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Making the most out of Mediation

January 2021

About RMC

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TODAY'S TOPICS

- Preparing for mediation
- What to expect out of the day and how to make the most of it
- Mediation tactics

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OUR SPEAKERS

Joachim Chau and Brian Murnaghan
Edmonton

CBM LLP LAWYERS

Kelsey O'Brien
Saskatoon

McKERCHER LLP

Terri Higdon
St John's

COX & PALMER

Jennifer Therrien
Ottawa

KELLY SANTINI LLP|SRL
lawyers | avocats

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Preparing for Mediation

1. Preparing your file
2. Preparing your people
3. Preparing to settle

Terri Higdon
Cox & Palmer
St. John's

Kelsey O'Brien
McKercher LLP
Saskatoon

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COX & PALMER

Preparing Your file

- Send everything to your lawyer ASAP

- Know your case
  I. Key facts and Timelines
  II. Issues
  III. Strengths and weaknesses
  IV. Gaps
  V. Assess reasonable quantum range

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Preparing your people

- Mediator
- Insured?
- Insurer representative(s)

Preparing to settle

- Ensure opposing attending parties have authority to settle
- Ensure you have appropriate authority
- Consider when to accept
- Prepare draft settlement documents
- Consider whether some issues (if not all) can be resolved?

Preparing your file

- Document management is crucial
  - ensure that all documents that you intend to discuss are exchanged, and available to be shared on your screen during the mediation as needed

- Mediation briefs take on higher importance
  - the slower communication and halting flow of speaking during an online mediation means that exchanging briefs in advance is even more important than in face-to-face mediations

Preparing your insureds

- Manage expectations of insured's with respect to the flow of discussion and the additional time that may be needed to complete a mediation virtually

- Arrange for a test run prior to mediation to make sure everybody is comfortable with the software and their link is functioning correctly

Preparing your insureds

- Remember that strategizing prior to the mediation requires additional effort given the lack of face-to-face meeting time

- Discuss how you will communicate confidentially with counsel and insureds during the mediation (ie. chat function, email, text, etc.)

Preparing your space

- Ensure appropriate décor and formalities maintained despite people often attending from their homes
- Try to attend while in a smaller room as the acoustics will be better than in a large conference room
- Check your lighting – poor lighting can make it difficult to see people during the mediation

Preparing your Tech

- Arrange for technical support in the case of issues that arise—technical problems are common, and it is important to have personnel available to address them or you risk having to re-schedule
- In the case of a multi-party file, consider hiring a facilitator with expertise in the virtual platform to assist
- Ensure use of headphones for confidentiality reasons and because other parties may not have the best microphone

Preparing your Tech

- Attendees should plan to use their computer, rather than a smartphone, to allow for clarity in viewing documents
- If possible, having access to multiple screen is ideal for viewing documents being discussed or shared during the mediation
- Ensure that appropriate charging and power source equipment is available, as the mediation may run longer than anticipated

What to expect out of the day and how to make the most of it

Joachim Chau
CBM Lawyers
Edmonton

Brian Murnaghan
CBM Lawyers
Edmonton

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Go in With an Open Mind

- This may be the only (and best) chance to settle the claim before trial
  - Anything can happen
  - Remember not to get discouraged if things do not go to plan
- If nothing else, use it as a way to gather information and assess risks
  - Does the Claimant's story at mediation match your prior understanding of the file?
  - What needs to be done after mediation to appropriately prepare the file for settlement?

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Set Aside the Full Day

- Momentum can be powerful
- Consider starting early
- Consider taking more than one day where multiple parties, complex issues

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Online considerations

- Zoom backgrounds
  - You're in your home or office, consider whether you want a backdrop
- Distractions
  - Make sure the pets (and kids) are fed and watered
- Use a headset
- Don't forget you have a mute button!
- Practice your poker face
- Dress as though you are appearing in person (at least the top half)

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Strengths of online mediation

- Less costly
- Keeps litigation process moving forward despite COVID-19 challenges
- Less emotional and intimidating for parties, particularly defendants

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Weaknesses of online mediation

- Slower
- It is more difficult to read people's emotions and non-verbal cueing
- No hot lunch
- Lack of equipment or high-speed internet access may put people without those resources at a disadvantage
- If the matter involves a highly emotional dispute, an online mediation may be less effective at addressing the emotional needs of the parties

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Mediation format

- Introductions
  - Opening statement
    - What sort of file is this? Bodily injury v. property v. CGL
- Breakout rooms
  - You're going to be spending *a lot* of time with your lawyer
- Caucus
- Other
  - Do you want to have a direct discussion with Plaintiff's counsel?
  - Mediations can be very personal to a claimant and some discussions may be too sensitive or direct

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Exchanging offers

- As a general rule, the Claimant will open
- Offers are discussed individually by mediator with each party in Breakout Rooms
- Candid discussion with mediator
- Mediator presents offers to the parties

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Pre-mediation meeting

- Your team may involve more than just the insured
- Make sure everyone is clear on the rules, the key issues, your positions, your version of the facts, any information missing

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Have a plan

- Talk to your lawyer about prior settlement discussions in order to suss out the issues most important to the Claimant (or Claimant's counsel)
- Develop a strategy to get to where you want to be
- Remember that you need to be flexible; things will not always go to plan and you may need to adapt
- Talk to your lawyer about your expectations

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Have Your Full File Available

- You want as much information at your fingertips as possible
- In the event there is a discrepancy, check the records
- Accurate information is your best asset in negotiating a fair settlement

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HAVE AUTHORITY

- Know your authority and come prepared with your top line

- Make sure you know who to call if you need more money
  - Use your discretion
  - Not all decisions are going to be made on the merits
  - Your lawyer is there to advise you of the value of the file, but further considerations like the costs of continuing litigation may impact your decisions with respect to settlement

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BE FLEXIBLE DURING THE MEDIATION

- New information can come to light during mediations that may require you to change your pre-existing assumptions or position so be ready to improvise if necessary.

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ASK YOUR MEDIATOR FOR A RECOMMENDATION

- If negotiations have fallen apart at mediation, ask your mediator to recommend making one final offer to try to resolve the matter

- See further discussion in Mediation Tactics section

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FINALIZING SETTLEMENT

- If you reach a settlement at the mediation, have the settlement documents including the Minutes of Settlement

- This will save you costs later and ensure that all parties are on the same page

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DO NOT GIVE UP
EVEN IF MEDIATION FAILS

- There is nothing stopping you from continuing settlement discussions with the other parties even if a resolution cannot be reached at mediation

- Consider leaving your last offer open for acceptance
  - Leaving money on the table can be attractive in the moment, but time can change that

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Mediation tactics

Jennifer Therrien
Kelly Santini LLP
Ottawa

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Determine your BATNA

- BATNA stands for Best Alternative to a Negotiated Agreement
- How to identify your BATNA:
  a) List all alternatives to the current negotiation
  b) Evaluate the value of each alternative
  c) Select the alternative that would provide the highest value for you
  d) After determining your BATNA, calculate your bottom line

Demands and Offers

- Give yourself a lot of room to negotiate with your opening offer
- BUT make meaningful incremental increases in subsequent offers
- Know your bottom line but do not hyper focus on it
- Take your time making offers, but not too much time

Framing Offers Effectively

- Who should make the first offer?
- Use the mediator as the sounding board?
- How should the offer be framed to create desired response?
- What message do you want to send to the opposing party?

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The Balance of Posturing with Credibility

- Do not make an offer that is not supported by legitimate factors
- Do not make final offers unless you mean it
- Do not say one point is non-negotiable and then give it away later
- Do not make outrageous offers and large concessions
- Just say “no” to unacceptable offers

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Creative Tools When Close to a Resolution

- Consider a double blind
- Get creative with your offers
- Consider making a call to go above your reserves if appropriate

QUESTIONS?

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