forward, you can make fine adjustments to the offer but that you're done making coarse adjustments for the purpose of settlement that day. If the plaintiff plans to resolve the claim at mediation, this message should encourage them to take the opportunity to get within striking distance of the Zone of Potential Agreement before you leave without presenting your best or final offer – assuming you value the case similarly.

The plaintiff frequently is trying to figure out the most amount of money the defence can put forward on the date of the mediation in order to see how it stacks up against what a good day versus a bad day at trial could look like for them. Depending on the decision

maker's appetite and tolerance for risk, they should ask these questions: Does it make more sense for me to settle the case today and have certainty and closure without the lawsuit hanging over my head? Does it make more sense for me to push forward with the case because the defence isn't seeing the case and connecting the dots in a way most judges or juries would? Consider looking at the plaintiff lawyer's track record. Do they typically pick winning cases? Are they known for their trial experience? Who can they bring in to help them that would significantly tip the scales? Having a solid understanding of your opponent and their team, as well as building relationships within the industry, is paramount to getting a strong "gut reaction" for how to proceed. No one knows what the outcome of a trial is until the judgment is released or verdict is rendered. Cases have been won that many thought would be lost. Cases have been lost that many thought would be won.

In terms of quantum, I cannot say that there is a right or wrong approach or formula to resolution at mediation. However, there are some inputs you may consider to adjust your offer range. What was the percentage change in the plaintiff offer? What was the gross dollar change? Do you want to move in some sort of proportionality to the plaintiff's movement? Have new strengths or weaknesses you've learned about through the mediation changed your calculations?

Whether you opt to bring the mediator into the inner circle or not, at some point in the mediation, it's worthwhile to project to the mediator and the opposing parties where you

are going. It will help the mediator manage expectations in the other room and tailor the messages relayed from defence to the plaintiff to ensure there are no surprises when you get to your last, best, greatest or final offer.

Unless you are superstitious, have your lawyer prepare the necessary closing documents and have them ready in hand or available in draft at the mediation. These closing documents can be printed at the mediation venue and save the plaintiff an extra trip to their lawyer's office. For online mediations, the documents can be scanned, signed and returned or signed using one of the approved platforms like Docusign. On the occasion where a structured settlement is likely to be considered, ensure that defence counsel are aware of your organization's structured settlement protocols. For example, is the structure to be owned by the casualty insurer or is it to be assigned? Who will bear the cost of the assignment?

OTHER CONSIDERATIONS

11. Disbursements

Please appreciate that you are trying to negotiate a settlement with the opposing decision maker, being the plaintiff. Disbursements are frequently very sizable and frequently contentious. While you may have valid criticisms regarding some of the disbursements, the practicality is that the list that the plaintiff lawyer provides to you is likely going to be the amount of money coming off of the offer you just made with a view toward determining the net dollar amount in the plaintiff's pocket.

Defence counsel may tell me they don't pay for X, Y or Z. I completely understand organizations have policies in place to deal with certain disbursements. Please consider what a court would do? Offers which comply with Rule 49 are typically in the format of claims or damages plus costs and disbursements to be agreed upon or assessed. What would a judge or assessment officer do with the list of disbursements?

12. Courtesy and Civility

I attended a seminar where Justice Archibald and Justice Dow spoke about current trends in trials. They both spoke about the difference between doing a job by representing a party and making it personal. If the parties conduct themselves appropriately, there is no reason why counsel shouldn't wish each other the best after a long day of arguing in court. In other words, what happens in the courtroom should stay in the courtroom.

The same approach should apply to attendance and conduct at mediation. Let's look at something like surprise surveillance used to try to gain an advantage over the other party. Is it really worth using surprise surveillance on this one matter in exchange for demonstrating that the opposing lawyer ought not to trust you ever again? You take the risk of embarrassing them at mediation. Don't make this a personal attack on the lawyer; rather, make it about the claim itself.

Please don't look at your phone when someone else is speaking. I understand that most people type their notes. I believe there is a big difference between looking at a computer

and looking at your cell phone, even if you are or claim you are making notes on your cell phone. Try to look at the other speaker periodically when they are making their opening statements. For a plaintiff, they might feel as though mediation is the one opportunity, short of going to trial, where they get to explain their side of the story. The plaintiff has been thinking about what they were going to say from the date of the accident and certainly from the date of the examination for discovery. Act like you're interested, whether or not you are. My guess is the plaintiff will be far more likely to listen to you and your lawyer in return when it's your turn to speak.

You will have an easier time at mediation, and in life generally, if you can have civil, cordial and authentic relationships with the opposition. This applies to your relationship with this individual plaintiff, their lawyer, your own lawyer and the mediator. You will likely work with one or more of them again. You have only one opportunity to make a first impression. Try to make it a good impression as bad impressions are very hard to rebuild.

CONCLUSIONS

Mediation is part of the litigation landscape in this province. There is a serious log jam for civil lawsuits in most judicial jurisdictions in Ontario, only made worse by COVID. If the parties are able to communicate clearly and authentically throughout the process leading to, at and following the mediation, there is great benefit to be achieved for both insurance claims professionals and plaintiffs.

For the litigants, it's often said that mediation is their "trial" since very few cases actually end with judgment or verdict. By approaching mediation seriously and thoughtfully and having regard for your organization's ultimate objectives and intentions, this process can be a rewarding, satisfying and relatively low stress and low cost means to resolve a lawsuit.

WANT TO LEARN MORE?

Ask me about Cooper Mediation's Lunch and Learn / Webinar Program. I would be pleased to come to your organization and discuss these and other tips to help insurance professionals get the most out of mediation.

ABOUT THE AUTHOR

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