

WHAT MAKES FOR AN EFFECTIVE MEDIATION?

IT IS ABSOLUTELY ESSENTIAL THAT BOTH PLAINTIFF AND DEFENCE COUNSEL TELL THEIR CLIENT WHAT THEY SHOULD KNOW AND NOT WHAT COUNSEL THINK THEY WANT TO HEAR. I FIND THIS PARTICULARLY PREVALENT AMONGST THE INSURANCE DEFENCE BAR, WHO HAVE BEEN MARGINALIZED IN MY VIEW BY THE INSURANCE INDUSTRY TO THE POINT WHERE THEY ARE FEARFUL OF MAINTAINING THEIR CLIENTELE. THIS SEEMS TO MOTIVATE THEM TO PAINT A ROSIER PICTURE OF THE CASE THEY ARE DEFENDING FOR THE INSURER THAN REALLY OUGHT TO BE THE CASE.

ABOUT FOUR YEARS AGO, I PARTICIPATED ON A PANEL FOR THE CHIEF EXECUTIVE OFFICERS OF THE INSURANCE INDUSTRY. WE HAD A QUESTION AND ANSWER PERIOD SHORTLY AFTER OUR TALK AND WHAT I HEARD FROM THEM WAS PRECISELY WHAT I AM TELLING YOU; THEY WANT TO KNOW WHAT THEY SHOULD KNOW, THAT IS WHAT THEIR REAL EXPOSURE IS AND NOT WHAT COUNSEL THINKS THEY WANT TO HEAR.

IT SEEMS TO ME THERE ARE OTHER ISSUES THAT CAN BE DEALT WITH AS WELL TO MAKE A MEDIATION MORE LIKELY TO SUCCEED.

IF, FOR EXAMPLE, DEFENCE HAS MISUNDERSTOOD THE PLAINTIFF'S CASE AND UNDERVALUED IT, THEY SHOULD AT LEAST HAVE

PERMISSION FROM THEIR SUPERIORS THAT, IF THAT IS THE CASE, THAT THEY CONTINUE TO NEGOTIATE AT THE MEDIATION TO COME UP WITH A FIGURE THAT BOTH PARTIES ARE PREPARED TO RECOMMEND TO THEIR CLIENTS, AND WILL LEAVE OPEN FOR A PERIOD OF TIME. AT LEAST THAT WAY THE MEDIATION DOES NOT END WHEN THE DEFENCE RUNS OUT OF MONEY, AND REACHES A POINT WHERE BOTH PARTIES FIND A NUMBER THEY ARE COMFORTABLE WITH.

IT IS OBVIOUSLY CRITICAL THAT ALL EXPERT REPORTS, MEDICAL AND OTHERWISE, BE MADE AVAILABLE TO OPPOSING COUNSEL LONG BEFORE THE MEDIATION. THIS IS ESPECIALLY SO ON THE PART OF PLAINTIFF'S COUNSEL WHO WILL WANT THE INSURER TO BE AWARE OF WHAT THEIR LIFE CARE PLAN SAYS, WHAT THEIR VOCATIONAL ASSESSOR SAYS AND, OBVIOUSLY, THE RANGE OF EXPOSURE THROUGH THE FORENSIC ACCOUNTANT THAT FACES THE INSURER. IT IS TO BE HOPED THAT WITH THAT REALISTIC INFORMATION ON PAPER, REGARDLESS OF THE DEFENCE LAWYER'S ADVICE, THE INSURERS WILL BE WISE ENOUGH TO PUT TOGETHER AN AUTHORITY THAT IS USEFUL.

WE MUST ALL KEEP IN MIND THAT THERE IS A CHAIN OF AUTHORITY IN AN INSURANCE COMPANY WHEREBY THE PERSON AT THE TOP OF THE PYRAMID ISSUES THE AUTHORITY, BUT USUALLY GIVES LESS TO THE

PERSON IMMEDIATELY BENEATH THEM, WHO IN TURN GIVES LESS TO THE ADJUSTER.

THEREFORE, THERE IS ALWAYS MORE MONEY AT HOME, SO TO SPEAK, AND A GOOD IDEA FOR PLAINTIFF'S COUNSEL WOULD BE TO FORCE THE DEFENCE TO MAKE THE PHONE CALLS TO GET FURTHER AUTHORITY.

AS WELL, WHERE THERE IS WHAT APPEARS TO BE AN IRRECONCILABLE LIABILITY DISPUTE, PLAINTIFF'S COUNSEL WOULD BE WISE, WELL IN ADVANCE OF THE MEDIATION, TO URGE DEFENCE COUNSEL TO EITHER SETTLE THEIR LIABILITY DISPUTE OR, IN THE ALTERNATIVE, GET PERMISSION FROM THEIR CLIENTS TO AGREE TO COME TO THE MEDIATION TO SETTLE OUT THE PLAINTIFF'S DAMAGES - PAY THEM OUT ON A 50/50 BASIS, AND THEN GO TO A MUCH LESS EXPENSIVE FORM OF RESOLUTION OF THEIR ISSUES THROUGH ARBITRATION OR A VERY SHORT TRIAL.

PREPARATION

ABOVE ALL, IT IS CRITICAL THAT NEITHER SIDE IS SERVING EXPERT REPORTS ON THE EVE OF MEDIATION. SUFFICIENT TIME MUST BE LEFT FOR CONSIDERATION TO BE GIVEN BY BOTH SIDES TO THE OTHER'S EXPERT REPORTS AND TO ALLOW, FOR EXAMPLE, THE PLAINTIFF TO

HAVE AN OPPORTUNITY FOR HIS OR HER DOCTORS TO COMMENT ON THE POSITION TAKEN BY THE DEFENCE EXPERTS.

I STRONGLY RECOMMEND THAT PLAINTIFFS' LAWYERS, IN PARTICULAR, PREPARE THEIR OPENING THOROUGHLY. I NEVER ASSUME THAT ADJUSTERS, WHO ARE VERY BUSY AND UNDERSTAFFED, HAVE HAD THE CHANCE, OR TAKEN THE TIME, TO FULLY REVIEW THE MEDIATION MEMORANDUM THAT I PRESENT, OR THE EXPERT REPORTS THAT ARE ATTACHED.

THEREFORE, I TAKE MY TIME AND HIGHLIGHT ALL THE ISSUES AND HIGHLIGHT THE EVIDENCE FROM THE EXPERT REPORTS THAT THE ADJUSTER OUGHT TO BE AWARE OF.

IF I NOTE THAT THEY ARE MAKING NOTES DURING MY OPENING, IT TELLS ME THAT THEY ARE PUTTING TOGETHER MATERIAL SO THAT THEY CAN GO BACK TO THEIR HOME OFFICE AND SHOW SOME BACKUP TO SHOW THEIR SUPPORT FOR INCREASED FUNDING.

PREPARATION BY BOTH THE PLAINTIFF AND DEFENCE LAWYER IS CRITICAL IN MANAGING THE EXPECTATIONS OF THEIR CLIENTS.

ON THE PLAINTIFFS SIDE, IT IS CRITICAL THAT THE TIME VALUE OF MONEY BE EXPLAINED TO THE CLIENT. THE CLIENT SHOULD UNDERSTAND THAT REGARDLESS OF WHAT COUNSEL AND CLIENT BELIEVE IS A REASONABLE RANGE FOR SETTLEMENT, THAT THERE IS REAL VALUE IN RECEIVING ONE'S MONEY A YEAR, OR TWO, OR THREE, AHEAD OF TIME AND TO EXPLAIN WHAT PRESENT VALUES ARE.

IT IS OBVIOUSLY EQUALLY IMPORTANT TO THE SUCCESS OF THE MEDIATION THAT DEFENCE COUNSEL PRESENT A REALISTIC PICTURE OF WHAT THE EXPOSURE WILL BE. THIS NOT ONLY TAKES INTO ACCOUNT THE FACTS OF THE CASE AT HAND, BUT ALSO THE PLAINTIFF'S COUNSEL WITH WHICH THEY ARE DEALING. COUNSEL WHO ARE EFFECTIVE AT TRIAL MUST BE GIVEN FAR MORE RESPECT AND ATTENTION AND MORE MONEY, QUITE FRANKLY, THAN THOSE WHO ARE NOT.

WHAT TONE SHOULD BE SET?

OBVIOUSLY, IT HAS TO BE CONCILIATORY AND NOT COMBATIVE OR ADVERSARIAL. HOWEVER, SOMETIMES ELEMENTS OF ADVERSARIAL AND COMBATIVENESS WILL CREEP IN AS A NECESSARY ELEMENT.

FOR EXAMPLE, I WILL NEVER FAIL TO POINT OUT IN A MEDIATION THAT IF WE DO NOT GET SETTLED HERE, AND UNLESS THE NEGOTIATIONS

ARE ONGOING THEREAFTER, THE NEXT STEP IS TRIAL, AND THAT MY OPPONENT SHOULD CONSIDER WHAT THEIR CHANCES OF SUCCESS AT TRIAL ARE CONSIDERING THE CASE, CONSIDERING THE LAWYERS, AND ALL THE REST.

I WILL ALSO NEVER SHRINK FROM POINTING OUT WHERE THE INSURER MAY BE PUTTING THEMSELVES INTO JEOPARDY OF EXPANDING THEIR POLICY LIMITS.

IF YOU HAVE A CASE WHERE THE POLICY LIMITS ARE \$1,000,000.00, AND THE CLAIM HAS A POTENTIAL OF EXCEEDING IT, IT IS IMPORTANT TO POINT OUT TO THE OTHER SIDE THAT NOT ONLY ARE YOU WILLING, READY AND ABLE TO PROCEED TO TAKE AN ASSIGNMENT FROM THEIR INSURED SHOULD THE CLAIM GO OVER LIMITS, BUT THAT YOU ARE MORE THAN PREPARED TO PURSUE THEM UPON THAT ASSIGNMENT FOR BAD FAITH, AND THEREBY EXPAND THEIR POLICY LIMITS. IN SHORT, I ALWAYS LET THEM KNOW THAT FAILING AT MEDIATION THEY CAN ASSUME THAT THEY WILL RECEIVE A FORMAL OFFER IN WRITING THAT WILL PUT THEIR POLICY LIMITS IN JEOPARDY.

TIMING OF MEDIATION

I RECALL WHEN MANDATORY MEDIATIONS FIRST CAME IN THERE WAS SOME REGULATION THAT SAID THEY HAD TO TAKE PLACE VERY EARLY

ON IN THE PROCESS. I DO NOT KNOW OF ANY LAWYERS WHO FELT THAT THIS WAS ANYTHING OTHER THAN A TOTAL WASTE OF TIME. THERE IS VERY LITTLE TO DISCUSS UNTIL ONE HAS A CLEAR PICTURE OF THE PROGNOSIS FROM EXPERTS THAT ARE RELIABLE.

SO AGAIN, I REPEAT WHAT I SAID BEFORE, THAT IT IS CRITICAL THAT BOTH SIDES HAVE ALL THE EXPERT REPORTS UPON WHICH THEY INTEND TO RELY.

I HAVE FOUND AN IRRITATING TENDENCY ON THE PART OF INSURERS AND THEIR COUNSEL, TO COME TO MEDIATIONS OF SIGNIFICANT INJURIES WITHOUT A LIFE CARE PLAN OR WITHOUT A VOCATIONAL ASSESSMENT.

I USUALLY COMMENT ON THE FACT THAT I AM NOT AT THAT MEDIATION TO LISTEN TO THEIR AMATEUR OPINIONS ABOUT WHETHER MY LIFE CARE PLAN IS ACCURATE OR OTHERWISE, AND THE SAME WITH RESPECT TO A VOCATIONAL ASSESSMENT. OFTENTIMES, DEFENCE COUNSEL WILL POINT TO THEIR OWN DOCTORS' REPORTS THAT WILL SAY SOMETHING TO THE EFFECT THAT THIS MAN OR WOMAN CAN GET BACK TO WORK, ETC., ETC. I THINK IT IS IMPORTANT TO POINT OUT THAT THESE ARE DOCTORS AND NOT VOCATIONAL EXPERTS. A VOCATIONAL EXPERT NOT ONLY HAS TO TAKE INTO ACCOUNT THE

PHYSICAL CAPACITY OF THE POTENTIAL WORKER, BUT ALSO EMPLOYER ATTITUDES, THE LABOUR MARKET, AND ALL OTHER THINGS THAT WILL DETERMINE THE INJURED PARTY CAN BE SUCCESSFULLY EMPLOYED.

I CAN NEVER UNDERSTAND WHY INSURERS OR DEFENCE COUNSEL THINK THEY CAN COME TO A MEDIATION AND HAVE PLAINTIFFS' COUNSEL SIMPLY ACCEPT THEIR CRITICISM OF VOCATIONAL ASSESSMENTS OR LIFE CARE PLANS. IT IS SIMPLY UNREALISTIC.

DEMONSTRATIVE EVIDENCE

I KNOW THAT MY COLLEAGUES, ROGER OATLEY AND JOHN MCLEISH, FOR EXAMPLE, GENERALLY, AS I UNDERSTAND IT, ORDER UP DEMONSTRATIVE EVIDENCE, SUCH AS COMPUTER-GENERATED GRAPHICS OR ILLUSTRATIVE PANELS OF THE INJURY OR SURGERY, FOR EACH OF THEIR MEDIATIONS.

I ALSO KNOW, FROM BEING A DEFENCE COUNSEL, THAT THIS IS SOMETIMES FOUND AS A SOURCE OF IRRITATION TO THE INSURER BECAUSE \$20,000.00 TO \$25,000.00 EXTRA HAS BEEN SPENT ON DISBURSEMENTS AND, IN THEIR OPINION, UNNECESSARILY.

I CAN TELL YOU THAT JOHN AND ROGER TELL ME THAT THEY HAVE NEVER BEEN REFUSED THE DISBURSEMENT OF THEIR ILLUSTRATIONS.

FOR MYSELF, I DO NOT BRING THEM ALONG. I USUALLY DO NOT MAKE THAT EXPENDITURE UNTIL IT IS CLEAR THE CASE IS GOING TO TRIAL. HOWEVER, IN THE COURSE OF THE MEDIATION, I MAKE IT CLEAR THAT SHOULD THIS CASE NOT SETTLE, THEN I WILL IMMEDIATELY PROCEED TO OBTAIN THE DEMONSTRATIVE EVIDENCE, WHICH EVERY DEFENCE LAWYER WORTH THEIR SALT SHOULD BE AWARE IS GOING TO PUT THEM AT MUCH GREATER INCREASED RISK OF A BAD RESULT AT TRIAL ON THE ISSUE OF DAMAGES.

CHOICE OF A MEDIATOR

MOST PLAINTIFFS' COUNSEL DO NOT REALLY HAVE A GREAT DEAL OF CHOICE. WE ARE OFFERED USUALLY TWO OR THREE NAMES. ALTHOUGH SOMETIMES WE ARE ASKED WHOM WE WOULD PREFER.

MYSELF, I PREFER THE MEDIATORS WHO ARE AGGRESSIVE AND WHO PREVIOUSLY PRACTICED IN THIS AREA NOT TOO LONG AGO.

I DON'T FIND THAT RETIRED JUDGES ARE ALL THAT USEFUL OR HELPFUL IN THE MEDIATION PROCESS. SOME OF THEM ARE TOO FAR REMOVED FROM THE ASSESSMENTS THAT WERE GOING ON WHEN

THEY WERE JUDGES. THEY ARE TOO FAR REMOVED AND UNFAMILIAR WITH THE ACCIDENT BENEFITS PROCESS, AND HOW IT INTERFACES WITH TORT.

THEREFORE, I PREFER MEDIATORS WHO HAVE PRACTICED IN THIS AREA, WHO ARE AGGRESSIVE IN THE WAY THEY CONDUCT THEIR MEDIATION WHEN THEY GO INTO EACH CAUCAS ROOM, AND WHO WILL MAKE EVERY EFFORT TO BRING ABOUT A RESULT THAT BOTH PARTIES CAN LIVE WITH.

EACH OF US HAS TO KEEP IN MIND THAT THE DEFINITION OF A GOOD SETTLEMENT HAS NOT CHANGED. IT IS ONE IN WHICH THE PLAINTIFF FEELS THAT THEY RECEIVED LESS THAN THEY OUGHT TO RECEIVE, AND THE DEFENCE FEELS THAT THEY HAVE PAID MORE THAN THEY WANTED TO PAY. THAT FACT MUST BE EXPLAINED TO ONE'S CLIENT, WHETHER YOU ARE A PLAINTIFF'S LAWYER OR A DEFENCE LAWYER, SO THAT THEY COME WITH THE PROPER ATTITUDE.

PREPARATION OF THE CLIENT FOR THE MEDIATION

FROM THE PLAINTIFFS' PERSPECTIVE, IT IS A MATTER OF LETTING THEM UNDERSTAND THAT WE ARE NOT THERE TO GRAB THE LAST DOLLAR. IT IS IMPORTANT FOR THEM TO UNDERSTAND THAT EVERY CASE HAS A

POTENTIAL RANGE AND THAT TRIALS ARE TO SOME EXTENT VERY UNPREDICTABLE, ESPECIALLY WITH JURIES.

ONE HAS TO BE SURE THAT THEY HAVE THE FULL CONFIDENCE OF THEIR CLIENT OR THERE IS NO WAY THE MEDIATION CAN SUCCEED. THE PLAINTIFF'S LAWYER HAS TO BE SURE THAT THEIR CLIENT'S EXPECTATIONS ARE NOT OUTLANDISH OR UNREASONABLE.

ASIDE FROM DISCUSSING THE TIME VALUE OF MONEY WITH ONE'S CLIENT, IT IS ALSO IMPORTANT TO OUTLINE FOR THEM THE ONE ISSUE THAT ONLY THEY CAN DECIDE; I REFER OF COURSE TO THE ANXIETY, CONCERN AND SLEEPLESSNESS THAT USUALLY PRECEDES A TRIAL WITHIN THREE OR FOUR MONTHS OF ITS DATE OF INCEPTION. IT IS NOT A DISCOUNT VALUE THAT I CAN DETERMINE, BUT IT IS CERTAINLY SOMETHING THAT THE CLIENT WILL KEEP IN MIND. THE OLD EXPRESSION THAT A BIRD IN THE HAND IS WORTH TWO IN THE BUSH IS SOMETHING THAT SHOULD BE DRUMMED INTO THEIR HEADS.

ON THE OTHER SIDE OF THE EQUATION, THERE IS NO DOUBT IN MY MIND, FROM MY EXPERIENCE WITH INSURERS, THAT THEY MUCH PREFER SETTLING AT MEDIATION WHERE THEY HAVE SOME CONTROL OVER THE PROCESS. I DO NOT THINK INSURERS WANT TO GO TO

COURT ANY MORE THAN MY PLAINTIFF CLIENTS DO IF A REASONABLE RESULT CAN BE REACHED WITHOUT HAVING DONE SO.

KEEP IN MIND THAT THE INSURERS ARE WELL AWARE OF WHAT THEY HAVE DONE OVER THE LAST 15 TO 20 YEARS. IN EFFECT, THEY HAVE BEEN IN A COST CUTTING MODE WHEREBY THEY HAVE CAPPED THE HOURLY RATE OF THEIR SENIOR COUNSEL, WHICH MEANS THEY HAVE LOST MANY OF THEIR BEST LAWYERS, AND HAVE STRATIFIED THE HOURLY RATE THAT THEY WILL ALLOW TO BE CHARGED FROM LAWYERS WHO ARE OUT ANYWHERE FROM ONE TO TEN YEARS, LET US SAY.

THEY THEREFORE REALLY SHOULD UNDERSTAND THAT THEY ARE WALKING INTO THIS SITUATION AT A DISADVANTAGE. I DOUBT THAT THERE ARE MANY OCCASIONS IN WHICH THE YOUNG DEFENCE LAWYER SITTING ACROSS THE TABLE FROM ME HAS HAD MUCH, IF ANY, EXPERIENCE IN TRYING A CASE WITH A JURY. YET THE INSURER TENDS TO TREAT THE PROCESS AS IF EVERYTHING IS EQUAL. IT IS SIMPLY NOT TRUE.

IT IS ALSO IMPORTANT TO LET YOUR CLIENT KNOW THAT MEDIATIONS DO NOT SUCCEED 90% OF THE TIME AS THEY USED TO AT THEIR INCEPTION BACK AROUND 1990. IN MY EXPERIENCE, I AM LUCKY TO

SEE HALF MY MEDIATIONS SUCCEED ON THE DAY OF MEDIATION. HOWEVER, I DO EXPLAIN TO MY CLIENTS THAT IT IS THE BEGINNING OF THE PROCESS OF NEGOTIATION AND THAT JUST BECAUSE A CASE DOES NOT SETTLE ON THE DAY OF MEDIATION, THEY SHOULD NOT DESPAIR THAT IT IS INCAPABLE OF SETTLEMENT OVER THE NEXT FEW MONTHS OR AS A TRIAL DATE APPROACHES.

ARE MEDIATIONS MORE EFFECTIVE THAN PRE-TRIALS OR OTHER METHODS TO SETTLE A CASE?

PRE-TRIALS, IT SEEMS TO ME DO NOT ACCOMPLISH MUCH ANY MORE. FIRSTLY, THEY ARE LIMITED IN THE AMOUNT OF TIME AVAILABLE.

SECONDLY, MANY OF THE JUDGES APPOINTED TO THE TRIAL DIVISIONS OF OUR VARIOUS COURTS HAVE NOT BEEN LITIGATORS AND DO NOT BRING MUCH TO THE TABLE IN THE WAY OF ACCEPTABLE ADVICE.

THIRDLY, THEY HAVE VERY BUSY SCHEDULES AND DO NOT HAVE THE KIND OF TIME NECESSARY TO FULLY READ THE MEMORANDA OR TO FULLY AND CAREFULLY REVIEW EACH PARTIES' MEDICAL REPORTS, LOOKING FOR PLUSES AND MINUSES ON EACH SIDE.

THE ONE GREAT ADVANTAGE TO GETTING A SETTLEMENT AT A PRE-TRIAL IS THAT GENERALLY THEY ARE NOW SET VERY SHORTLY BEFORE

TRIAL SO THAT THE MOTIVATION TO SETTLE, IF NOT PRESENT BEFOREHAND, IS LIKELY TO BE PRETTY MUCH AT ITS PEAK AT THAT POINT.

AT ANY STAGE OF THIS PROCEEDING, AND IN PREPARATION FOR MEDIATION OR PRE-TRIAL, FORMAL OFFERS TO SETTLE MUST BE EXPLAINED TO ONE'S CLIENT, BOTH PLAINTIFF AND DEFENDANT. THEY MUST UNDERSTAND THE COST CONSEQUENCES OF FAILING TO MEET THE OTHER PARTY'S OFFER TO SETTLE. IT IS VERY SALUTARY, FOR EXAMPLE, FOR A PLAINTIFF TO KNOW THAT IF THEY DO NOT REACH THE NUMBER THAT THE DEFENDANT HAS OFFERED, THAT THEY WILL NOT ONLY RECEIVE FAR LESS MONEY THAN THEY WERE HOPING FOR, BUT THAT THE AMOUNT THEY RECEIVE WILL BE REDUCED BY THE AMOUNT OF THE DEFENDANT'S COSTS, WHICH WILL USUALLY RECEIVE A SET-OFF ORDER FROM THE PRESIDING TRIAL JUDGE. THEY ARE STILL THEN IN A POSITION OF HAVING TO PAY THEIR OWN COUNSEL THEIR CONTINGENCY FEE OF THE AMOUNT RECOVERED BEFORE PAYMENT OF FEES TO THE OTHER LAWYER.

THEY SHOULD ALSO BE AWARE THAT NOT MUCH IN THE WAY OF COSTS FROM THE OTHER SIDE WILL BE COMING THEIR WAY.

BY WAY OF SUMMARY, I MUST SAY THAT I DO NOT FIND THAT CLIENTS,
THAT IS PLAINTIFFS OR INSURERS, ARE GENERALLY AN OBSTACLE FOR
SETTLEMENT. TO ME THE GREATEST OBSTACLE IS AN UNPREPARED
LAWYER, OR ONE WHO HAS NOT TOLD THEIR CLIENTS THE TRUTH AND
TOLD IT THE WAY IT IS.

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