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Conversations with Claims Professionals about Mediation

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Having mediated thousands of cases with insurance claims professionals and having interviewed 55 of them last spring for a graduate school project, I would like to offer a summary of the challenges and concerns they typically face (as they have been explained to me) in mediation of litigated disputes. I suspect counsel may have similar challenges and concerns. Hopefully, these insights will help all participants in mediation come to the table with better strategies that produce better outcomes, or make the process more productive at least.

Mediator Qualities

Mediators need to be able to convey the limits of authority. At some point, there is no more money. Mediators who take more time with plaintiffs when a final offer is conveyed are successful more often. Some rely on past experience ("I've mediated with this claims professional and I can tell you this is it."). One common problem is the distrust of plaintiff's lawyers to believe that "this is really it." Sometimes carriers pay more money when plaintiff's lawyers hold out – not always but enough times to foster the impression that it will happen again.

Not surprisingly, mediators who actively assist the parties in resolving cases are preferred over mediators who are passive. Some claims professionals welcome critical, evaluative feedback from mediators when they ask the mediator for his or her opinion. It's important to note that unsolicited evaluations are not well-received. At some point, a mediator runs the risk of being seen as the "authority figure" who thinks that he or she can predict the future. That approach can, and often does, backfire for the mediator.

Parties (and counsel) who express extreme anger are common. The mediator's emotional intelligence and ability to manage difficult conversations can be a critical factor when choosing potential mediators. All participants need to be patient with these interactions because difficult conversations and difficult people take time. Impatience is an effective way to realize impasse.

Process

Anything can happen in negotiation and mediation. This may appear obvious. But it's good to remember that preparation – as crucial as it is - only goes so far. One key question in any negotiation is "Who's pulling the strings? Who's absent and do they have authority?" Another key question is "How do I know if I'm being overconfident?" Assuming the risk of a bad outcome at trial is one thing. But assuming a calculated risk that includes an exit strategy is better because the contingency plan makes a good outcome more controllable and less dependent on chance.

Most defense counsel and claims professionals want to avoid opening presentations. I suggest you make that clear to your mediator ahead of time. On the other hand, there are sound strategic reasons to have a joint session, assuming you have a mediator who can manage it. Some claims professionals like joint sessions because it allows them to see the other side or have other parties hear from defense counsel.

Challenges with Opposing Counsel

Of course, everyone must cooperate in order to make a deal, but sometimes that just won't happen. The hard truth is that some super-aggressive attorneys (whether they represent plaintiffs or co-defendants) will cause defendants to spend more time and money on the case. If possible, try to understand what the plaintiff actually wants; it might be a sum certain after expenses or something that makes their life easier like adjustments to their house or a motor vehicle.

When demands go up or when settlement talks break down, consider proposing a range or a bracket that incorporates the prior demand from plaintiff but shows movement on your side. If an increase in demand happens in mediation, ask for a joint session and remind the other side that you have what they want (i.e., money, perhaps a release, information, etc.). Mediations that end prematurely leave the other side not knowing what you would offer, or how much authority is available, or whether the claims professional would reconsider her valuation.

When emotions are high, consider a generous offer to start the process. Although this approach produced mixed results with one large carrier, it can deflate anger. In the right case, consider offering a portion of money up front that you'd offer anyway (i.e. for continuing medical care or devices, transportation, etc.). In one case, plaintiff's counsel appreciated the adjuster's overall assessment of the case and her compassion for the plaintiff, allowing her to take what time she needed to return to mediation a year later. Consider how much time and money that saved with fewer, less contentious legal battles. We are hard-wired to reciprocate. If cooperation starts on the defense side, you may engender cooperation in return. And if not, you can pull back until another opportunity emerges.

Challenges with Co-Defendants

Your mediator should take steps to address allocation problems before the mediation. When there is no communication with other adjuster(s) before mediation, why not initiate the conversation and inquire about their evaluation? Ask the question they want to answer, "Why should we re-evaluate?" Other questions that are often relevant include, "Why do you think your insured doesn't have exposure?" "What will more discovery uncover?" "Is there room to move on the allocation percentage (yours or theirs)?" "Would the other carrier consider neutral case evaluation and take that number to their claims committee (or would you do the same)?" Remind them about facts that might rub jurors the wrong way. For example, a jury might not appreciate their insured's conduct and put "a pox on both houses." What are the lawyers not talking about? That may matter more to jurors than anything else.

Jeff Trueman is an experienced, full-time mediator and arbitrator. He helps parties resolve a variety of litigated and pre-suit disputes and interpersonal problems concerning catastrophic injuries, wrongful death, professional malpractice, employment, business dissolution, and real property. His writings have appeared in the Washington University Journal of Law and Policy and elsewhere.