Mediation *in* personal injury disputes

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

part 2

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VIII. Realistic versus unrealistic demands

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

X. Opening statements

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

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

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

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

XI. The lawyer's credibility

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

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

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

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

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

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

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

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

XII. Opening offers

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

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

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

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

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

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

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

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

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

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

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

XIV. Lawyer-client disagreement

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

In a personal injury case this may arise where:

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

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

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

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

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

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

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

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

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

XV. Strategies to bring the mediation to a successful conclusion

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

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

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

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

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

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

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

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

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

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

XVI. Multiple mediations

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

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

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

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

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

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

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

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

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

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