TIPS FOR REGULATORY AUTHORITIES IN A DISCIPLINARY COMPULSORY CONFERENCE

STEPS TOWARDS MORE EFFECTIVE AUTHORITY REPRESENTATION IN COMPULSORY CONFERENCE

1. Conduct a thorough case assessment and risk analysis, and on that basis prepare a negotiation plan. Identify the authority's interests –. The specific needs may be non-legal, for example, the need for a public record, control, precedent, recognition and reputation.

2. Thinking creatively about possible options is also necessary. A thorough risk analysis will require evaluation of the authority's BATNA, WATNA and MLATNA (best, worst and most likely alternatives to reaching a negotiated agreement in compulsory conference). This provides the authority with a reality check on what will happen if the matter does not settle in compulsory conference.

3. Prepare a case summary.

4. Prepare an opening statement. That statement will need to identify key factual and legal issues, important non-legal issues and the authority's future objectives. The aim of the opening is to persuade opponents, rather than to bully or antagonise them. Persuasion is more effective than threats and intimidation in compulsory conference. Credibility can be lost by making enemies with those whose agreement is required.

5. Understand that the mindset required for compulsory conference may be different from that required for a hearing. You will need to listen actively and understand the other parties' points of view (even if you don't necessarily accept them.)

6. Thorough preparation is essential to have the greatest chance of success. You will need to understand the case in order to be able to negotiate intelligently and effectively.

7. You will also have to prepare the authority fully. The authority will need to understand:

    a. what happens in compulsory conference, the basic stages in the compulsory conference process and the fundamental principles of compulsory conference.

b. the strengths and weaknesses of the case and the pivotal importance of the authority as decision maker in compulsory conference.

c. the benefits of reaching a resolution in compulsory conference and the alternatives and comparative risks involved with each alternative.

d. the role of the member as a facilitator, rather than decision maker, and that confidentiality is the cornerstone of compulsory conference.

8. Consider a strategy for negotiation in compulsory conference. What is most important to the authority? What concessions can be made? Although there needs to be a plan, and definite goals, success in compulsory conference depends on flexibility and adjusting positions in order to react to information that is revealed in compulsory conference.

9. Consider what case management directions or orders you will want if the dispute does not settle at the conference. How much will these steps cost? Have you informed the authority?

10. Set aside sufficient time for the compulsory conference. Treat it as a "day out of the office".

11. Establish rapport with the member, as well as the decision makers for opposing parties, who need to feel that the negotiations are proceeding in good faith.

12. Be prepared to listen and to focus on the future, rather than on the past, when considering options for resolution.

13. Use the private sessions to greatest advantage – communicate the authority's goals and interests; help the member understand the strengths and weaknesses of the authority's, as well as opponents', case.

14. Negotiate effectively – avoid creating an impossible impasse or backing the authority into a corner that may create loss of face. Use the member as an ally to diagnose, and help solve, the problem, as well as to assist in breaking impasse. Use the member as a sounding board to explore offers, options and strategies. Make suggestions about varying the process or taking a break, if this would help to break the impasse.

15. Have some understanding of the special considerations that might arise in the course of compulsory conference, for example, the impact of offers to settle, funding issues, the use of experts, tackling difficult

parties, cultural factors, multi-party issues and the application of law and ethics in compulsory conference.

16. Have patience – compulsory conference can take many hours, more than one session, or even extensive follow-up, usually via telephone.

17. Become familiar with drafting agreed statements of fact, agreed outcomes and submissions..

COMMON MISTAKES MADE BY LAWYERS IN COMPULSORY CONFERENCE

18. Unfamiliarity with the process, the role of the member, or the roles of lawyer and authority in the process.

19. Bringing the wrong people to the negotiation.

20. Poor preparation for compulsory conference – on facts, law, possible options, likely settlement terms and authority issues.

21. Failure to consider the best, worst and most likely alternatives to reaching settlement in compulsory conference.

22. Poor or positional negotiation skills – negotiation in compulsory conference is different from direct negotiation between lawyers.

23. The lawyer may get caught in “negotiation traps”; e.g. widely optimistic advice to the authority, the lawyer considers that the authority has invested too much time and money in the dispute to settle, the lawyer over-relies on his initial advice, or the lawyer ridicules good suggestions made by an opponent simply because the suggestions were made by the “other side”.

24. Insulting the opponent.

25. Making assumptions about the authority’s needs or interests or the other parties’ goals and objectives. It is the authority who is in dispute and the authority who makes the decision. The lawyer can advise on the law but should take care not to advise on “what’s best” for the authority. Only the authority knows what’s best and that may not always coincide with what the lawyer considers to be right.

26. Failing to listen to the authority, opponents or cues from the member.

27. Failing to appreciate what is important to the authority. Compulsory conferences often reveals that a lawyer may have one view of the

authority's pressing interests, whereas the authority has an entirely different view of its aims, needs and interests.

28. Failing to use the member to explore fully the strengths and weakness of the case, or the risks and opportunities inherent in the case.

29. Taking extreme positions or insisting on a "bottom line" in the negotiations.

30. Misrepresenting or omitting relevant facts.

31. Inattention to detail in the settlement agreement.