FEATURE

PREPARING FOR MEDIATION: IMPORTANT ISSUES TO CONSIDER

By Paul Iacono

In theory, mediation is supposed to be non-adversarial. Even so, it is still advocacy but a different kind of advocacy. Litigators are used to, and comfortable with, the adversarial system. With the passage of time and familiarity with mediation, they are adapting their techniques and becoming more and more skilled at mediation strategies.

The success of any type of process in the adversarial system, whether it is a motion, trial, pre-trial conference, appeal etc. – is dependent upon preparation. Mediation is no different. Good counsel preparing for mediation will do the same kind of in-depth analysis that they would do for any other litigious event. S/he will think about the dispute, the person who will be resolving the dispute, and about the best ways of achieving their client's goals in resolving that dispute.

Even the mediator must prepare for the mediation. From a mediator's standpoint, preparation begins at the time the mediation is being arranged. Once counsel has selected the date, time and place of the mediation, a whole series of issues must be dealt with. These are the terms and conditions of the mediation. The first thing to be dealt with is potential conflicts. The mediator must canvass issues that will raise potential conflicts:

- Who are the parties?
- Who are the insurers of the parties?
- Who are the counsel?
- Are there any other relationships that need to be disclosed? The mediator and the parties must have a feeling of neutrality throughout the entire process.

Another matter to consider is who will be paying for the mediation. Since our Alternative Dispute Resolution (ADR) practice has expanded into commercial issues, as distinct from personal injury and insurance matters, I find it interesting that in the commercial setting the parties agree to share the cost right at the outset. Many commercial litigators believe this is an important aspect and feel that it ensures the neutrality of the mediator. In personal injury disputes, normally the insurer agrees to pay right at the outset. Query whether this is appropriate. Should the parties begin by agreeing to share the cost, make the final cost of the mediation a condition of settlement. A pattern has been established, in the personal injury context, which makes matters very easy for plaintiff's counsel. The insurer pays for everything.

Counsel must be told at the outset that materials to be submitted for the mediation must be received seven days before the mediation date. It is an important part of the process that counsel agrees to this right at the outset. There is nothing that can undermine a successful mediation quicker than materials or memoranda delivered at the last minute. In my view, if it becomes necessary to cancel the mediation because of late delivery of materials, it should be stipulated as a term of the agreement that the individual violator is responsible for the cost of the cancellation. No one, especially the insurer, likes to be taken by surprise by a report they have never seen before which dramatically alters the profile of the case. Don't do anything to cause the mediation to get off the rails before it even starts.

Confidentiality is the foundation of a successful mediation. It is important at the outset when the mediation is arranged that everyone accept as a given that any materials delivered, that anything said in the context of the mediation process which begins when the mediator is retained, is protected by confidentiality. Generally speaking, it is common practice today that after the mediation is booked, the mediator sends confirming correspondence to

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counsel which includes the mediation agreement setting out all these terms and conditions, including confidentiality, and counsel sign it and return it to the mediator. In this way, there can be no second-guessing; everything is set out in writing. Confidentiality is a comfort to the litigants. Mediation works because the litigants are prepared to put their best foot forward knowing that nothing they do or say at the mediation can hurt their case.

The parties present at the mediation must be the ones who are the litigants, or who have the authority to settle on behalf of the named parties. This is a delicate topic. It does happen on rare occasions that an insurance representative attends mediation and runs out of settlement authority. Things happen! Plaintiff's counsel presents his or her case in such a way that the insurer realizes the case is more serious than was first thought. Perhaps the reserves on the file are too low. Even if all you accomplish on the mediation is to get the reserves to where they should be you have done a lot and you will eventually settle the lawsuit. I recognize that it will be disappointing to the plaintiff but a simple sympathetic explanation to the plaintiff by the mediator will keep the process going. There is always a positive spin that can be put to any situation and no cause for alarm. A good mediator will establish the ground rules for ongoing discussions, always keeping lines of communications open.

Once mediation has been arranged, counsel must then turn their attention to the mediation memo. My experience has been that the most persuasive mediation memos are written in the narrative form, telling the story of the litigation as a chapter of someone's life. These memos will outline the issues in the dispute and the strengths of the litigant's position on each and every issue and will attempt to deal with the arguments they anticipate receiving from their opposite number.

The best mediation memo is one that is brief and to the point, yet it must be thorough and present the issues in a way that is both engaging and analytical. In thinking about your arguments, keep in mind if you write a good mediation memo, the mediator will use it as a road map to resolution. One thing you should keep in mind is that if you get the mediator on your side of the issue, you will have an easier sell to your opponent. Mediators, like judges, are human beings and they eventually get involved in the persuasion process.

In personal injury litigation, the question I am asked most frequently is how to deal with complicated medical evidentiary issues. The best answer I can give you is that you must balance brevity and conciseness against ensuring that the mediator is focused on the crucial issues as well as their proof. This can be achieved by highlighting at certain points in the mediation memo, certain excerpts of the medical evidence and where they can be found. This, however, should be kept as brief as possible; no more than two or three sentences. In some personal injury cases where the medical briefs are substantial, a good way of dealing with this is to keep the references to the medical information brief in the memo itself, but provide an executive summary of the entire medical brief.

Let your client participate in the drafting of the mediation memo whether your client is plaintiff or defendant and send the client a copy of your mediation memo. Tell the client this is your argument, and invite suggestions. It helps the litigants buy into the mediation process and it promotes resolution. Generally speaking, defendants are experienced litigants. It is important for them to become part of the mediation process. The more they feel a part of the process, the more likely it is you will achieve resolution in a way that everyone can leave the settlement table satisfied.

Other disclosure issues

1. Previous offers or negotiations

If formal offers to settle have been delivered by counsel prior to the mediation, it is absolutely vital that this be disclosed to the mediator and should be

included in the mediation summary. It would even be wise to affix as exhibits a copy of the formal offers. When an experienced mediator reads the memos and the analysis of the issues, s/he will obviously appreciate why the case is not resolved.

If there have been settlement negotiations prior to the mediation without delivery of formal offers, this should also be discussed in the mediation memo, particularly if one side or the other is coming to the mediation with a significantly altered position. A classic example occurs in a personal injury case where after discoveries the counsel have discussed potential ranges for damages with each thinking they are within "shouting distance" of each other. When they arrive at the mediation, however, counsel for the plaintiff announces that his or her range has increased by $75,000.00 to $100,000.00. That is a difficult case to resolve when defense counsel is still thinking about the previous discussions and what was once " shouting distance" now becomes a gulf. If you plan to attend a mediation with a different view of damages than what you have discussed with your opponent, you must warn them in advance.

You cannot take an opponent by surprise at a mediation. That lawyer will be embarrassed with the client and the mediation is likely to become a waste of time. If there have been negotiations prior to the mediation and if no formal offers to settle have been exchanged, but there have been discussions about settlement, if counsel has changed their minds about those numbers, it absolutely must be communicated before the mediation is arranged. There is nothing that makes resolution more difficult when at a mediation one counsel announces to the other that the figure for settlement has doubled since their last discussion. In these kinds of situations, a discussion or a letter must pass between counsel to the effect that "I am agreeable to going to mediation but any discussions we have had regarding settlement are no longer relevant because the case has changed and I will be taking an entirely different settlement position at the mediation for the following reasons."

2. Disclosure of Surveillance Evidence

In personal injury litigation surveillance is a very sensitive subject. If it is good surveillance and the defendant intends to use it because the plaintiff has no possible way of explaining their way out of it, then it should be disclosed in the mediation summary and it should be sent to counsel ahead of time for viewing and comment. This is particularly so in cases where defense counsel have asked expert medical witnesses to comment on that evidence.

The other situation occurs where surveillance is used strictly for credibility purposes and it has not been revealed to opposing counsel. In my view, this has to be handled at mediation as it would be handled at a trial. These are difficult decisions for counsel but they must be made. If it is a situation where a witness has been caught in a direct lie, the decision is easy. It can be revealed on a surprise basis at the mediation and it will usually have a dramatic effect. The more difficult cases are those situations where although it does relate to credibility, there is a potential explanation. This is the kind of case where it can backfire on a defendant. However, if it will backfire at mediation, it will backfire at trial and at least the mediation setting is non-binding.

3. Caucusing Rule

There are two rules for caucusing which are commonly used. The first is that everything discussed in a caucus can be revealed to the group as a whole unless counsel specifically requests that it remain confidential. The second is that everything revealed in a caucus is confidential unless it is specifically agreed that it can be shared with the group as a whole. This latter caucusing rule is used in cases where the parties are very close to trial and counsel's trial strategy cannot be compromised. This latter rule is used so that the mediator can discuss with counsel specific trial

ACROSS CANADA

Alberta

The MLA review team consulting with employers on the review of long standing contentious WCB claims will have more time to complete its work. The Workers' Compensation Amendment Act (Bill 26), which received royal assent May 21, 2002, includes a provision that gives government the authority to set up a review body on long standing, contentious WCB claims. Members of the legislative assembly committee members are meeting with employers to review outstanding issues relating to cost. The review team will submit recommendations to the Minister by September 30, 2002. For information on recent changes to workers' compensation in Alberta, see: **www.gov.ab.ca/hre/wcb**

Ontario

A case where a real estate firm was found partly liable for an employee who got drunk at the company's 1994 Christmas party and crashed her car, has been ordered to a new trial. Citing three errors in law by the judge, the Ontario Court of Appeal released a unanimous decision in August ordering a new trial for Sutton Group Incentive Realty of Barrie. The original judgment had found the employer failed to protect the employee from harm, after she crashed and was convicted with impaired driving, having twice the legal amount of alcohol in her blood. A new hearing may be delayed if the employee seeks leave to appeal to the Supreme

WORTH RE-QUOTING

"If the ceiling collapses, breathe through a handkerchief to avoid inhaling dust … Moxie and a good sense of balance are essential when crawling on a roof."

– Advice in *The Hidden Staircase* by Carolyn Keene. From *Nancy Drew's Guide to Life* by Jennifer Worick

strategy and express a view as to the likelihood of its success. On some occasions the mediator may urge counsel to reveal certain things to his or her opponent in the hopes that resolution will be achieved. This is a risk that must not be taken lightly. The thrust of the former rule is to ensure that everything gets on the table, that each party puts their best foot forward and that the most persuasive arguments are used to achieve resolution.

Preparing for the session itself

Since most plaintiffs are "civilians" to the litigation process and mediation in particular, more time must be spent in preparing for the session. Plaintiffs must be encouraged to speak out at the mediation session in order to establish a rapport with defence counsel, defendant and insurance representative.

A plaintiff who is a good witness will do well at mediation. It is very wrong for plaintiff's counsel to tell their client not to say anything at mediation. It is also very wrong for plaintiff's counsel to read statements from a plaintiff who is in attendance. Let the plaintiff speak for himself or herself. If necessary, have the plaintiff memorize a prepared statement. It is important that the plaintiff come across as a sincere, credible witness. Spend the time you would normally spend for an examination in chief. It will be time well spent and it will pay dividends. Insurers are impressed with someone they believe will make a good witness and they will pay a premium.

It is important that counsel explain the confidential principles of mediation, the importance of caucusing with the mediator and the caucusing rule that will be used. It is also important that the negotiating process be explained as well as the use of "shuttle diplomacy." In most cases, participation by the defendant or the defendant's insurance representative is not that crucial. However, I can say without hesitation that a few well-chosen words by the defence representative has far more weight in the plaintiff's mind than does anything any of the lawyers say. My practice is to tell the insurance representative to say whatever they like whenever they like. It cannot hurt a case.

Plaintiffs must be prepared for the negotiating tactics that will take place during the course of a mediation and plaintiff's counsel should have a very frank discussion with the client as to what the appropriate ranges of damages are and what the negotiating goals should be at the mediation.

Similarly, defence counsel should know the realms of the settlement authority long before the mediation starts. There is nothing worse than defence counsel finding out at a mediation that his or her insurance representative does not come with appropriate authority. Make sure that the reserves on the file have been properly set. Have discussions with your client when you review the mediation memo.

Dealing with emotional issues

If something has happened in the conduct of the lawsuit that has caused emotions to run high, this must be defused immediately. Sometimes the event itself that gives rise to the litigation is emotionally charged and that must be dealt with as well. There is nothing wrong with enlisting the mediator's assistance in dealing with these emotional issues. For example, if counsel are not getting along and at least one of them recognizes that this may be a stumbling block for resolution, give the mediator a "heads up telephone call." If there is something going on between the clients where there is a problem, let the mediator know. Depending on the extent of the problem, you may have to let all other counsel know as well.

We are well down the road in terms of using mediation as a tool to resolve litigious disputes. The next step is to improve our mediation techniques so that we can overcome any obstacle to settlement that arises during the course of the mediation. These are but a few suggestions.

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TOXIC MOLD IN CANADA

By Glenn Gibson & David Pym Sr.

Overview

In the Fourth Quarter 2001 edition of Crawford Adjusters Canada's ProClaim Newsletter (crawfordandcompany.ca), we highlighted that insurers needed to "Prepare for Mold Losses." Since that time, we've seen a steady stream of headlines such as:

"Mold Litigation - The Monster in the Closet"

"Having a bad mold complex? - At least 150 families sue apartment management"

"Canada - Mold Growth in Buildings an Environmental and Financial Risk"

"Attorneys are smelling blood - Toxic Mold"

"Flurry of Mold Claims possible in Canada"

"Toxic mold: The Fungus that is eating the US. Will it have an appetite for Canada?"

As we head toward the end of 2002, how big a problem has toxic mold become for insurers?

In the United States, the mold problem seemed to jump into the spotlight about three years ago with the State of Texas leading the way. This US state has released some statistics that are quite startling: in 2001, Texas reported a total of 50,000 new claims involving "mold." In 2002, four of the largest underwriters in Texas had received 39,000 new 'mold' related claims. Add an increase in the per file cost to handle a water damage claim from US$2,800 in 2001 to US$8,000 to 2002.

It is certainly safe to say that "mold" claims have become a big issue in the United States. Is it coming to Canada? It's already here! Consider that in 2000,