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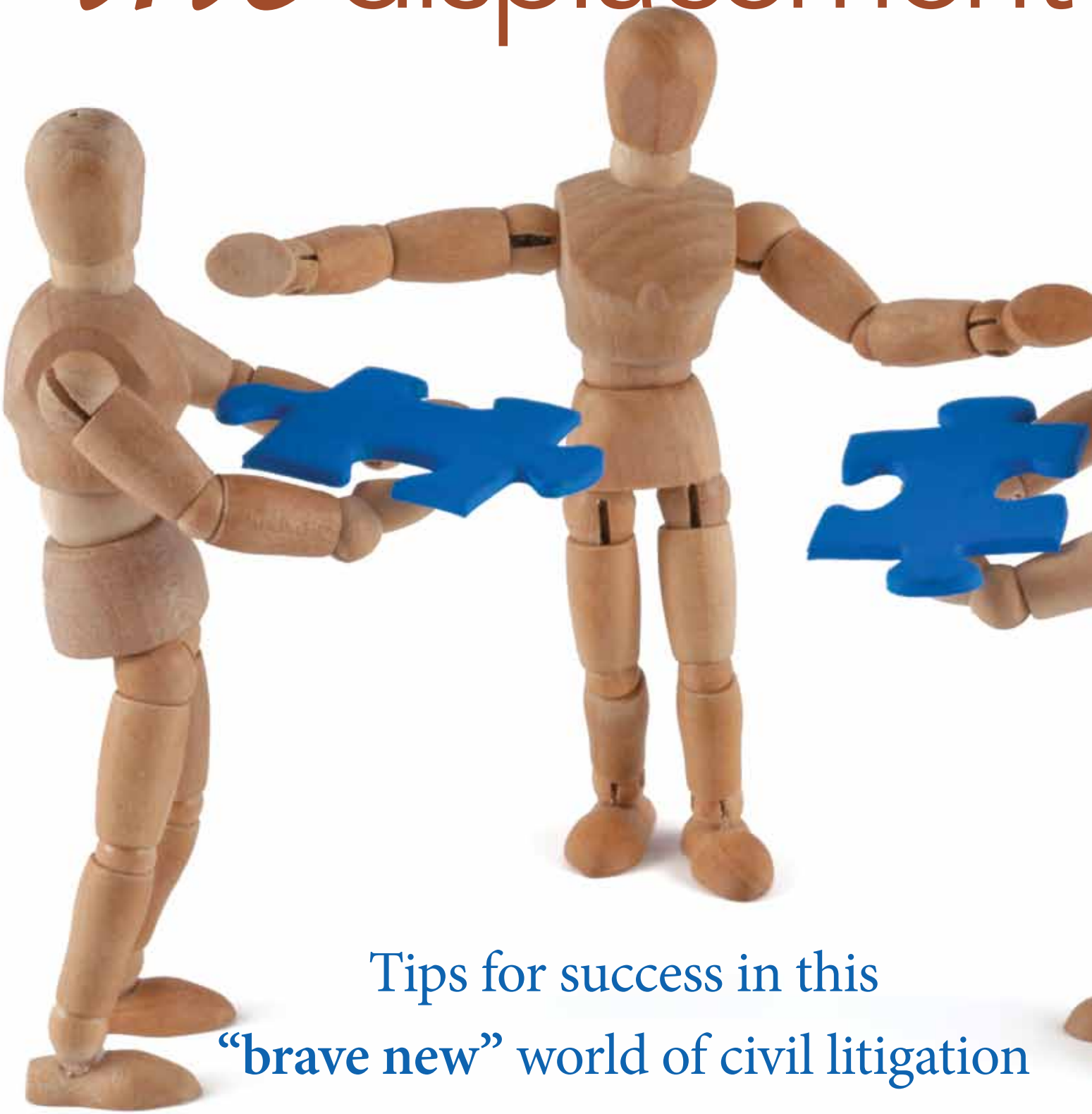

Tips for success in this "brave new" world of civil litigation

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

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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.

Frank Gomberg,
B.A., J.D., LL.M., is a mediator with Teplitsky, Colson LLP Barristers in Toronto, Ont.