Preparing for Mediation: Where the Real Advocacy Begins

Peter W. Kryworuk and Alysia M. Christiaen,
Lerners LLP

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The importance of mediations as an effective tool in reaching a settlement cannot be stressed enough. A mediation provides counsel with a very unique opportunity. It is often the one time in the entire litigation process where you have the opportunity to discuss the claim, your client's injuries, and the damages, directly with the decision maker who has the authority to settle the action. A successful mediation requires effective preparation which includes a comprehensive reviewed assessment of the case, the preparation of persuasive mediation materials, management of client expectations, and development of a strategy for the mediation itself.

Ready for Mediation?

One of the first things that needs to be determined is whether the case is ready for a mediation. Going to a mediation too early is often a waste of time because counsel and the mediator may not be fully informed about the facts or have the necessary information to fairly assess the key issues in the case. On the other hand, going to mediation too late can result in failure. Counsel and/or the parties may be too entrenched in their positions and the willingness to compromise may have passed. The costs of litigation incurred to date may discourage settlement. Most cases have a window of opportunity for meaningful settlement discussion. Mediation too early or too late is bound to fail.

As plaintiff's counsel, you must be fully informed as to the value of your client's case. You should not proceed to mediation while any material questions about your client's losses remain unanswered. It is imperative that you have assembled all of the evidence, including medical and expert reports require to appropriately assess and value your case. Not all cases will require a cabinet full of reports, but you must be satisfied that you have the information you need to go to a mediation, with the evidentiary support for the claims you are advancing for settlement. In most cases, this means that the case has matured to the point where you are able to get a full prognosis of your client's injuries and future needs, and are able to undertake a complete assessment of all past, present and future pecuniary and non-pecuniary losses.

Assessing the Case

One of the most important steps in a personal injury action is assessing the value of the case. A damages assessment cannot be properly completed without having all of the necessary information. Do not agree to go to a mediation if there is still information that you need to gather to assess the value of the claim. Your ballpark estimate of the damages does not advance your client's best interest, nor will it be accepted by the adjuster if there is no evidence to support it.

What information do you need to assess the value of your client's case? An expert opinion from one or more medical specialists needs to be obtained for each type of injury or impairment. Depending on the severity of the client's injuries, you will want to obtain a life care plan report commenting on their future care needs, including the need for housekeeping and home maintenance assistance. Not all cases warrant obtaining a life care plan, but a report from an occupational therapist who conducts an in-home assessment, or a functional abilities evaluation, may assist with the future care costs claim.

In terms of the economic losses, some cases only require a report from a forensic accountant, economist or actuary based upon stated assumptions. For example, when your client has returned to their pre-accident employment on a part-time capacity. Other cases may require a full vocational assessment. You may need to obtain reports commenting on your client's ability to return to work, the need to retrain, their work life expectancy, their restrictions, limitations and required accommodations, or a labour market report. Do not forget to consider special damages including all out of pocket expenses. Consider the impact of statutory accident benefits where applicable. If any subrogated claims are being advanced make sure you have updated assessments of those claims.

It is just as important to ensure that you have all of the necessary information from the defendant before assessing the value of your client's case. The defendant has to provide you with all reports from independent medical evaluations. You should also request to be provided with updated particulars of any surveillance or other investigation.

A very important tool to obtain in advance of the mediation is a good actuarial/economic/accounting report. At a mediation, you may be required to re-evaluate and re-calculate damages during the negotiation process. Most economic loss reports assist with this by providing an easy to use method to value the present value of a loss of $1,000.00 per year, for the period of the loss. You should also bring to the mediation a slide rule with present value calculations (a slide rule app can easily be downloaded onto your smartphone).

If the case warrants, you should consider obtaining a report from a structured settlement specialist in advance of the mediation. A representative from the structure company will attend at the mediation if requested, in appropriate cases. You may want to canvas with defence counsel if this will be helpful.

Completing a thorough assessment of damages in advance of the mediation allows you to develop a strategy as to how you will present offers at the mediation, and most importantly, to set a target range for settlement.

A useful way to develop your strategy for mediation is to think about a “circle of compromise”. Each case has a value that has an upper range of damages and a lower range of damages. For a mediation to be successful, both parties need to operate within this circle of compromise. The plaintiff will start off the mediation with offers in the upper range of damages, and the defendant will start off in the lower range of damages. The goal is for both parties to move to a final position that is somewhere in the middle of the circle of compromise. Putting in a first offer that is well outside of the circle of compromise, will likely result in an equally offensive first offer from the defendant. By putting in an initial offer that is high, but within the acceptable range of damages, the chances of a successful mediation increase significantly. It signals to defence counsel and the adjuster that you are there to negotiate in good faith, and that you and your client expect that everyone will compromise in order to settle the case.

Preparing the Material

The advocacy of a mediation starts with the mediation memo. It is often ignored yet a persuasive tool that helps the mediator, and more importantly, the insurer and decision maker, understand the plaintiff’s case, as well as the real risks of going to trial. Mediations often fail when the adjustor has insufficient authority. Delivery of a persuasive and fair mediation memo well in advance of the mediation will minimize this risk.

The length of the memo will obviously depend on the facts of the case, and the issues in dispute. However, a mediation memo should be clear and concise. You do not want your mediation memo to be so short that your reader is missing an appreciation of the facts or does not understand the case which would be presented at trial. At the same time however, you do not want your memo to be so long and detailed that you lose your reader’s attention, and cause them to skim through the pages and gloss over the important details. Your focus should be on

writing the mediation memo with the twin goals of brevity and persuasiveness – the exact number of pages is not an appropriate concern.

The tone of your mediation memo should be moderate and even. It is important to paint a picture of your client's life before the injury, and how it has been changed by the accident. You want to elicit sympathy for your client, but you need to ensure that you do not alienate the adjuster or defence counsel by overselling the impact of your client's injuries. The mediation memo is not the place to be confrontational. The fact that the parties have agreed to a mediation means that counsel and the parties are generally willing to work toward the common interest of resolving the matter. You may have polar positions on certain issues with opposing counsel, but the mediation memo is not the place to rehash old arguments. Remember that the mediation memo is also going to be read by the mediator and the adjuster. You do not want to affect their impression of the case, or their impression of you or your client, in order to get in one last jab at defence counsel. Personal attacks rarely advance the settlement process and should especially be avoided on a mediation.

Each counsel has their own stylistic preferences when it comes to the layout of the mediation memo. One is not necessarily better than the other. What is common to all counsel's mediation memos is effective coverage of all of the issues that need to be addressed in order to achieve a settlement.

Typically, you'll want to provide the reader with an overview of the plaintiff and the issues in dispute, and then have sections dealing with liability and damages. Take care in drafting the memo. You need to be accurate in the review of the facts. You should be fair and balanced, and do not overstate or exaggerate your client's claim. Use headings and sub-headings to focus the reader's attention.

Liability

Liability should be discussed briefly, unless it remains a contentious issue at the mediation. Even if liability has been admitted, there is usually value in highlighting the circumstances of the accident. If it was a very serious impact, it could help inform the reader as to the injuries that resulted, and garner some appreciation for the genesis of the physical and emotional injuries flowing from the injury.

If liability is still in dispute, then you will want to highlight the weaknesses of the defendant's case, and emphasize the strengths of your client's case. Each element of liability needs to be addressed in the mediation memo. Be sure to devote sufficient attention to standard of care and causation, and in applicable cases any special defences such as seat belt defence. Consideration should be given to attaching documents that support the plaintiff's theory of liability. The most obvious are expert reports on liability, such as accident reconstruction reports. However, scene photographs and sketches can be equally useful, especially in complicated cases. In appropriate cases attach copies of key witness statements.

Address any real liability or contributory negligence issues up front. In appropriate cases, admit some level of contributory negligence. Deal with the defendant's anticipated arguments up front, in a responsive manner, and acknowledge weaknesses where they exist. Expressing a willingness to compromise on previous hard line positions, where appropriate, can be very effective. Compromising on a less important issue can allow you to take a firmer position on more critical issues.

Remember, this is your one time to speak directly with the person making the settlement decisions on your client's case. You want to convince them that there is a risk for them if the action proceeded to trial. Remember that the contents of your mediation memo may very well set the tone for mediation and impact the chances of achieving your client's settlement objective.

Damages

When discussing your client's damages, you will want to ensure that you address each head of damages being claimed. Failure to do so could result in defence counsel assuming that you will not be advancing a claim for such damages, which could ultimately lead to the adjuster coming to the mediation without sufficient settlement authority.

When dealing with your client's non-pecuniary general damages, you should provide a good concise summary of their injuries and their treatment. Chronologies are a useful tool in some cases. Consider attaching photographs of your client's injuries to the mediation memo if they tell a story. Counsel rely heavily on demonstrative evidence at trial to help convey to the trier of fact the nature and extent of their client's injuries. The value of demonstrative evidence should not be forgotten just because your advocacy is taking place in a mediation conference room instead of the courtroom. Some counsel on mediation go overboard with photos, videos and

other demonstrative evidence to the point where it has an adverse effect on the opponent's view of the case. Remember all is good in moderation.

A summary of your expert's findings and conclusions should be provided in the memo and the reports should be attached. The summary should include the expert's opinion on diagnosis and prognosis, as well as the client's restrictions and limitations. Do not shy away from commenting on the defence medical expert reports – either to emphasize the conclusions if they are assistive, or to point out their weaknesses if they are harmful.

If you have been provided with a surveillance report from defence counsel, be sure to reference it in the mediation memo. If it is helpful, highlight the fact that the insurer's own surveillance confirms your client's impairments and restrictions. If it is harmful, you need to provide an explanation for what was documented by the investigator or put the video into context of your client's overall injuries. Where appropriate send the surveillance to your own experts who may provide opinions to neutralize the surveillance.

When dealing with future economic losses, the mediation memo should set out the wages or salary you intend to base your claim for damages on. By providing actual dollar amounts in the mediation memo, the adjuster will be able to easily calculate the potential loss when seeking settlement authority. All claims for damages for future losses should be supported with reference to your expert reports.

A similar exercise needs to be conducted for any *Family Law Act* plaintiffs.

Assessment of Damages

Consideration should be given as to whether to include an assessment of damages in the mediation memo or even an opening offer. A canvass of several plaintiff lawyers revealed that it is quite rare to include a first offer in the memo. Typical practice is to simply include a statement along the lines of "a reasonable assessment of damages will be provided by the Plaintiff at the mediation." One obvious risk to setting out a specific offer is it might change if new information is provided. An assessment that is too high may scare away the defendant. It is best to present an assessment of damages at the mediation where it can be explained and put into context. I prefer to outline the "best case scenario" of the plaintiff's damages in my opening statement and after will present the assessment in writing.

Outline previous offers that have been made and any offers still open for acceptance. But as a general rule do not start negotiating until the mediation begins and do not negotiate against yourself.

Jurisprudence

It is not common to mention jurisprudence in your mediation memo. It may be useful in cases where there is a dispute on a specific issue, and you have found authority directly on point that addresses it. If it is necessary to refer to authorities you should provide defence counsel with the case law in advance of the mediation, and bring copies to the mediation. Reference can be made to the decision when appropriate, if the issue continues to remain in dispute.

Final Comments

Make sure that you provide your mediation memo by the date requested by the mediator. By submitting it late, you are making a bad first impression. It does not give defence counsel opportunity to report to his insurer and to maximize the authority brought to the mediation. You want to avoid late surprises or expert reports, which can result in a cancellation of the mediation, or a failed mediation.

When sending a copy of the memo to defence counsel, send two copies, so that one can be provided easily to their client, the true target reader of your memo.

Importantly, you want to make sure that defence counsel, and their client, has your mediation memo and all expert reports on time, so that the adjuster comes to the mediation with appropriate authority available to settle the case. The adjuster's authority for the mediation will not be decided the day before the mediation. Often times, a claims committee will review the case and the recommendations of defence counsel and the adjuster at least a week or two in advance of the mediation. You only do a disservice to the mediation process and to your client by late serving mediation material. In some cases it is unavoidable but avoid delivery of late material at all costs. If necessary reschedule the mediation to allow the other side to consider the new material and deliver responding materials if necessary. Do not give your opponent a way out of addressing your expert opinion by saying we have not yet had a chance to respond.

In summary, your mediation memo should present a comprehensive and compelling argument, without surprises.

Managing Client Expectations

An important part of the preparation for a mediation is managing your client's expectations. Your clients need to have an understanding of the mediation process, and the role that they play in that process. A ten minute meeting before the mediation starts is simply not enough time to prepare your client. It is best to have a meeting with your client a week or so in advance, so that they have time to process the information you provide, and ask you any questions.

At this stage of the game, your client should not have grand illusions about the value of their claim. If they do, then you have not been properly communicating with your client as the litigation proceeded.

It is important that your clients be familiar with the mediation process. While mediators may vary their practice somewhat, it is always possible to explain the general mediation process to the client. In cases where you have experience with a particular mediator, it is possible to be more precise. You should always explain to your clients that they should go into the mediation with no expectations. The overall goal is to try to settle the case, but to only settle it if it is on reasonable terms, that are acceptable to them. The client needs to understand that there will be no determinations made at the mediation. The mediator is not a judge and their role is to try to facilitate the settlement and not decide the case. While many cases will settle at mediation, this is not always the case, and a failure to settle should not be viewed as a bad outcome. Often mediations will bring the parties closer together, and will facilitate a settlement being made at a future time.

The clients need to be prepared for defence counsel's initial presentation. I advise them that they can expect defence counsel to speak to them directly, and depending on the style, may try to intimidate them or persuade them that their case has no merit. It should be stressed that attention needs to be paid to the arguments being made because often, they will be the same arguments that are advanced at trial. You should explain to the client that you will have an opportunity to speak directly to the representative of the insurance company, who will be writing the cheque in the event of a settlement, and you will be presenting arguments highlighting the strengths of the case.

The pre-mediation meeting is also an opportunity to review the claims that are being advanced and to discuss the theory of the case that will be put forward. The client should never be surprised about the arguments being made at the mediation. If mediation memos are being

exchanged, copies should be provided to the client to review in advance. The practice may vary from case to case depending on the sophistication of the client.

Review the particular strengths and weaknesses of the case, and discuss your own assessment of it. You may not wish to advise the client of your bottom line assessment, but at the very least, they should have some idea of how the case will be presented, and what is the possible best case scenario. You should review with your client the upper range and the lower range of damages in the circle of compromise. This will help them to understand that a successful mediation will require compromise from both parties, and that the goal is to move toward the middle of the circle to reach a number that is reasonable for everyone.

It is important to temper the client's expectations by explaining the weaknesses in the case, and to make sure that they understand that a settlement is a compromise and that a best case scenario can only be achieved at a trial. Depending on the timing of the mediation, you may wish to include a discussion about the risks associated with trial, including Rule 49 cost consequences.

If a settlement may involve a structured settlement, there should be a preliminary discussion with the client regarding these annuities and how they work. I will often have some structured settlement proposals to review with them.

The bottom line is that you want to make sure that the client is comfortable going into the mediation. You want them to know that they will have the benefit of your advice as matters proceed. No settlement offer will be made without their written instructions, and any settlement offer made by the other side will be explained to them. They will have an opportunity to make a decision whether to accept or reject the offer, or provide a counter-offer with the benefit of your advice.

The pre-mediation meeting is also a good opportunity to remind the client of the arrangement with respect to legal fees and disbursements and to advise them that before they accept any settlement offer they will be provided a net estimate of their recovery, after fees and disbursements have been deducted. In cases involving subrogated claims or payments to others, the client should be reminded of these other obligations.

If your client is articulate and sympathetic, you may want them to make a short statement at the mediation. If that is your intention, help your client to prepare what they are going to say. You obviously do not want their statement to sound rehearsed, but you also do not want them going

off unscripted in a way that could be harmful to their case. You also want to make sure that they are comfortable with providing such a statement. A brief statement from your client can help the adjuster to understand the problems that they are faced with on a daily basis. No matter how well your mediation memo is written, a good statement from your client has the potential to be most compelling. It will also allow the adjuster to form their own impression as to how good of, and how sympathetic of, a witness your client will be at trial. You may also wish to have a family member provide an anecdote of how things have changed in the family since your client was injured.

You need to make sure that your client is emotionally prepared for the mediation as well. You should stress that it will likely be difficult to listen to the opening statement of defence counsel, and warn them against outward displays of disagreement or anger. Let them know that they can write down their thoughts or concerns about the opening statement, and they can share them with you at the breakout. In appropriate cases discourage behavior that will not be well received during the mediation. For example, where clients tend to openly display pain behavior it is appropriate to advise them not to make any demonstrations that they are in pain during the opening statements. This will likely have a negative impact on the adjuster, and ultimately the settlement value of their case.

Conclusion: Preparation Increases Likelihood of Success

The key to a successful mediation is preparation. Preparation requires you to have persuasively laid out your client's case and damages, so that the decision maker has a good appreciation of the potential exposure and risk at trial. Preparation requires you to have completed a detailed analysis and assessment of the value of your client's case, which is supported by the evidence. Preparation requires you to have made your client comfortable with the mediation process and with the need to compromise.

Proper preparation greatly improves your ability to best advance your client's interest at mediation, and even if the mediation is not successful, you will have the tools in place to move the case forward to trial. A case that is properly prepared and presented at the mediation, often leads to further discussion and eventual settlement.

Mediation advocacy is now recognized as an important skill. Just as in trial advocacy the level of success is often very dependent on the level of preparation.