

**BEST PRACTICES FOR PREPARING A MEDIATION MEMORANDUM  
ON BEHALF OF A DEFENDANT OR INSURER**

Those who prepare and write great mediation memoranda are not born to do so. Rather, they have worked long and hard at their craft, they have received tutelage, training and direction from colleagues and they continue to refine their skills. This is good news as each person who sets about the task of preparing and writing a mediation memorandum has the potential, with hard work, thoughtfulness and good effort, to be a great writer.

1. Who is the target audience

- Mediator
  - give the mediator the information, facts, evidence and law to assist the mediator in their understanding of the issues and so that the mediator can reinforce your arguments with the other side in caucus
- Plaintiff Counsel
  - important audience
  - help manage their expectations and those of their client
  - focus their attention on that which matters and that which does not
- Plaintiff
  - important audience
  - opportunity to present the theory of the defendant's case directly and without editing or comments
  - opportunity to reach the ultimate decision maker [who may be reasonably informed and intelligent or who should have the good sense to ask their lawyer for advice on the strength or viability of the arguments presented in the defence memorandum]
  - opportunity to present the facts, evidence and law in a compelling fashion

## 2. Timing

- mediator likely has a preferred timeline [typically 2 days to 7 days in advance of the mediation] - allow more time if there are multiple parties or complex issues or a large quantity of documentation which you expect the mediator to read and digest
- plaintiff counsel should be able to deal with the mediation memorandum in the same time frame allowed for the mediator
- the plaintiff should receive a complete copy of your mediation memorandum - send 2 copies to counsel for the plaintiff - consider sending the text of the memorandum by fax or email to counsel for the plaintiff as soon as it is ready
- if the memorandum contains new reports or new facts or information [a prime example being surveillance or investigation] which you expect should have a bearing on the assessment of the claim by counsel for the plaintiff and the ultimate settlement value, then the memorandum should be sent sooner rather than later - allow time for the memorandum to be read, digested and for the new information, etc. to filter through the assessment process undertaken by counsel for the plaintiff and, more importantly, for counsel for the plaintiff to perform their expectation management function

## 3. Tone and Style

- be persuasive
- be polite
- be concise [less is more]
- Goldilocks principle [not too much, not too little, just right]
- find a compelling theme
- primacy and recency
- use of headings, quotations and bolding
- point-first writing [tell the reader why what they are about to read about is important]
- editing by one or more individuals [other than the writer]

#### 4. Introduction / Overview

- set out the theme
- discuss the most important and impactful aspects of the defence
- acknowledge any real flaws or weaknesses of the defence
- highlight points of agreement
- highlight what you believe are the most important points of disagreement which may stand in the way of settlement and how those points or issues may be addressed or negotiated
- discuss what is likely to drive the value and ultimate settlement of the claim

#### 5. Content / Nuts and Bolts

- tell the story [whether chronologically or by topics]
- give the mediator, counsel for the plaintiff and the plaintiff himself or herself what they need [they need different things]
- counsel for the plaintiff needs to understand what is realistically going to drive the issues which are truly in dispute, those claims which are viewed seriously by the defence and the relevant and pertinent evidence which is likely to impact on the assessment of the claims [and why certain other claims are weak or unlikely to drive settlement values]
- the plaintiff requires the defence memorandum to be in plain English and in a digestible format - this is a matter of style, presentation and content
- counsel for the plaintiff should already have a good understanding of the medical reports and records, the employment documents and care needs [and presumably the costs associated with those needs] though they need you to focus them on areas of emphasis or importance
- focus on real issues affecting credibility and/or causation [as distinct from manufactured issues or isolated inconsistencies]
- counsel for the plaintiff and the plaintiff himself or herself will need a clear of understanding of:
  - why the various claims for damages will fail to succeed and the realistic and accurate present day values for the claims
  - why the plaintiff's theory on liability or damages or both is flawed or unlikely to be accepted by the trier of fact

- if the law or the facts or both are on the side of the defendant, explain what the law and the facts are and how they apply to the case
- the mediator needs a working understanding of the facts, evidence and law
- if liability is in issue, the mediator needs to understand the relevant evidence applicable to the issue and any applicable law
- the mediator needs a working understanding of the facts and evidence that support the various claims for damages
- dates of birth, present value calculations, summaries of income tax returns, employment information and the like, costs associated with care or housekeeping and burn rates are all important
- avoid the temptation to produce every medical report and medical document and to summarize each and every one of these documents
- use headings, bolding and italics
- use lists or bullet points
- be scrupulously honest and accurate when setting out the facts or when referencing the findings, opinions or conclusions of experts [both yours and theirs]
- deal with not only the facts and opinions that help but also those that hurt
- deal with the facts and opinions that matter [there are a great many facts and opinions that don't enhance the understanding of the audience or assist you in making your case]
- highlight areas of agreement
- organize the facts in such a way as to fit within your themes and tell a compelling story
- describe the parties, witnesses, health care professionals, employers and all of the other actors in the claim in a consistent manner and in a fashion that will allow the reader to follow the story
- use acronyms that are well known [AB, LTD, IRB, etc.] - if the acronym is not commonly used, it is better not to shorten the name or the expression
- edit, edit some more and then edit some more - strive to eliminate unnecessary detail
- use charts, graphs, timelines or diagrams

- include photographs where appropriate [the accident scene, damage to vehicles or the lack of damage, scarring or the lack of scarring, etc.]
- do not overreach
- avoid using long quotations from medical reports or case law - if a longer quotation is appropriate, introduce the quotation with a sentence to explain why the quotation is important and add emphasis to the quotation [through italics or bolding] to highlight what truly matters in the quotation
- if there are a great number of tabs to the brief, consider using two-sided copying - remember that you want the mediator, counsel for the plaintiff and the plaintiff himself or herself to carry the brief, take it home, read it and bring it back to the office and to the mediation
- consider using a highlighter to draw the reader's attention to certain portions of the memorandum or of the attachments
- do not be a slave to precedents
- if it's not broken, don't fix it

Secret world of mediation [humorous]

[www.youtube.com/watch?v=JmKcTBtAWF8&feature=youtube](http://www.youtube.com/watch?v=JmKcTBtAWF8&feature=youtube)

Mediation 911 [serious]

An 11 minute video, entitled Mediation 911, to help young lawyers prepare for their first mediation, which was assigned this afternoon, and is happening tomorrow morning at 9 am. This is the introduction to an online course Negotiation Mastery for the Legal Pro. This is a 9 hour on-line course with 48 lectures. It's pretty much soup to nuts on distributive negotiation.

<http://legalpronegotiator.com/mediation911>