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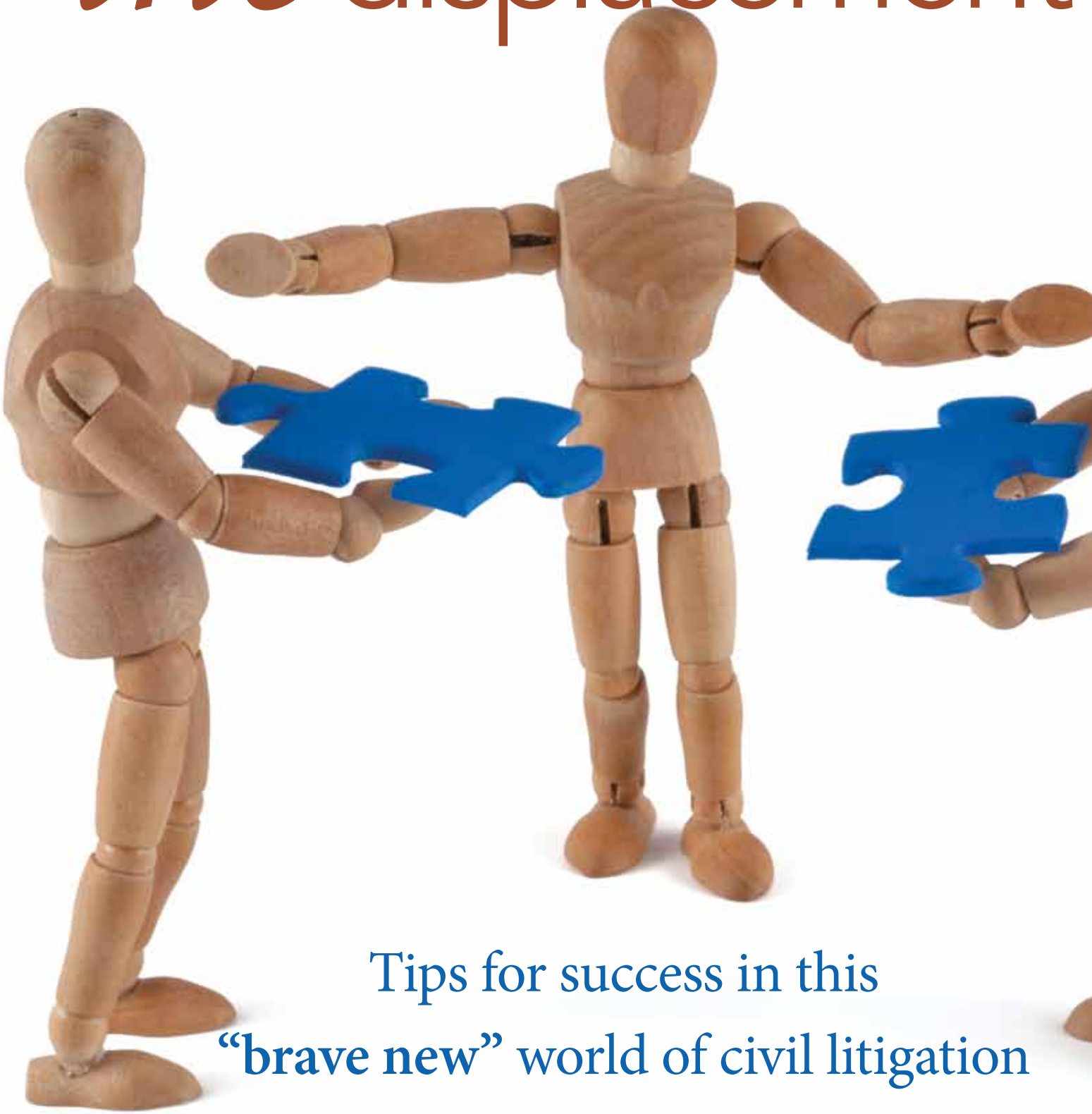

Tips for success in this "brave new" world of civil litigation

of trial by mediation in personal injury disputes

BY FRANK K. GOMBERG

part I

–Ed. Note: The following is Part 1 of a two-part article by Frank K. Gomberg. The second part will appear in the next issue of The Litigator.

Where are we now and how have we gotten here?

Historically, good lawyers discussed the possible resolution of their civil cases at every appropriate opportunity during the lifespan of a personal injury lawsuit. I recall that in 1975, a mere 37 years ago as this is being written, the question posed was whether it was a sign of weakness for a lawyer to approach another lawyer to explore the potential for settlement. The general consensus, as articulated by Professor Martin Teplitsky, then of the Osgoode Hall Law School, was that initiating settlement discussions by calling a colleague on the telephone was not a sign of weakness; rather, it was a sign of intelligence.

Unfortunately, with the advent of civil pretrials in Ontario and with mandatory mediation in three of the largest Ontario urban centres – Toronto, Ottawa and Windsor – the former practice of good lawyers discussing the settlement potential of their personal injury cases on the telephone and at examinations for discovery is almost extinct. Some of the contributing impediments, at least in the personal injury context, are the:

- explosion in the number of lawyers called to the Ontario bar
- explosion in the number of cases many Ontario lawyers have in their personal injury portfolios
- personal unfamiliarity (and therefore lack of trust) of many lawyers with their colleagues

- pressures of working on hundreds of cases seemingly contemporaneously
- feeling that a better deal can be struck at pretrial and the consequent fear of client criticism if a case is settled prior to some sort of face-to-face meeting of the lawyers (with clients present). Another way of articulating this concept is that lawyers are petrified of surrendering too much, too early.

Because pretrials were institutionalized in Ontario long ago, any settlement discussions which might have taken place before or after examinations for discovery were deferred to the pretrial conference.

The pretrial conference then became the default forum for settlement discussions. The wisdom of this shift from pre- or post-discovery lawyer-lawyer settlement discussions, to the initiation of settlement discussions at pretrial, is debatable.

The Superior Court in Ontario is a generalist court. This means that the next judge in line is assigned to be the pretrial judge; and the next judge in line will be the trial judge.

Though all judges are supposed to be competent with court processes (how pretrials are conducted; who speaks first; how the case is evaluated; what is the definition of litigation risk) it is clear beyond any possible doubt that there is a wide disparity between judges in subject matter expertise.

It is trite, but rarely discussed, that a lawyer who is appointed to the bench is invested with no more subject matter expertise the day after his appointment than the day before. Thus, it is postulated that having a judge with wills and trusts expertise (when at the bar) pre-try or try a complex medical malpractice case is as ludicrous as having a judge with an insurance law background (when at the bar) pre-try or try a complicated family law case. Though it is an undoubted component of the litigation lawyer's advocacy role to educate the judge, it seems preposterous to have multiple specialist tort lawyers litigate a complex products liability case in front of a judge who taught tax law at the local law school.

Unfortunately, that is the systemic weakness in Ontario which informs the shift in settlement discussion from pretrial to mediation. Because lawyers generally do not discuss their personal injury cases early on, or even after discovery, for the reasons set out above; and, because the quality of the pretrial depends on the unpredictability of who the system assigns to pre-try the case; and, because the same unpredictability prevails with the assignment of the trial judge, this means that the only guaranteed meaningful settlement discussions to be had are likely to be at mediation.

One of the reasons mediation is so critical is that the parties attend voluntarily (with the exception of compulsory mediations in Toronto, Ottawa and Windsor) and they by consensus select the mediator. The practical meaning of all of this is that the mediator has at least some credibility with all of the parties – for they selected her; and the mediator will have at least some subject matter expertise – for it defies common sense for the parties to hire a mediator with none. This leads to an excellent prognosis for the mediated settlement of most personal injury cases in Ontario. The reality, even in Toronto, Ottawa and Windsor, is that if the case warrants the selection of a private mediator (and all significant cases do), then the settlement prognosis is excellent; for the parties, even where mediation is mandatory, usually opt for highly competent mediators with subject matter expertise.

This means that for a vast majority of personal injury cases, the settlement forum has shifted from where it used to be (pretrial) to mediation. It is axiomatic that advocacy in this essential forum is even more important than trial advocacy, since most personal injury cases go to mediation, but few personal injury cases go to trial. This article will focus on mediation advocacy in an effort to improve the reader's performance in this "brave new" civil litigation world.

II The criteria for selection of an appropriate mediator

It is trite to state that for a mediation to be worthwhile, the mediator must be competent. There are many highly qualified, competent mediators in Ontario. There is no excuse for any case worthy of mediation to be mediated by an incompetent or sub-par mediator. The question worth answering is whether it matters much which mediator is selected from a list of competent mediators, all of whom have subject-matter expertise. The question is hard to answer without the benefit of an empirical study comparing mediation results achieved by mediator A, with subject matter expertise, to those achieved by mediator B, likewise with subject matter expertise. Assuming that a scientific study is even possible, the definition of the quality of the result is amorphous. If mediators A and B achieve roughly the same percentage of settlements, but A's settlements are for more money than B's, then plaintiffs will prefer mediator A and defendants

will prefer mediator B. This leads to the inexorable conclusion that as long as lawyers think that mediator shopping will improve their results, there will be lots of mediator shopping.

As I see it, rather than viewing a mediator's desirability through the narrow prism of the plaintiff getting more money with a certain mediator, or the defendant paying less money with another mediator, it is preferable to select a mediator using other and more meaningful criteria such as: A. the requirement to select a mediator who will have credibility with the other side; and B. different mediator styles; active or passive?

> *Substance matters* much more than style in mediator selection; *pick a mediator whose style* the other side likes and with whom you and your client *can work*

A. The requirement to select a mediator who will have credibility with the other side

Most counsel maintain a list of mediators who are acceptable to them. Even if you have a list with, say, five names on it, it still makes excellent sense to have the other side propose the mediator; for how can the other side demean the mediator's competence or professionalism at the mediation when the other side has picked the neutral? Unless the other side has picked someone who is not on your list of preferred mediators, and is also unacceptable to you, my suggestion is that you simply go on the mediation with the mediator having been selected by the other side. If the other side does propose someone unacceptable, then at that juncture I suggest that you exchange lists of acceptable mediators and then pick the mediator in concert. Joint selection of the mediator is obviously preferable to agreeing to a substandard mediator in order to defer mediator selection to one's opposite counsel. However, by engaging in joint selection, counsel sacrifices the following argument to the other side at the mediation: "You picked the mediator; why don't you listen to what she is saying?"

B. Different mediator styles; active or passive?

Mediator style is an interesting and somewhat controversial topic. Just as some technically competent surgeons have horrible bedside manner, and some technically inferior surgeons have excellent bedside manner, the question that a litigation lawyer must ask is whether in any particular case, the style may affect the result, and can you live with a style that you might not like, in order to achieve a result that you might like. This is a difficult if not impossible question to answer, because in a simple two-party insurance mediation there are at least four people involved – the claimant, her lawyer, the insurer and its lawyer. Each of the lawyers must consider whether an active or passive mediator is preferred. How about your own client? What might work best with him? Each of the lawyers must then ask

herself whether the opposite lawyer and the opposite client will likely react more favourably to an active or to a more passive style of mediation.

In the quest to hire an acceptable mediator, it is far preferable for a lawyer to be more concerned with what may resonate with the other side than it is to hire a mediator with whom you are comfortable, but with whom the other side will have little connection. The reason that this is significant is that at the end of a contentious negotiation, the mediator's input is greater with someone who respects and considers what the mediator has to say when the mediator does "reality testing". If the other side is comfortable with an active "in-your-face" mediator and you can predict that, then even if you might prefer a less aggressive mediator, the in-your-face mediator may be preferable – as long as you and your client can live with this aggressive style.

If you predict that the more passive approach will "play" better with the other side, then even if you might prefer a more aggressive mediator, the more passive mediator may be preferable as long as you and your client can live with this passive style.

Mediation is not a pretrial, and the more evaluative a mediator is, the less the distinction between a mediation and a pretrial. The distinction between an evaluative mediator and an in-your-face mediator is subtle but nonetheless important. An aggressive mediator with subject matter expertise may do reality testing in a more direct way than will a mediator with a passive style. An aggressive mediator with subject matter expertise may refer to case law, jury results, other matters of importance including litigation risk and witness credibility in a much more forceful way than a more passive mediator would. Having said this, the mediator is not a pretrial judge and it is suggested that if one wants an out-of-court pretrial, then one should arrange a neutral evaluation and not a mediation.

In my view, there are very few cases which cry out for a passive mediation style and very few which cry out for an aggressive in-your-face style. The vast majority are "mediatable" in either style, with the determining factor being whether you can live with a style you do not prefer, in order to achieve a superior result. Ultimately, I submit that the more competent surgeon with less developed bedside manner is the surgeon I would prefer; and the same can be said of mediation. With the suggestions set out above, and after due consideration, substance matters much more than style in mediator selection, as it does in most professional endeavours. Pick a mediator whose style the other side likes and with whom you and your client can work. The mediator must have subject matter expertise and must have a proven track record of success. This maximizes your chances of achieving a mediated resolution to the case.

> *Within reason,* counsel should be able to do whatever he or she believes *appropriate at mediation;* anything less than this permits one party to dictate how the mediation is to unfold, and in doing so *almost ensures* that the *mediation will fail*

It is absolutely essential that counsel consider his own client, as well as the other lawyer and her client when deciding what kind of mediator is likely to fit the bill. Though future behaviour of a mediator and her reaction to certain facts and clients is as impossible to predict as a trial verdict, it seems clear that just as one derives comfort from knowing the "profile" of a judge, it is sensible to choose a mediator who has a known and predictable track record in terms of how she conducts herself at mediations. Just as zebras don't change their stripes, it is highly unlikely that a mediator who's been passive for 10 years is suddenly going to be "in-your-face". It is equally unlikely that an in-your-face mediator is going to find religion and become a passive mediator. It is suggested that you analyze the case and the other side and pick a mediator whose style is most likely to connect with and impress the other side. This selection of the mediator is an essential component of mediation advocacy and ought not to be overlooked or trivialized.

III. Technology-based and other forms of mediation advocacy

I believe that the substance of what happens at mediation ought to be dictated by the lawyers and ought not to be imposed by the mediator. This means that the mediator is responsible for arranging the mediation in a safe place and is further responsible for the physical and emotional safety of the participants while at the mediation. The mediator is the master of the process but not of the substance or of how to address the points of contention at mediation. It is sometimes difficult in practice to identify what is process and what is substance. In my view, the use of opening statements, PowerPoint or video presentations or, for that matter, the very limited, narrow use of a helpful expert witness either in person, live by Skype, or on video, are part of the substance of the mediation, not its process, and ought to be left to counsel's discretion and not controlled by the mediator.

I can recall a case in which the plaintiff was grievously injured while rock climbing in close proximity to someone who kicked a large rock (which struck the plaintiff in the head) while the defendant was approaching a rope in order to rappel down the rope. The defendant's rope was immediately adjacent to the rope the plaintiff was about to ascend. The defendant's position was that those on top of the rock-face owed no duty of care to those below. Plaintiff's counsel retained a torts professor to discuss the tort concept of duty of care during the plaintiff's opening statement in the joint session at mediation. I think that this was a highly effective use of the opening joint session. As mediator, I would be loathe to prohibit opening statements in the joint session should any party wish to make an opening statement.

The same can be said for the use of joint sessions and for video or PowerPoint presentations. Insurers in personal injury mediations often complain or even actively resist when plaintiffs' counsel wish to show PowerPoint or video presentations. As mediator, my rhetorical question is, why resist when the more information the defence has, the better able the defence is to make an informed and intelligent settlement decision?

I have seen defendants' counsel effectively use PowerPoint and other powerful technology (including an examination of an expert witness via Skype) to deflate a plaintiff's claim. These modalities are all helpful and indeed ought to be permitted by the mediator in an effort to facilitate settlement. The mediator should encourage the use of whatever may help explain the plaintiff's rationale to want more; or the defendant's rationale to pay less.

In my view, should a mediator unilaterally ban joint sessions or technology-based advocacy, then that mediator ought to be avoided; for mediation is party-focused not mediator focused. A mediator who expands her definition of process control to encroach on what is really substance, engages in mediator imperialism. This is an improper role for a mediator. It is entirely sensible for the parties and their counsel to refrain from hiring such a mediator or to withdraw from the mediation should such a mediator attempt to impose his views of process on what is clearly partially or completely a matter of substance.

It is suggested that the lawyers ought to be permitted to employ whatever technology they wish to use in order to effectively advocate on behalf of their respective clients. This includes Powerpoint presentations, using Skype to examine a witness, medical illustrations, engineering animations and anything else that might reasonably help the other side better understand your case. It is suggested that technology not be used to attempt to mask an absence of substance. Thus, an expensive animation of an intersection collision where the plaintiff says he went through a green light and of the movement of the plaintiff's seatbelted body (according to the plaintiff) in the vehicle, will be useless if the evidence is overwhelming that the plaintiff went through a red light and was not wearing a seatbelt. Not only

will this not be helpful on the red light/green light issue and on the seatbelt issue, but this will have a devastating impact on the lawyer's credibility, which is of critical importance.

Should there be disagreement between the parties on the use of PowerPoint presentations or on any other aspects of mediation advocacy, the mediator ought to do whatever she can to ensure party autonomy. In other words, counsel within reason should be able to do whatever she believes appropriate at mediation. Anything less than this permits one party to dictate how the mediation is to unfold, and in doing so almost ensures that the mediation will fail. The mediator who prevents counsel from showing a PowerPoint presentation usurps the function of the advocate. This is impermissible and ought to be eschewed.

IV. Building realistic client expectations

It is absolutely essential that clients have some realistic assessment of the value of their claims or of the viability of their defences. This places an important duty on counsel to ensure that the client understands what may happen should the case go to trial, and that the client understands this before the mediation begins. Counsel for insurance companies have reporting responsibilities related to reserves; consequently, it is unlikely that a claims representative will attend at mediation with no insight into the potential value of a case. However, it is startling that many plaintiffs seemingly arrive at mediation with little appreciation of the hurdles they may have to overcome to recover "the motherlode" at trial. This failure to educate is a basic failure on the part of plaintiffs' counsel and will seriously undermine the process – if not kill it.

If the plaintiff is injured in a two-car accident and he says he went through a green light, and the defence says that the defendant went through a green light, in the absence of witnesses or other criteria of assistance to the trier of fact, the litigation risk which attaches to the plaintiff's case on liability is postulated to be approximately 50 percent.

If the plaintiff is 60 years old and hadn't worked for five of the six years prior to the accident, but got back to work one year before the accident and earned $50,000 in this time frame, the plaintiff must understand that though the defence concedes that he'll never work again by virtue of his paraplegia, the jury may not award him $50,000 per year for the next five years for wage loss (or $250,000). The reason is that the jury may not believe that with his historical work record, he'd have worked these five years, even had the accident not occurred.

One way of assessing the future wage loss component of the case for settlement purposes is to reduce the $250,000 by say 50% (to $125,000) to take into account the plaintiff's poor five-year pre-accident work history. This is the application of the principle of litigation risk to damages. One might further reduce the $125,000 for the litigation risk associated with the 50% liability red light/green light paradigm. This leads to a possible settlement value (for this component of the claim) of $62,500 – a far cry from what the plaintiff may think ($250,000) or what the insurer may hope ($0).

It is essential that both the plaintiff's lawyer and the defence lawyer set the table for these types of liability and damages discussions long before the litigants arrive at the mediation. It is one thing for a plaintiff's lawyer to demand $250,000 for the five years of future wages posited in the previous example. It is problematic for the plaintiff to hear this demand with no understanding that the demand is completely unrealistic as it is grossly inflated. To attempt to explain to the plaintiff six hours into the mediation (after five offers have been made back and forth) that the real settlement value of the five years of future wage loss (taking into account the highly uncertain liability picture) may be $62,500, is to doom the mediation. For the insurer's lawyer to attempt to explain to the adjuster that the settlement value of the $250,000 future wage loss demand in this 50% liability case may be $62,500 (when what was previously reported was $0 or $10,000) will also doom the mediation.

Should the plaintiff resist these last minute attempts to educate her, then a meaningful settlement opportunity has been forever lost. Should the client reluctantly accede to her lawyer's imprecations and settle the case in keeping with the last-second advice and recommendations, the client will almost assuredly feel that she was intimidated or bullied into doing so. These eventualities are very unfortunate, as they could easily have been avoided by pre-mediation discussions with the client closer in time to the examinations for discovery. Timely communication about such things as settlement value reduces the possibility of client dissatisfaction and the client's perception of being bullied. In the short term, this leads to more settlements. In the long term, managing client expectations in a timely and realistic way precludes more litigation – this time between a disgruntled client

and his former lawyer who failed to keep him advised in a timely way of the settlement value of his case.

V. Preparation of the plaintiff for mediation

The client must be fully briefed by her lawyer prior to the mediation. It is suggested that it is far preferable for this to be done sufficiently in advance of the mediation so that the discussion percolates and sinks in. Briefing a client a week to 10 days prior to the mediation is ideal.

Briefing the client an hour before the mediation is sub-optimal: there is a lot of tension and anxiety that morning and the client may not absorb much of what his lawyer is telling him. Though a professional litigant (like an insurance representative) may possibly be briefed at the last minute, because he is familiar with the process and with the mediator, it is never acceptable for a claimant's lawyer to brief a claimant an hour before the mediation starts.

In my view, the only possible circumstance where it is even conceivable that a lawyer might brief a claimant the morning of the mediation, is where the claimant is coming in from out of town. In these circumstances, the lawyer should brief the client on the telephone and should then "re-brief" the client the morning of the mediation. It is obvious that it is far better for a client to be over-prepared than underprepared. There is no substitute for a calm, well-prepared client at a mediation.

Preparing the client should include the lawyer fully explaining the process, including the fact that numerous offers will be exchanged in volleys back and forth. The client must be told that the mediation will unfold over many hours and that patience is not only a virtue but a necessity. The client must understand the possible pitfalls or hurdles to be confronted in a jury trial and she must be advised of the potentially catastrophic result if adverse findings of credibility are made by the trier of fact. All of this is essential, as it informs compromise at mediation.

It is also mandatory that the client be given a copy of the other side's mediation memorandum or summary at least a day and preferably two or three days prior to the mediation. Where the claimant's command of English is poor, the claimant should be advised of the importance of a relative or friend translating the other side's mediation memorandum to the claimant. In appropriate cases, it may be necessary to hire a professional translator to

The *best time* for mediation is after completion of examinations for discovery, but *prior to pretrial.* It is then that the factual matrix of the case is usually sufficiently developed *after examinations for discovery,* so that a meaningful mediation *can be conducted*

translate the other side's memorandum to your client. Where the client attends the mediation fully conversant with the legal and factual issues, it is likely that the mediation will lead to a settlement.

It is also suggested that the lawyer who will attend the mediation brief the client, and that this not be delegated to a law clerk, a paralegal or even to another lawyer. A level of comfort with the process and substance of the mediation is necessary for the otherwise nervous client to shine at the mediation. The client's comfort level is enhanced in the same way that a dental patient's comfort level is enhanced if the dentist spends time telling the patient what procedures will be done, how long they'll take and whether the patient will need freezing. The patient won't like the trip to the dentist, but it is tolerable if the patient knows what is coming. The same is true of mediation preparation. The time spent with the client prior to the mediation will pay huge dividends in the acceptability of the result.

I suggest that a video or written explanation of mediation that is given to a client is a poor substitute for lawyer "face-time" with a client and should be avoided. As stated, there is no substitute for a personal briefing by the lawyer who will take the mediation. Just as briefing the client at the last minute is sub-optimal, if a briefing is held too far in advance, the client will forget the subtleties and nuances. A complete briefing around a week to 10 days prior to the mediation by the lawyer who will take the mediation (ideally for the sake of continuity this is the same lawyer who's had carriage of the file throughout) supplemented by the client's review of the other side's mediation memorandum, is ideal. Anything less may lead to client surprise at the mediation; and surprises are usually anathema to party satisfaction.

VI. When in the evolution of the case should it be mediated?

Counsel must decide in conjunction with the opposite counsel whether mediation is worthwhile, and if so, when it should be scheduled in the life of the litigation. Of course in jurisdictions where mediation is mandatory, the same question can be asked, but not about whether mediation is worthwhile. The question in these mandatory mediation situations becomes when?

In a non-mandatory situation, should counsel agree that mediation is worthwhile, timing becomes paramount. Should mediation be attempted prior to examinations for discovery; after discoveries but before pretrial; or after pretrial but before trial?

In my view, the best time for mediation is after completion of examinations for discovery, but prior to pretrial. The reason is that the factual matrix of the case is usually sufficiently developed after examinations for discovery, so that a meaningful mediation can be conducted.

Of course, there are cases where pre-discovery mediation is possible. Where eight defendants are sued arising from a slip and fall injury where the damages are relatively insignificant, but discoveries will take six or seven days (with a consequent lawyer cost of $25,000 for each of the eight defendants), the settlement value of the case dictates an early pre-discovery mediation.

If the case doesn't settle at mediation, then the *Rules of Civil Procedure* mandate a pretrial. A pretrial, if unsuccessful, does not preclude further mediation after the failed pretrial. Many cases have been mediated after failed pretrials, where the pretrial has narrowed the issues, but not sufficiently to lead to settlement. Indeed, cases may be mediated during trial in a fashion similar to a "mid-trial pretrial". It is even possible to mediate a case after the verdict, while an appeal is pending; after the appeal is argued but before the Court of Appeal decides; and even after the Court of Appeal decides but prior to a decision on yet a further appeal to the Supreme Court of Canada. Mediation is a flexible process designed to address litigation risk, and there is always litigation risk until there's no longer litigation. As such, one can even mediate a case that has been argued in the Supreme Court of Canada, until that case is actually decided. Until the decision is made, either side may prevail, and this uncertainty is the bedrock upon which mediation is constructed.

VII. The mediation memorandum or summary

Just as the pleadings set the parameters for the lawsuit, so does the mediation memorandum or summary set the parameters for the mediation. Indeed, it is almost certain that anything significant which is raised for the first time at the mediation, which is not addressed in the mediation memorandum, will not be realistically considered by the other side.

Addressing new issues for the first time in the mediation memorandum may be a significant impediment to settlement and may doom the mediation or lead to its cancellation. Serving experts' reports of any significance as part of the mediation materials is a very bad idea; the other side will have insufficient time to obtain a responding report or to obtain enhanced settlement authority. Thus, if a plaintiff intends

to raise a new liability argument or to serve a medical report about an injury not previously documented, and if this is done a week or even a month prior to the mediation, the mediation will either not proceed, or it may proceed with diminished or even no possibility of settlement. Surprise is never an acceptable strategy for mediation. Surprise will almost always engender antipathy or worse. Perhaps the first commandment is never include in a mediation memorandum anything significant that has not yet been sent to the other side.

The question then becomes "what is significant?" If you were hanging on to information for it to be a surprise, then it is by definition significant. If you expect the defendant or his insurer to pay you a lot more money than you would expect without the report, then it is significant. If you are representing the defendant and the report destroys the plaintiff's theory of liability or his damages for the first time, then it is significant. If all that the report does is respond to the other side's expert, then I submit that it is acceptable, though hardly optimal, to serve a recently-received expert's report as part of the mediation materials.

If the mediation materials are to include recent reports which alter the terrain of the litigation, then a phone call advising the other side about what is coming is mandatory. The mediation can then either proceed, perhaps with a tentative settlement being reached on an "as recommended" basis, or the mediation can be adjourned pending consideration of the recently obtained material, or perhaps pending further discovery, or even further medical-legal examinations. A mediation cancelled for good reason is far preferable to proceeding on a fruitless, futile, acrimonious mediation with each side posturing to impress her client and to attempt to bully the other side. The cancellation fee to be paid to the mediator is a relatively inexpensive investment in the future settlement potential of the case.

It is trite, but true that the mediation memorandum is being written primarily for the other side's client and not so much for the other side's lawyer. Certainly the mediation memorandum is not being written principally for the mediator. The plaintiff's lawyer in a personal injury case is writing principally for the claims adjuster and secondarily for the other lawyer. As a practical matter, what does this mean? What it means is that the mediation memorandum must lucidly set out in an understandable format why the plaintiff has a good case and why the insurer should pay a lot of money. The mediation memorandum must be divided into liability and damages sections and it should candidly deal with weaknesses in the plaintiff's case. My view is that it is appropriate to quote from experts' reports on liability and damages, but the quotations as a rule should not go on for pages and pages.

If the plaintiff's lawyer feels that most or all of an expert's report is critical, then he should quote the essential portions in the mediation memorandum and refer the reader to the whole report or say "see pages 7 to 13 of the report" in the mediation memorandum.

I suggest that it would be very unusual for a plaintiff's mediation memorandum to exceed 30 pages. The mediation memorandum ought to be supplemented by a mediation brief, which includes all salient reports that the plaintiff's lawyer wants the adjuster to read. Keep in mind that not all reports are critical and that if the reports are adequately summarized in the mediation memorandum, then inserting them in the mediation brief may be unnecessary. The insurance adjuster has previously seen and read the reports. If you as plaintiff's counsel have honestly and accurately summarized an expert's report, then including the actual report in the brief may be superfluous.

A. Extra copies

It is critical that the plaintiff's lawyer send each defence lawyer enough copies of the mediation memorandum and of the supporting briefs so that the defence lawyer may forward these materials to each client to whom she is reporting. Sometimes plaintiff's counsel knows that defence counsel is reporting to an insurer and to an insured or even to two insurers and two insureds. In these circumstances it is necessary to send four or five copies of all materials to defence counsel, specifically requesting (not demanding) that defence counsel forward the materials to his clients.

In general, it is counter-productive for a plaintiff's lawyer not to give a plaintiff a copy of the defendant's mediation memorandum prior to the mediation. The plaintiff should know what the defendant's positions are. The plaintiff's lawyer will obviously tell the plaintiff what he or she thinks of the defendant's legal and factual positions. It is submitted that it is not part of the plaintiff's lawyer's job to insulate or to protect the plaintiff from defence positions and in all but the most unique cases, the plaintiff should be given copies of all defence materials in advance of mediation.

B. Saving something for the mediation

In my view, whether to save something for the mediation is a matter of advocacy. Where and in what format is the presentation likely to make the biggest impact? If it seems preferable to make a point in the mediation memorandum than to express the point at the mediation, or to do both, then the point should be made in the mediation memorandum. Though there is no universally correct answer, it is suggested that most points should be made in the mediation memorandum and expanded upon at the mediation. If a video presentation or PowerPoint is to be used, or if witnesses are to be Skyped in or even brought to the mediation, emphasize these aspects of the presentation at the mediation and minimize them in the mediation memorandum. Ultimately, this is about the power of persuasion and what is going to be most likely to succeed.

C. The length of the mediation memorandum

Though there are exceptions, it is suggested that the length of the mediation memorandum should bear some relationship to the complexity of the issues and to the anticipated length of the trial. It is obviously counter-intuitive to have a 75-page mediation memorandum where the trial is anticipated to take two days. It is equally absurd to have a four-page mediation memorandum where liability and damages are hotly contested and the trial is anticipated to last three months. A comprehensive mediation memorandum should not exceed 30 pages. Keep in mind that the target audience is not the mediator, but the opposing client. One is far better off with a 30-page plaintiff's mediation memorandum which the adjuster reads, than with a more comprehensive 75-page mediation memorandum which they do not read. Much of this is common sense – which frequently seems somewhat uncommon when it comes to crafting mediation memoranda.

D. To demand or not demand specific sums of money in the mediation memorandum

There is disagreement amongst plaintiffs' lawyers about the strategy of making an actual monetary demand or proposal in the mediation memorandum. Although there is nothing inherently wrong with making such a demand, it is unlikely that it will be met by a monetary response in the defendant's mediation memorandum. The reason for this is that the defendant's mediation memorandum is usually prepared independently of the plaintiff's mediation memorandum and as such is usually not responsive to the plaintiff's mediation memorandum. As such, if the plaintiff makes a $700,000 demand in his mediation memorandum and the defendant's mediation memorandum is unresponsive to this monetary demand, the question arises about who makes the first offer at the mediation. It is probably preferable for no offers to be made in mediation memoranda where no offers have been previously exchanged. Where, however, there have been previous Rule 49 or non-Rule 49 offers, then the mediator should obviously be told about this. Where the mediation takes place after the pretrial conference, then it seems logical to tell the mediator what happened at the pretrial conference. The reasons for this border on the obvious. If the plaintiff wanted $1 million a year ago and was offered $200,000, and then said she'd take $800,000 six months ago and was offered $400,000, then in my view, absent some startling developments, the mediation is a mediation of the $400,000 - $800,000 gap. To keep the mediator in the dark about what happened at pretrial or at previous negotiations is counter-intuitive. It means the mediator is unable to participate to maximum efficacy in narrowing the gap – for the mediator doesn't know (and is the only one not to know) what the gap actually is.

–Ed. Note: Look for the continuation of this article, beginning with a discussion of "Realistic and Unrealistic Demands", in the next issue.

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Mediation *in* personal injury disputes

BY FRANK K. GOMBERG

Tips for success in this "brave new" world of civil litigation

part 2

Ed. Note: Part I of this article appeared in the October 2012 issue of The Litigator

VIII. Realistic versus unrealistic demands

Though it is not universal, the initial demand at mediation is almost always made by plaintiff's counsel. The typical exception to this is where the plaintiff has made a pre-mediation offer (which was not responded to) either in her mediation memorandum, by way of a Rule 49 offer, in a letter, at previous negotiations, or even at a previous mediation or pretrial.

Assuming that the plaintiff makes the first offer at the mediation, the question is whether this offer should be completely unrealistic, somewhat unrealistic, realistic or modest. The answer, as in so much of litigation is "it depends".

The abiding fear of plaintiffs' counsel is that of "leaving money on the table". Though this is always a possibility, without any empirical studies, it is impossible to hazard a guess about how often this actually occurs. Defendants are equally concerned about overpaying – in other words, paying more money than the absolute minimum that the plaintiff will accept. Again, without empirical studies, it is impossible to determine how often this actually occurs. A complicating factor is that the plaintiff's lawyer always fears that his own evaluation of the plaintiff's case may conceivably be lower than the defendant's lawyer's evaluation of the plaintiff's case. The defendant's lawyer has a similar concern. The defendant's lawyer always fears that her own evaluation of the plaintiff's case may conceivably be higher than the plaintiff's lawyer's evaluation of the plaintiff's case. These fears invariably infect the negotiating process, as they drive plaintiffs' lawyers to propose inordinately high numbers while simultaneously driving defendants' lawyers to propose inordinately low numbers. To be blunt, if the plaintiff's lawyer thinks her case may be worth $400,000 and the defendant's lawyer thinks the case may be worth $300,000, this case should be settleable. When the plaintiff's lawyer demands $800,000 and the defence offers $50,000, the settlement prospect diminishes.

Since the plaintiff's lawyer usually gets the ball rolling, the question is where to begin. Using the example where the plaintiff's lawyer thinks his case may realistically be worth $400,000 for settlement purposes, in my view it makes little sense to demand $800,000. What's wrong with demanding $600,000? Most plaintiffs' lawyers don't want to do this because they feel they are starting too low. I disagree. The plaintiff's lawyer believes that starting at $600,000 is a negotiating impediment. This is false. The plaintiff's lawyer is worried that she will get the $50,000 lowball offer no matter what she proposes. As such, why not ask for $800,000 or more? The fallacy in this is that asking for way too much money impairs one's credibility and impairs or impedes the process in a place where a premium should be placed on enhancing one's credibility and maximizing the efficacy of the process. The other thing that should be kept in mind is that if one uses a tennis match as a metaphor for the negotiations, then the plaintiff's lawyer is serving. If instead of starting at $800,000, the plaintiff's lawyer starts at $600,000 and in response gets the $50,000 lowball offer, then the plaintiff's next offer can be $575,000 instead of $500,000 – which it would likely have been had the defendant offered $200,000 instead of $50,000. The plaintiff's lawyer has all the flexibility she needs to respond to lowball offers, by starting at a sensible number and then reducing the offer in small increments in order to respond to the exigency of further lowball offers. If after two or three lowball offers, the plaintiff's lawyer perceives that the negotiations are going nowhere, the plaintiff's lawyer can at that point:

i) terminate the mediation;
ii) ask the mediator to explore other approaches to settlement. One of these is the confidential hypothetical "what will you take?"; "what will you pay?" approach, to be discussed below.

Just as the plaintiff's lawyer has flexibility to respond to lowball offers, the defendant's lawyer has flexibility to respond to an initial highball offer by starting at a sensible number and then increasing the offer in small increments in order to respond to the exigency of further highball offers.

Using the example of the case that the defence evaluates at $300,000, if the plaintiff's lawyer demands $800,000, rather than responding with a lowball offer of $50,000 (which demeans the defendant's lawyer's credibility), why not offer $150,000? If the next plaintiff's offer is $750,000, then offer $200,000, then $225,000, then $250,000. If the plaintiff's lawyer is still way too high and the defendant's lawyer perceives that the negotiations are going nowhere, the defendant's lawyer can at that point:

i) terminate the mediation;
ii) ask the mediator to explore other approaches to settlement. One of these is the confidential hypothetical "what will you take?"; "what will you pay?" approach - to be discussed below.

IX. What will you take, if the defendant will pay it? What will you pay, if the plaintiff will take it?

The mediator is there as a servant of the parties, to assist in the negotiations with a view towards settling the litigation. This is an important job which is made easier by lawyers and litigants who behave responsibly and realistically. Unfortunately, from time to time, lowball and/or highball offers are made even late in the day, where pragmatism seems to have been jettisoned. What then can be done to save the day?

Though this paper is being written for counsel and not for mediators, if counsel know what the mediator has in her arsenal, this may make it easier for counsel. In the example above, I've postulated a scenario where the plaintiff's

The *opening statement* may be the *only chance* in the mediation, and probably in the life of the litigation, for the plaintiff's lawyer to *address the insurer directly* and for the defendant's lawyer to *address the plaintiff directly.* The *opportunity* to effectively put one's case to the decision-maker with no filter interposed between you both is *truly unique* and ought *not to be missed*

lawyer thinks the settlement value of the case is $400,000 and the defendant's lawyer thinks it to be $300,000. If after seven hours of mediation, the plaintiff's lawyer is at $650,000 and the defendant's lawyer is at $250,000, there is obviously a problem. If the plaintiff's lawyer is at $450,000 and the defendant's lawyer is at $100,000, there is obviously a problem. In the first of these examples, after seven hours of mediation the plaintiff's lawyer is way too high. In second of these examples, the defendant's lawyer is way too low. What can be done to salvage the mediation?

One or both of the lawyers can ask the mediator (or the mediator can suggest this on his own) to engage in the "what will you pay?"; "what will you take?" hypothetical. This is done by the mediator assuring both sides that their hypothetical in-caucus numbers will not be revealed to the other side. Using the example where the plaintiff's lawyer is at $450,000 and the defendant's lawyer is at $100,000, the plaintiff's lawyer may tell the mediator confidentially that the plaintiff will take $350,000 – if the defendant will pay it. The defendant's lawyer may tell the mediator confidentially that the defendant will pay $300,000 – if the plaintiff will take it. The mediator must then attempt to forge a settlement between $300,000 and $350,000 without revealing these two numbers to the lawyers or to their clients. Whereas it looks like the plaintiff won't take less than $450,000, the mediator knows the plaintiff's number is really $350,000. Whereas it looks like the defendant won't pay more than $100,000, the mediator knows the defendant's number is really $300,000. The mediator must figure out a way to bridge the $350,000 - $300,000 gap without disclosing confidences. Most mediators will figure out what to do. The lawyers should encourage their respective clients to disclose their bottom lines to the mediator on this confidential basis, since to persist in the $450,000 - $100,000 paradigm helps no one. If the mediator cannot narrow the $350,000 - $300,000 confidential gap, then nothing is lost. The defendant will leave the mediation thinking that the plaintiff's number is $450,000. The plaintiff will leave the mediation thinking that the defendant's

number is $100,000. The mediator has taken his best shot at narrowing the gap. The parties deserve no less.

X. Opening statements

The opening statement is made in joint session at the commencement of the mediation. The way personal injury mediations unfold, there may not be another joint session. As such, this will be the only chance in the mediation and probably in the life of the litigation for the plaintiff's lawyer to address the insurer directly and for the defendant's lawyer to address the plaintiff directly. Given this reality, there is no excuse for a poorly constructed or a poorly executed opening statement. The opportunity to effectively put one's case to the decision-maker with no filter interposed between you and the decision-maker is truly unique and ought not to be missed. The next opportunity to put one's case forward without interference from the other lawyer will be at trial – and effective mediation advocacy will hopefully obviate the necessity of a trial.

It is strongly suggested that when the plaintiff's lawyer opens, she speak directly to the insurer's representative and that this be done in a realistic, respectful way. Condescending opening statements which are made in an overbearing, bullying fashion are to be avoided at all costs. The best and most productive opening statements for plaintiffs, acknowledge the risks inherent in a jury trial, acknowledge weaknesses in the plaintiff's case, acknowledge that there are two sides to every story and explain how the plaintiff's lawyer will attempt to limit the damage of the weaknesses and enhance the punch of the strengths. An important component of the plaintiff's lawyer's opening is to analyze the weaknesses of the defendant's case and to fairly tell the adjuster why the plaintiff's case has more merit to it than the adjuster might otherwise think. It is strongly recommended that the plaintiff's lawyer never tell the adjuster how the plaintiff's lawyer will "bury", "annihilate" or "kill" the defendant's case (or the defendant's lawyer) at trial. It is equally offensive for the plaintiff's lawyer to advise the adjuster that the plaintiff's experts are all Nobel Prize laureates and that the defendant's experts are all crude incompetents. This type of exaggeration is extremely poor advocacy and ought to be avoided at all cost.

It is always a bad idea to simply read one's mediation memorandum at the mediation. This demeans the other side, for clearly they are competent readers.

I suggest that the plaintiff's lawyer view the opening statement as a unique opportunity to persuade, and that the opening be delivered in a different order from that used in the mediation memorandum, with a particularly interesting point to be made at the beginning and at the end of the presentation. If you as plaintiff's lawyer can keep the adjuster engaged in the process and impressed with your intelligent approach, organization, competence, advocacy skills and integrity, you are well on the way towards achieving an excellent result for your plaintiff.

XI. The lawyer's credibility

The nature of litigation is that the lawyers are close to the combat and often misperceive their roles to include being co-combatants with their clients. It is much easier for a mediator or for a trial judge to see this, than it is for the lawyer embroiled in the fray.

Though the lawyer is not neutral and does not have to be neutral (as a mediator, judge or jury must be), it is critical that the lawyer not sacrifice objectivity on the altar of overzealousness. An overbearing, grasping, unrealistic lawyer is doing the client a tremendous disservice at mediation – for how can that lawyer evaluate the reasonableness of offers and make recommendations to the client when the lawyer's affinity for the client or his case clouds the lawyer's judgment? The client has presumably hired the lawyer to advance her case with honesty, integrity, passion, intelligence, preparation and judgment. When the lawyer sacrifices any of these important attributes of advocacy, the lawyer loses credibility with the other side and arguably loses credibility with his own client. A thoughtful client will realize that an unprincipled lawyer vis-a- vis the other side, is probably unprincipled vis-a-vis his own client as well. If a lawyer exaggerates to the other side, this should give the client little comfort as the lawyer has probably exaggerated to his own client as well.

It is certainly not only within the bounds of advocacy, but mandatory that the lawyer advance the best points on behalf of a client and attempt to minimize the worst points. However, by way of example, for the plaintiff's lawyer to argue that the plaintiff suffered a significant brain injury where the Glasgow Coma Scale at the scene was 15 and remained 15, and where all experts retained by both sides dispute a head injury, makes no sense and will adversely impact on that lawyer's credibility with the defence at mediation, at a subsequent pretrial, at trial and in cases in the future.

It is trite to observe that a reputation takes a career to build and can be destroyed in an instant. Credibility, once lost, can rarely be restored. The practicalities dictate against trying to put one over on the other side. This will rarely be successful and will almost always impact adversely on the client.

In the example above, it is certainly appropriate to argue that the plaintiff has suffered a mild concussion with consequent headaches which are problematic. To go further, in the absence of credible experts, and to argue cognitive impairment, is to demean those parts of your case that may be valid but will now be viewed as invalid by virtue of your impaired credibility on the head injury issue.

The general rule of thumb should be that if you don't really believe it and there's no compelling evidence to support it, then don't try to pitch it to the other side.

Another way of putting it is this: if the issue was pitched to you, with the evidentiary matrix that has been assembled, might you buy it? If not, then it is suggested that you not pitch it to the other side.

All of this has practical and significant ramifications at mediation. Though advocacy is obviously important and requires a lawyer to put his client's "best foot forward", this does not extend to advancing "phantom limbs". Attempting to put "phantom limbs" forward will almost always fail and will redound in a significantly adverse way to your case. Put simply, when in doubt, leave it out.

XII. Opening offers

The negotiation of personal injury cases at mediation is somewhat different from other negotiations as the lawyer is there with her client and the negotiations take place in real time with settlement decisions made on the spot. This reality should not be overlooked; nor should the Damocles sword of the non-specialist pretrial judge and the non-specialist trial judge with a non-specialist jury be minimized. Anything which contributes to the potential failure of the mediation ought to be avoided; and yet lawyers often engage in high ball/low ball antics at mediations. The fact that this is unwise ought to be obvious. The reason why it is unwise may be less so.

The realistic/unrealistic paradigm has already been discussed. The reason for the plaintiff's lawyer not making excessive demands or for the defence lawyer not making ridiculously low offers relates to the fact that clients are predictably unpredictable, and they may react in tempestuous ways to perceived disrespect. A plaintiff's initial offer of $2 million for a case the defendant's adjuster thinks is worth $300,000 may lead to an immediate termination of the mediation. The adjuster may instruct her lawyer to leave and the lawyer and the mediator may not be able to persuade the adjuster to stay.

Similarly, an ill-conceived defence offer of $10,000 for a plaintiff's case that has a probable settlement value of $200,000 may cause the plaintiff to bolt.

Why risk the failure of a mediation that may have been arranged a year ago, just to engage in posturing? Lawyers are often overly confident of their abilities to control their respective clients, particularly when the clients have "disrespect", "bad faith", and other noxious ideas in their minds. The plaintiff who has been injured in an accident may now feel re-victimized by the mediation process. The defendant's insurance representative may feel that the plaintiff is a malingerer and may have a bad history with the plaintiff's lawyer. If one is the defence lawyer or the adjuster, one should be careful not to re-victimize the plaintiff if there is a desire to see the case to settle at mediation.

If you as plaintiff's lawyer have a bad history with the adjuster, then to exacerbate this by making absurd settlement demands is to ensure the failure of the mediation.

The punch line is that lawyers for defendants should not be discouraged by excessive initial offers, nor should lawyers for plaintiffs be discouraged by minuscule initial offers. The lawyers should encourage their clients to stay, negotiate in good faith and see what happens. Many a victory has been snatched from the jaws of defeat. However, platitudes like this one often fail to assuage the hurt feelings of clients who are outraged. Given this reality, the lawyers on both sides should attempt to talk the clients out of blatantly ridiculous offers. If one or more of the clients insist, then an unrealized settlement may be the result.

XIII. Information to be communicated to the mediator prior to the mediation

As part of the informational process, it is critical that before the mediation session begins, the mediator be made aware of all previous settlement offers, Rule 49 offers, pretrials, mediations or recommendations that one side has told the other she would make. It is by necessity critical that if lawyer A told lawyer B he'd recommend $300,000 all-inclusive, and if lawyer B said he'd recommend $200,000 all-inclusive, that they both communicate the same thing

to the mediator. There is rarely, if ever, a reason for lawyers to "misremember" what they told the other side. It is unethical for the plaintiff's lawyer to have told defence counsel a year ago that she'd recommend $300,000 and to say today that the recommendation a year ago was $400,000. This misremembering will constitute a big obstacle to settlement, as the lawyer's credibility is now seriously compromised. Lawyer credibility has been discussed above. Suffice it to say that it is entirely appropriate for the plaintiff's lawyer to say to the mediator that "a year ago I was prepared to recommend a settlement of $300,000 and the defendant was prepared to recommend $200,000. My view of the case has changed. I will no longer recommend a settlement of $300,000". The defendant should not misremember either. It is entirely appropriate for the defendant's lawyer to say that "a year ago I was prepared to recommend a settlement of $200,000. I will no longer do so". All of this must be recounted in an honest way either before the mediation session or at the mediation.

I suggest that a section be incorporated into all mediation memoranda dealing with the history of negotiations or settlement discussions. This history must be scrupulously accurate and the histories in all mediation memoranda should accord with each other. A failure to agree on what has previously happened in terms of settlement discussions, recommendations, all-inclusive versus not all-inclusive offers, prejudgment interest, costs, disbursements and other similar disagreements are all anathema to possible settlement at mediation and, where anticipated prior to mediation, ought to be canvassed with the mediator – either in the mediation memoranda or by way of a pre-mediation letter to the mediator.

Lawyers are often *overly confident* of their *abilities to control* their respective *clients,* particularly when the clients have "disrespect", "bad faith", and other *noxious ideas* in their minds. The *plaintiff* who has been injured in an accident *may now feel re-victimized* by the mediation process

XIV. Lawyer-client disagreement

Calling disagreement between lawyer and client "a problem" is a euphemism for the client not taking the lawyer's advice, or the lawyer disagreeing with the client's instructions. Arguably, these are different ways of saying the same thing.

In a personal injury case this may arise where:

i) the plaintiff thinks his case is worth more than his lawyer thinks it to be worth;
ii) the plaintiff wants to settle his case for less than his lawyer thinks it to be worth;

It should be obvious that scenario (i) is problematic. Scenario (ii) is interesting, but raises few practical problems.

The mediator is there to facilitate a settlement given the exigencies, cost and unpredictability of litigation. It is postulated that the mediator is not there to talk a plaintiff out of what the mediator and plaintiff's counsel may think is an unusually low settlement (scenario (ii)). It must be remembered that the case belongs to the plaintiff and not to his lawyer. The client has reasons for doing things which may be viewed as obtuse by his lawyer. A plaintiff may need quick money for various legitimate reasons and may fear litigation for equally legitimate reasons. Since the lawyer is not a guarantor of results, it is entirely appropriate for a mediator to facilitate a settlement for what the plaintiff's lawyer and the mediator feel is an inadequate sum, as long as the plaintiff wants the case settled and understands his lawyer's *contra* advice.

What if the plaintiff rejects her lawyer's advice to settle for the $100,000 that is offered by the defence at the end of the day? The plaintiff wants more and the mediator feels the case is not worth more. The plaintiff's lawyer needs the mediator's help in convincing the plaintiff to accept the $100,000.

If the plaintiff's lawyer needs the mediator's help with the plaintiff, he should tell the mediator privately that he needs such help. There is nothing wrong with the mediator meeting with either counsel privately. It is obviously very improper for the mediator to meet privately with a plaintiff and the mediator should never do so without being invited by plaintiff's counsel to do just that.

It is entirely proper for the mediator to help the plaintiff's lawyer with the plaintiff who has unrealistic settlement expectations – as long as the mediator feels the expectations are unrealistic.

Where there is a legitimate area of disagreement is where the plaintiff thinks his case is worth $200,000 and his lawyer thinks the case is worth $100,000. The mediator personally agrees with the plaintiff. He disagrees with the plaintiff's lawyer, who is seeking the mediator's help to beat the plaintiff into what the mediator feels is an inordinately low settlement. This scenario poses particular difficulty for mediators with subject matter expertise; for mediators with such expertise may personally agree or disagree with the lawyers.

I think that the better view is for mediators not to get too exuberant about beating litigants into doing what they don't want to do, regardless of whether the mediator agrees with the plaintiff's lawyer's advice. Human nature being what it is, it is obviously easier for a mediator to support a plaintiff's lawyer's advice to a plaintiff to accept less than the plaintiff wants, when the mediator agrees with the lawyer. However, the mediator must always keep in mind that her allegiances are not principally to the lawyers, but to the parties and to the integrity of the process.

The mediator should always have candid discussions with counsel. If the mediator disagrees with counsel, most lawyers are sophisticated enough to know that in areas of opinion, disagreement is hardly unusual. Few lawyers will ask mediators with whom they disagree, to advance a position with that lawyer's client with which the mediator expresses professional disagreement. In other words, if the lawyer and the mediator do disagree, it is rare for the lawyer to ask the mediator to advance a position with which the mediator disagrees. In those extremely rare cases where a lawyer asks a mediator to do something with the lawyer's client that the mediator doesn't agree with, the mediator ought to tread lightly and ought to refrain from doing anything that the mediator finds ethically repugnant.

XV. Strategies to bring the mediation to a successful conclusion

Most litigants are prepared to discount their potential success at trial by the perceived risk of proceeding to trial and losing. This so-called litigation risk is the currency which is transacted at mediation. Except where mediation is mandatory, it can be inferred that the litigants are at the mediation in order to achieve settlement. If they weren't, then they wouldn't be there in the first place.

It is therefore strongly suggested that the lawyers agree on a mediator who is loathe to take no for an answer. This means that the mediator must be energetic, persistent, determined and

must doggedly pursue settlement, even when the prospects look bleak. Thus, at the end of an arduous mediation, when settlement looks impossible, it is critical that the mediator exploit the trust that she obviously has with all counsel – for if this trust was absent, the mediator wouldn't have been hired by these lawyers.

Rather than accepting the apparent impossibility of a settlement when the monetary terrain seems way too vast to traverse (after many hours of negotiation), the mediator can employ a number of techniques to seek to bridge the gap. One of these techniques is the hypothetical and confidential "what would you take; what would you pay" approach (as discussed above). Another approach is to ask each of the lawyers privately whether the "problem" is with his client and whether the lawyer needs some assistance in moving his client along the spectrum of compromise. Sometimes the mediator may not think to approach the lawyers; or there may be such hostility or acrimony between the lawyers or between the warring clients that the mediator becomes distracted from considering this or any other approach to seal the deal. If a lawyer suspects that the mediator may not have considered a strategy to achieve resolution, it is incumbent on that lawyer to make any suggestion to the mediator that the lawyer feels is warranted. After eight or nine hours of often-heated caucus discussions, the mediator may be punch drunk and may not think of something. If counsel has something in mind, tell the mediator; the mediator will be grateful for the help.

It is also crucial for the mediator and the parties to fully understand all proposals and to consider that when the lawyers and the litigants are tired, what may seem obvious or explicit to the mediator may be enshrouded in confusion or may be misunderstood by the parties. Two examples of this illustrate the point.

i) A complex case with multiple parties was being mediated for the second time. The plaintiff was a 25-year-old severely brain injured victim of a car accident. He'd been catastrophically injured on the highway due to the negligence of another driver who had struck the plaintiff's car, and by the combined negligence of the highway authority, the police, and by the lessor and driver of another car that had stalled on the highway causing the plaintiff to take evasive action. At the first mediation, the total offered was $1 million with many of the insurers being unrealistic. The second mediation was about to fail on a Friday night – after an 11-hour session. The plaintiff's final and lowest offer was $10,000,000. The defendants' final and highest combined offer was $9,500,000. The line in the sand was drawn, and nothing could apparently be done. As lawyers and clients were literally on their way to the elevator,

one of the very sophisticated insurance representatives asked the mediator privately whether the plaintiffs' lawyers were trustworthy. The answer was that they were, but how was this relevant? The answer was that this insurer would increase its contribution by the deficiency of $500,000, but only if the plaintiffs' lawyers were reliable and trustworthy. This sophisticated insurance executive had overlooked the reality that the plaintiffs' lawyers had made a firm, binding settlement offer of $10,000,000 and that this offer was open for acceptance, trustworthy lawyers or not. This insurance executive had apparently not discussed this with his lawyer, but blurted it out to me as we were leaving. I immediately reconvened the mediation and wrote up comprehensive Minutes of Settlement, which were promptly executed. The point to this is that the lawyers and the mediator must check out even what seem like basic propositions. To fail in this effort may be to leave a mediation with a settleable case unsettled.

ii) A case was being mediated after trial and indeed after the appeal to the Court of Appeal had been argued but not yet decided. After 12 hours of mediation, a deal was achievable – the defendant would pay the plaintiff $1.5 million if the plaintiff won in the Court of Appeal; and $1.2 million if the plaintiff lost in the Court of Appeal. The plaintiff had recovered $2 million at trial, but liability and damages were highly contentious and the Court of Appeal could do anything, including allowing the appeal and dismissing the case outright.

The plaintiff's lawyer misunderstood this proposal and was about to leave after 12 hours of mediation. I re-iterated the obviously sensible proposal: if you win in the Court of Appeal, you get $1.5 million; if you lose in the Court of Appeal, you get $1.2 million. The plaintiff's lawyer was shocked. She thought that if she won in the Court of Appeal, the proposal was that she'd get $1.5 million; if she lost, she'd get nothing. When it was pointed out that a loss in the Court of Appeal meant $1.2 million, the Minutes of Settlement were promptly executed. Fatigue and misunderstanding go hand in hand. Always parse things out with the mediator. You may find that the extra effort goes a long way towards eliminating or at least minimizing disagreement. Again, this is critical in order to ensure that settleable cases do not go unsettled.

The final attempt to bridge disagreement is when all strategies and tactics have been explored and a deal simply isn't there to be had. This doesn't necessarily constitute failure, as sometimes the case isn't ripe for settlement for a variety of reasons. When this happens, the mediator should encourage the parties to keep talking in the future. The mediator should attempt to bring everyone together before they leave the mediation. The mediator should also offer to continue to be available and, if requested to do so, the mediator should convene a second mediation. This amicable conclusion to a contentious day is the last thing that the parties will remember, and may well form the basis for resumed talks in the future. The salutary benefits of a friendly good-bye should not be underestimated, as this may be the foundation upon which subsequent settlement is constructed.

XVI. Multiple mediations

When a mediation fails to produce a resolution, it is suggested that counsel

undertake a *post mortem* to determine why a settlement was not achieved. There are numerous potential answers. Some are:

i) the mediation was premature;
ii) the plaintiff's demands were excessive;
iii) the defendant's offer was insufficient;
iv) the insurer may have set inadequate reserves;
v) one or more of counsel was/were unreasonable;
vi) one or more of the clients was/were unreasonable;
vii) the mediator wasn't up to the task.

It is unnecessary to deal with each of these possibilities *seriatim*. It is sufficient to state that none of these examples precludes a second or even a third mediation, as it is possible, if not probable, that one or more of these obstacles may no longer exist six months or a year or two after the unsuccessful mediation. As such, counsel should be alert to mediation opportunities at all times, including:

i) after a failed mediation, but before trial;
ii) just before the trial starts, but after all trial preparation has been completed;
iii) during the trial, after some crucial testimony has been tested by cross-examination;
iv) after the trial, but before the jury's verdict (which one can ask the judge to delay for a day pending mediation);
v) after the trial, but before the judge renders her judgment in a judge alone trial;
vi) after judgment, but before an appeal;
vii) after the argument in the Court of Appeal, but before judgment in the Court of Appeal;
viii) after the Court of Appeal judgment, but before an appeal to the Supreme Court of Canada;
ix) after the argument in the Supreme Court of Canada, but before the judgment in the Supreme Court of Canada.

Should counsel use the same mediator who mediated the case the first time for a second mediation? The answer depends on a number of criteria, including whether any of the lawyers or clients believe that the first mediation may have failed because of the mediator.

Most mediators subscribe to the mediators' equivalent of the medical profession's Hippocratic Oath, "Do No Harm". As such, I submit that it is rare for a mediation to fail because of the inadequacy of the mediator. It is however possible that though the first mediator was adequate, in hindsight she may not have been ideal for this particular case. The reasons for this are many and most if not all have already been discussed:

i) this case in hindsight required an in-your-face mediator instead of the passive mediator who mediated the case the first time, or *vice versa;*
ii) this case in hindsight required an evaluative mediator instead of the non-evaluative mediator who mediated the case the first time, or *vice versa;*
iii) the mediator was inadequate and not up to the task.

Unless the mediator is truly inadequate for the job, and unless one of the other delimited criteria obtain, it is probably preferable to stick with the same mediator who mediated the case the first time. Though there may be other reasons (aside from those set out above) to reject the idea of using the same mediator, it is suggested that since the original mediator knows the case and has spent many hours reading the materials, economy of resources and learning curve issues dictate that in anything other than the simplest case, it makes sense to re-convene with the same mediator. An added feature to this is that most mediators view an unsettled case as a personal challenge. Where the case hasn't settled at the first mediation, the mediator will embrace the professional challenge of trying to succeed where he has previously failed. Needless to say, where a new mediator is required for any of the reasons set out above, this new mediator will be highly motivated to succeed where the previous mediator has failed. The interjection of mediator ego into the unsettled case paradigm should not be underestimated. Everyone likes to succeed when they have previously failed. Everyone also likes to succeed where someone else has failed. This applies to mediations, just as it does to diagnoses in medicine, and to other endeavours like mountain climbing. Keep the principle in mind and do not reject a second mediation out of hand. The maxim "if at first you don't succeed..." is very much applicable to mediation. Never despair. A settlement may very well just be around the bend!

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