PREPARATION OF PLAINTIFF CLIENTS FOR MEDIATION

PANEL DISCUSSION ON HOW TO PREPARE FOR RESOLUTION AND AVOID THE PITFALLS THAT RESULT IN FAILURE
CHAIRED BY IVAN LUXENBERG
FOR ALTERNATIVE DISPUTE RESOLUTION
COLLOQUIUM 2022
OCTOBER 20, 2022: Session 1:30 p.m. to 4:00 p.m.

Peter A. Feifel
Feifel Gualazzi
Barristers and Solicitors
629 Queen Street East
Sault Ste. Marie, Ontario
P6A 2A6
Tel.: 705-945-8901
Fax: 705-945-9139
E-Mail: feifel@soolaw.ca

PREPARATION OF THE PLAINTIFF FOR MEDIATION

There have been countless briefs done on mediations over the years so I am going to try to avoid repeating what has been said by mediators and others far more knowledgeable than myself. Obviously each lawyer's style is completely different and what works for me may be completely opposite of what works for other counsel. As well each client is unique and the preparation of the mediation including the choice of mediator, the conduct of the mediation must be adjusted for each particular claimant.

My comments are restricted to voluntary mediations and not mandatory mediations which take place in other jurisdictions.

PRELIMINARY CONSIDERATIONS FOR A MEDIATION

We are often asked by a claim's examiner/adjuster before legal proceedings are commenced or by defence counsel after examinations for discovery for an offer. Previously we would do so but now in almost all situations we refuse. We suggest at the adjuster/claim's examiner stage or later after discoveries, that we are hopeful that after the defence lawyer has had an opportunity to examine our client to assist the Insurer in respect of whether or not our client is likeable/credible along with each of us obtaining our respective assessments, I am optimistic that we can

resolve the claim at a voluntary mediation. We give primarily 3 reasons as follows:

(A) We believe it is crucial to obtain expert medical assessments, a Housekeeping/Home Maintenance Assessment, Future Care Costs and Economic Assessment to properly assess the client's damages, failing which we could be opening ourselves to an E&O claim

(B) Previously it was possible for Plaintiff's counsel and either with the defence claims examiner and/or defence lawyer to embark upon what I refer to as a "pretend we are on the Courtroom door" negotiation. As an example, say without assessments the claim based on clinical notes and records was worth $100,000.00. If the Plaintiff arranged medical assessments, housekeeping and future care costs assessments and an economic assessment by spending $25,000.00, the claim could potentially be worth $300,000.00 + $25,000.00. The defence would spend $25,000.00 and conduct their assessments which would bring the value of the claim down to $200,000.00 plus of course the $50,000.00 that had been spent on disbursements by both parties. In the old days one could then settle at $200,000.00 without any of the significant disbursements that were incurred. Those days seem to be gone and insurers now seem to be embarking upon a "show me" instead of

"let's pretend." In other words, if a Plaintiff does not get the assessments the insurer will only pay $100,000.00 per claim that should really be resolved at $200,000.00, assuming that both parties would embark upon getting their respective assessments. This type of new philosophy seems to be widespread throughout the insurance industry and therefore it has become our firm policy not to embark upon any serious settlement negotiations without incurring what we feel are absolutely necessary disbursements to properly assess a claim. Normally after undertakings are completed we obtain our medical assessments which can take anywhere from 3 to 12 months and upon getting the medical assessments we approach the defence to set a voluntary mediation. During the time that we are waiting for that mediation we then obtain a future care costs, housekeeping assessment and economic assessment and make sure that the date for the mediation is set far enough in the future in order for us to prepare our mediation brief and have that brief served upon the defence 45 days before the mediation. In our opinion it is crucial when preparing for a mediation that right from the get-go you have the proper medical and other assessments to properly present your client's claim.

(c) In light of the Supreme Court of Canada decision in Jordan, Covid, the significant delay of civil jury trials, voluntary mediations have mushroomed

especially since March of 2020 and it seems to be the only avenue open for both the insurer and claimant to get a claim resolved in a reasonable period of time.

SERVICE OF MEDIATION BRIEF

We believe it is absolutely imperative to serve the mediation brief 45 days before the mediation. There should be sufficient time for the defence lawyer to get the mediation brief to his claims examiner and for the claims examiner to approach a supervisor committee to get authority when the representative of the insurer attends the mediation. Until a mediation brief is served the insurer will have set a reserve of what the insurer feels is the most that it is prepared to pay to resolve a claim without going to trial, based on information that has been given to the insurer by their own lawyer, investigators, productions, medical experts etc. When we serve the mediation brief we are preparing the brief primarily for the Insurer's decision maker (Supervisor/Committee) and not for the mediator, the defence lawyer or even our own clients. The hope of our mediation brief is for the Supervisor/ Committee to reconsider their position and hopefully increase the authority which they will grant to their representative, who will attend at the mediation to resolve the claim. The numbers that we put forth in our mediation brief are obviously the high end or a type of home run number should the matter proceed to trial however we suspect that the numbers which the insurer has

allocated to resolve the claim may also be close to what the insurer has viewed as their home run if the case proceeds to trial. If a mediation brief is served by the plaintiff only a couple of weeks or perhaps even days before the mediation then there is insufficient time for the defence lawyer to get the brief to the claim's examiner , who will obviously not have insufficient time for the claim's examiner to get the brief to the committee, so the authority which the representative has when the representative attends the mediation is far less than what it could have been had the mediation brief been served well in advance. We feel it is imperative to include the disbursement list in the mediation brief because that forms part of the authority which the committee is giving to the representative. The Insurer normally comes to a mediation with an all-inclusive maximum authority and if a disbursement list ahead of the mediation is not provided to the Insurer, then the authority will likely be less.

MEETINGS WITH THE CLIENT PRIOR TO MEDIATION

It is our firm's policy to meet with our client 3 times in the week before the mediation. The meetings are held in office because we view these meetings to be crucial if the client's claim is to be resolved at mediation.

FIRST APPOINTMENT IN THE WEEK BEFORE MEDIATION:

DAY 1 (Part A)

In the first appointment, before we even discuss the client's claim, very often the client's expectations are completely unrealistic. In preparing the client for the mediation we then discuss initially other jurisdictions such as Manitoba, Saskatchewan and now British Columbia whereby the right to sue in a motor vehicle accident for pain and suffering has been extinguished even if one is quadriplegic, paraplegic, amputee, severely brain injured. We inform our client of the Trilogy and the fact that in 1978 the maximum for pain and suffering in Canada was set at $100,000.00 which is now slightly over $400,000.00. We talk about the different no-fault systems since OMPP or 1990 and how each system has eroded the injured person's rights for compensation. We inform the client of the threshold, deductible, vanishing deductible, Rule 49 Offers, pre-judgment interest, cost consequences, jury selection, time frame of getting to trial. We talk of the cases where we have had successful and unsuccessful jury trials including trials in other Northern Ontario jurisdictions.

We spend a great deal of time explaining how the jury selection proceeds, the bias and prejudice which may exist and spend a fair amount of time on the pros and cons of a jury system, explaining all the risks to both sides including the uncertainty of the final decision in proceeding to trial in that manner.

In terms of cost consequences, because we have legal protection, the client is not risking losing their home, having their wages garnished or going bankrupt. Their risk is limited to what the insurance company is offering to settle the claim and if they lose their case at trial by either not meeting threshold or receiving an award which is less than what is being offered then the risk or cost consequence to them is losing that money which is being offered.

Day 1 (Part B):

We explain to the client that the mediation is strictly a voluntary process whereby both the Plaintiff and defence have agreed to attempt and resolve the claim outside of the Court process in that manner. I refer to the mediator as a referee at a hockey game who is not supposed to be on the Plaintiff's side or the defence side but is simply there as an expert to facilitate a resolution. We explain to the Plaintiff that everyone will be speaking on a first name basis, that nothing can be recorded, that they may hear laughter and joking which does not mean that individuals are not taking their claim seriously but is simply to get everyone to proceed in a non-adversarial fashion where all the cards can be put on the table without fear of something that someone says coming back to haunt them at some point in the future. In most cases we put the mediator on a pedestal and inform our client that the mediator is an individual who has done perhaps thousands of mediations involving this area of law, has a background of being a personal injury

lawyer and spends basically 100% of his time dealing with these types of cases whereby if the matter proceeds to trial they will be in front of a judge who may be an expert in criminal_law, matrimonial law, real estate law, and who may spend 95% of their time hearing cases involving other areas of law but only 5% of their time dealing with personal injury car accident cases whereby the mediator is an individual who spends 100% of his time in that area of law. We inform the client that if asked the mediator may give his/her input and that all participants at the mediation (mediator, defence lawyer, claim's representative and ourselves) spend essentially 100% of our time in this area of law to help the client who has the ultimate power and control to resolve their own claim. The alternative is for the client to give up that right and give it to 6 people from Tim Hortons and a judge which award could be more or less than what is being offered on the day of the mediation. We tell our client that if the mediation fails we will pay 50% and the insurance company will pay 50% but if the mediation is successful then the costs of the mediation will be borne by the insurance company as a disbursement. We believe it is important that the Plaintiff, in preparation for the mediation, understands that the mediator is truly neutral and is not going to be inclined to favour one side or the other because the mediator is being paid by that party. We also tell the client that the mediator is paid the same amount of money whether the case settles or not so there is no financial incentive for the mediator to attempt to

sway or force a settlement because he or she will get paid exactly the same amount whether the case is resolved or not.

Depending on the mediator, we will give a brief background of other experiences that we may have had with this mediator, the mediator's own legal background and what kind of style the mediator may use in the mediation (proactive, in your face or more softer/gentler approach). We inform the client that the mediation may not succeed, and the case may not be settled but that it could end up being a stepping stone for a future settlement. It may well be that the claims examiner has been sent with limited authority but after hearing what is said during the mediation the defence lawyer and insurance representative may go back to the committee to try to get additional authority after the mediation has ended. In some cases we warn the client that although it has never happened to the writer, that the insurer may be coming with zero authority to pay anything and that the reason that the insurer agreed to a mediation is simply to have their defence lawyer and/or representatives inform the claimant to the claimant's face why they are not paying anything on this claim because they do not know if the Plaintiff's own lawyer may have informed the claimant about the risks and costs associated with that particular claim.

We inform the client in preparing the client for a resolution that a mediation is very much like a baseball game. We use as an example a claim that may have a

home run value of $400,000.00. In that situation first base may have a value of $100,000.00, second base $200,000.00, third base $300,000.00 and a home run $400,000.00. The client in that case could go to trial and hit a home run, receiving $400,000.00 but the individual could also strike out in two different ways: A) the client does not meet threshold of having sustained a permanent serious impairment or B) the claimant does not beat the offer of the defence. If A or B happens, the insurance company has hit a home run. We explain to the client that a settlement is somewhere in the field. We are trying to get to third base whereas defence is trying to keep us at first base. Most cases settle somewhere between first and third base.

At the conclusion of Day 1, we give our client a copy of our brief and a copy of the defence brief. We tell the client not to give any heed to the dollar values in either briefs which represent home runs or grand slams for each side. We inform the client that previously we used to redact numbers which we no longer do because we do not want to insult their intelligence but to take all numbers with a grain of salt. We inform the client that when they read the defence brief they will become extremely upset and that this is not a personal attack by the defence on them but is simply a story which the defence is telling the claimant is the story that the defence will present to a jury should this matter proceed to trial. We tell our client that a very experienced defence lawyer told us many years ago that the job

of a defence lawyer when going to trial with a jury is to throw as much mud against the wall hoping that something will stick , so try to read the defence brief with that in mind. We also tell the client that what we have read in the defence brief are positions and comments that we have seen in numerous other defence mediation briefs, and although it will be difficult not to take the comments made in the defence brief personally. We ask the client to make comments on both any potential errors or corrections that should be made in either one of the two briefs and that on their next attendance we will discuss both briefs and possible numbers to resolve the claim at the mediation.

DAY 2 – PREPARATION FOR MEDIATION:

We then discuss both briefs, strengths and weaknesses on each side and any additional information that we may have omitted in the Plaintiff's brief that could explain something which is being outlined in the defence brief that may assist in the mediation. We then give a range of potential scenarios of what the case could settle at. As an example, if we feel that a claim reasonably can be settled at $300,000.00 all-inclusive, we will give scenarios of $100,000.00, $200,000.00, $300,000.00, $400,000.00 and $500,000.00 with a net under each amount of what the client would receive should they settle the case. We inform the client in that scenario that if the insurer only comes with $100,000.00 or $200,000.00 our recommendation will be not to accept their offer. At $300,000.00 they have

something to seriously consider and at $400,000.00 they are reaching third base. To reach $500,000.00 would be a home run which will 99.99% not happen. Again, the baseball analogy seems to be one that clients grasp and also brings them down to earth in respect of what they can expect to receive. We tell them that the ultimate offer from the insurer may be something in between but before the case settles they will know exactly to the dollar what they would net. We reinforce to the client, that the decision to settle or not is ultimately their decision irrespective if we are recommending the final offer.

We then talk about the claimant giving a brief talk at the mediation of about 3 to 5 minutes. Most mediations seem to fall apart on the issue of loss of income so I normally direct the client to address that issue as opposed to their suffering, pain or effects on their quality of life in other areas. Again, there may be exceptions to that rule. We tell the client that the client can make bullet points for their talk because people get nervous and draw complete blanks whereas the bullet points would help them to remember what they are going to say. We tell the client to direct their comments to the claim's examiner who along with our client are the decision makers, and ultimately the 2 most important people in the room (computer)!

DAY 3

On the third day, which is very brief we simply give instructions on the numbers which we had discussed with our client the previous day and if they have any last minute questions. We do not have the client give us a dry run of what they are going to say because we feel it takes the spontaneity out of their talk and quite frankly looks more theatrical and rehearsed. We want their talk to come from the heart and very often what they have to say is far more important than what their lawyer has said!

THE DAY OF THE MEDIATION

At the outset of the mediation we inform the defence lawyer and, more importantly, the claims examiner of the following:

1. That we have met our client 3 times;
2. That we have given our client the defence brief and our own brief and discussed the highs and lows of each position;
3. That we have discussed with our client a range of damages what we feel is fair and reasonable to resolve the claim;
4. That the client will give a brief talk of 3 to 5 minutes, particularly say on loss of income which if this mediation fails will probably be the reason why it fails;

5. That if the defence and the claims examiner have any questions, feel free to ask our client directly.

I think informing the defence and the claims examiner from the get-go that the client is fully aware with the mediation process, court process and what has been said by the defence, will greatly shorten all of the openings and then both the defence and ourselves can try to get the claim resolved far quicker than both the mediator and the defence lawyer having to educate the claimant on the mediation process, court process, and what the position of the defence is, should the matter proceed to trial.

MISCELLANEOUS

1. We tell the client that initially the mediator will speak, then ourselves, then the client, then the defence lawyer and possibly the insurance representative and I will be asked if I will reply which I will not. Under no circumstances are they to interrupt the defence lawyer or the claims examiner when they are speaking even if things are being said that are perceived to be character assassination and getting under their skin, to keep their cool and not give any signs of anger or negative emotions.

2. We have the client in attendance at our office for the mediation Zoom hearing. We do not want the client to be Zoomed in from their home. Although it is an informal attempt to resolve a claim, we do not believe that the optics of the client sitting at home in their bedroom is conducive to resolving a legal claim and as well it is simply impossible to perhaps share documentation, discuss matters by ourselves when the mediator is not present if the client is not in our office.

3. We inform the spouse of our injured client that the non-injured spouse is a fly on the wall and is not to speak at all unless he or she is asked. A family member (usually spouse) does not have a right to attend the mediation but we feel that the spouse /family member/best friend is a vital and crucial attendee for the injured person to feel more comfortable and make a decision on whether or not to settle. If the non-injured family member /best friend is attending, that person must also attend the 3 preparation appointments. Very often a spouse of the injured person is harder to control because they have lived with their loved one and have witnessed what their loved one has gone through and now hearing a defence lawyer make negative comments of their loved one can be challenging.

4. We inform the client that everyone will be speaking to each other on a first name basis, that it is informal, there may be laughter and joking which is part of the strategy that mediators are trained when they take courses on becoming a mediator and is an effort to get individuals to be more cordial, friendly and not adversarial to assist in a resolution.

5. We talk that there may be additional surveillance, and to just be completely honest if asked any questions.

6. Even if we do not get the defence brief until the day before the mediation, we will meet with our client in the evening to discuss the defence mediation brief so that the client does not hear for the first time at the mediation what the defence has written. Likewise, if the mediation brief is served on the morning of the mediation, we will begin the mediation later to give us an opportunity to review the defence mediation brief with our client.

7. Although a mediator may ask the claimant to jot down questions that they have when the defence is presenting their case, we inform our client not to ask any questions until we have had an opportunity to review those questions in private.

8. We feel the choice of a mediator is absolutely crucial. We have had mediations whereby it was obvious that the mediator had not read any material and was simply doing a generic presentation without any knowledge of the file. The mediator was simply acting as a pigeon flying back and forth with messages. We prefer in most cases a very proactive (in your face) mediator but one who also can also display empathy and treat the client as a human being as opposed to just another case. It is extremely important that the mediator has the ability to establish a great rapport, which is genuine and not staged or appears to be simply going through the motions. I want a mediator who is proactive, and is respected in both rooms. It goes without saying that the mediator must have an extremely significant background in personal injury. Our suggestions of the mediator will be guided in part as well on who is the Insurer, the defence lawyer and if the Insurer and us had retained a certain mediator in the past. At times we will give a list normally of anywhere from 1, 2 or 3 up to 10 names of mediators but suggesting that if the insurer is not content with any of the named mediators, to give us the name of who they would prefer and provided that it is an experienced mediator who has a reputation of being fair and unbiased then we normally agree.

9. We inform the client that although they may hear positions taken by the defence which they may view as character assassination, exaggerations, embellishments or outright untruths, the mediator will always ask the Plaintiff lawyer if they have anything to say in reply. I tell the client that we never reply. I inform the client that we are not going to get into arguments back and forth, that is not the purpose why we are there. I can send my reply in a diplomatic way through the mediator in private.

10. I can recall one time having a client who came to us for a second opinion from a very experienced lawyer who had been acting for him and had arranged a voluntary mediation which failed. The lawyer had built the file incredibly well with proper medical assessments, future care costs assessments, economic assessments etc. When the client attended our office he provided me with a copy of his lawyer's mediation brief which was outstanding. The client had been told by his previous lawyer to attend the mediation 15 minutes before the mediation. The client had never been provided a copy of the mediation brief from his own lawyer or the defence mediation brief. He had not been prepped for the mediation and was oblivious to jury selection, threshold, deductible etc. At the mediation he heard the mediator speak which he viewed as being completely biased (I

know this mediator who is one of the top mediators in the province and is a proactive, in your face type of mediator). He then heard his own lawyer speak who he agreed with. He then heard the defence lawyer speak who he wanted to kill. The mediator then asked his lawyer, "do you have anything to reply," to which the lawyer said no and once again the client went ballistic of how the Plaintiff lawyer could not reply when he heard all of these lies (in his mind) from the defence (and mediator). The mediation fell apart and a first offer was not even made. I have no doubt that the mediation fell apart because the lawyer had failed to properly prepare his client for the mediation and therefor the mediation was doomed to fail before it even started. Preparation is everything if you are hoping to resolve a claim at a mediation.

11. If the mediation is unsuccessful, and assuming the parties were civil, everyone should meet to say final goodbyes. The last impression of the plaintiff should be the same as the first impression, which may lead the path to a resolution at a later date.

12. We tell the client that they should normally be prepared to settle on the day of the mediation and to have the necessary support system with them for the client to make a decision.

13. In preparation we normally have the client dress respectfully for the process–normally "smart casual" (no muscle shirts), minimal jewellery, groomed) and tell them we want them sober, well rested and no gummy bears!

14. We tell the client that the mediator may want to see the lawyers alone and not to build a negative inference that there are "secret discussions" going on but that the mediator is the one who controls the process and that there may be very good reasons why the mediator wants to discuss some issues without either party except the respective lawyers being present.

15. We tell the client that we will have numerous opportunities to have private conversations without the defence lawyer, claim's examiner or mediator being present.

16. After receiving a final offer, we often tell the client to take a walk with their family member/friend to clear their head so that they are more comfortable to make their final decision in private without the stress of lawyers being present.

17. As a side note, we also tell the clients that we will be providing lunch which will not be shown as a disbursement on their account, that we don't want them hungry throughout the day and that the lunch may be as good as it gets!