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MEDIATION Matters

Five best practices insurers can use to make better settlement decisions.

by John Greer

Some insurance companies are better than others at settling court cases using mediation. Why is that?

Mediation in civil litigation is a regular fixture. Over the past 40 years, it has become routine for courts to refer cases to mediation. Fewer and fewer cases go to trial any more. Most settle. Settlement occurs at different stages: prior to mediation, during mediation or after mediation at a settlement conference with a judge or on the proverbial courthouse steps. Today it is not so much, "We'll see you in court," as it is, "We'll see you in settlement negotiations."

Some insurance companies do not take mediation seriously. Many always opt out of the practice. They may feel mediation means "compromise," something they are not willing to do. In truth, no party should accept a settlement agreement unless it is in the party's best interest to do so.

Or, they may feel skipping mediation signals they are ready to try the case, thereby enticing plaintiffs to settle for a lesser amount. But given that most cases settle without going to court, word will get around that the company's implied threat is an empty one. Knowing this, plaintiffs will simply wait out the company, nullifying any advantage it is trying to achieve.

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Key Points

What's Happening: Fewer legal disputes between insurers and plaintiffs are going to trial anymore. Most cases settle.

Common Pitfalls in Mediation: Being unprepared, not making offers in good faith, lack of candor with the mediator, not being flexible and the inability to look for creative solutions.

The Solution: Insurers using best practices can have a clearer understanding of the case at hand and the prospects for settlement.

Some companies merely go through the mediation motions. Maybe they are trying to get the plaintiff to reveal his litigation strategy or other trial nuggets. With the current state of required discovery, however, very little is likely to be revealed in mediation that would not, or has not already, come out.

Others may use mediation to play for time and do not get serious about settling until right before trial. This strategy is very much fact-dependent. There may be some instances in which the company's case is so strong it makes sense to hold out till the end to see if the plaintiff will realize his trial weaknesses and will settle close to the company's preferred number. On the other hand, there may be instances in which the trial could go either way or could likely go against the company. In these cases, there is little advantage to holding out to settle. Better to get on with negotiation at mediation and see what can be achieved.

Companies Find Mediation Useful

Insurance companies will fully engage in the mediation process if they find it advantageous to do so. Company settlement decisions are driven strictly by the bottom line, a straight-forward calculation of the risk of losing at trial weighted by the expected value of any payout plus the cost of litigation. Companies usually run the numbers before coming into mediation and so arrive with a pre-determined settlement range based on their reserve. If the maximum dollar figure generated by this initial risk analysis calculation was below the plaintiff's demand, many companies would not settle or budge off their top-line number no matter what happened during the mediation.

Yet some cases have been settled in mediation because the company found it to be in its interest to move off its initial calculation. Why are some companies better at figuring out which cases are worth settling, thereby providing certainty, closure, confidentiality and savings in time and money? The following are five ways companies can make better settlement decisions. Think of these as best practices used by effective companies.

Five Best Practices

Be Fully Prepared. It is critical the insurer obtain and review all relevant information prior to mediation. An insurance company cannot make an informed settlement decision without all the facts.

All too often parties come to mediation missing key pieces of information, such as the plaintiff's full medical or financial records. Worse, the company has run its risk analysis calculation and set its reserve based on what it thought was complete information, only to find out during mediation that important gaps exist. Inertia can take over if the company becomes psychologically invested in its settlement numbers, making it hard to move off them. Time is wasted while the company waits for the plaintiff to produce the additional information. A good mediator can help prevent these problems by pressing the parties ahead of time for an accurate assessment of whether they have all the necessary information. Effective companies assist the mediator by being transparent about what information they need and what remains outstanding.

Deal in Good Faith. Putting out settlement numbers is a form of communication indicating what a party views as a reasonable settlement range. If a party in mediation puts out numbers that the other party feels are bad faith communications, negotiations break down quickly.

For example, if the plaintiff reduces his demand during each round of negotiation and the company makes only meager increases in its offers (or worse, no increases at all), the plaintiff soon gets the message that the company is not interested in a good faith settlement. The company

The Advantages Of Mediation

Gives the parties a voice in shaping their own solutions. If they cannot agree, and the case does make it to trial, someone other than the parties (i.e., a judge or jury) will make the decision for them. Mediation can provide certainty in the sense that, if agreement is reached, the parties know exactly what will happen. Contrast that with the uncertainty inherent in going to trial.

Provides closure. Very often, injured plaintiffs want to get on with their lives. Settling in mediation has a high value for them compared to the time, expense and emotional turmoil involved in going to trial.

Confidentiality. Whether in joint session with the mediator and all the parties, or in private session with the mediator and only one party, everything said in mediation remains confidential and cannot be used if the case ends up in court. Confidentiality encourages the parties to look for creative solutions without fear that ideas placed on the table will come back to bite them. In contrast, absent special circumstances, a trial is a public event.

may view its offers as reasonable according to its risk analysis calculation, but the other party may see this as evidence of bad faith. Impasse soon results. To avoid miscommunications, effective companies come into mediations with a plan about where to start the negotiations (their opening offer) as well as how to proceed through the subsequent rounds by making jumps that communicate in good faith their reasonable value of the case. For a fuller discussion of these concepts, see J. Anderson Little's book, *Making Money Talk: How to Mediate Insured Claims and Other Monetary Disputes*.

Be Upfront With the Mediator. Being candid with the mediator facilitates the settlement negotiations. The mediator will be carrying the company's offers to the plaintiff. Progress toward settlement is more likely if the plaintiff understands the company's reasons behind an offer. This is because, while he may not agree with the offer, the plaintiff is more likely to respect it, and thus make a reasonable good faith demand in response. The mediator can do a better job explaining the offer if he fully comprehends it.

Effective companies help the mediator put context around the offer. They explain in private session their understanding of the case and how they value settlement. All this is confidential, and the mediator will allow the plaintiff to know only that which the company agrees can be revealed. By giving the mediator a full picture of how the company values the case, the mediator is better armed to piece together in his head the parameters of a possible settlement and explore potential solution space with the parties.

Be Open to New Information and Remain Flexible. The most effective companies keep an open mind during mediation. They listen for new information that may lead them to change their settlement position.

A good example is the demeanor of the plaintiff. The mediation may be the first chance for the company to see the plaintiff in real time and assess how he may present to a judge or jury. The company's attorney may have a sense if the attorney has already deposed the plaintiff, but mediation gives the company a chance to see for itself. For this reason, if the company representative cannot attend the mediation in person (as often happens for logistical reasons), a mediator can use video-teleconferencing so the representative can observe directly how the plaintiff handles himself. Often, companies form an impression of the plaintiff based on a paper review and set their reserve on that basis. However, things may look very different on the ground, and effective companies are open to additional observational information.

Another example involves key facts that emerge during the mediation. Contrary to how plaintiff's attorneys sometimes paint insurance companies as cold and heartless, company representatives are people too. The facts in a plaintiff's story may be so compelling that hearing them at the table can change the company's risk analysis calculation.

Encourage Creativity. The most effective companies look for creative solutions. They are not locked into one fixed solution, i.e., the one generated from their advance risk analysis calculation. Ineffective companies view mediation as a "win/lose" proposition. Effective companies, on the other hand, react to developments at the mediation table to find solutions that work for both parties. Surprisingly, when one party breaks a logjam by generating a creative option, the other party often responds in kind. When both parties commit to finding a solution, usually they will find one.

A structured settlement is a good example. Perhaps the insurance company is not willing to pay a lump sum up front. It may be that the plaintiff has financial needs that play out over a period of time, such as needing funds for doctor or physical therapy visits. If agreement on a lump sum payment cannot be reached, one might be possible for payments over time. If there is a concern the plaintiff may not be financially responsible, payments could be made directly to a doctor, physical therapist, or other reliable person.

The best way to find creative solutions is to be open to exploring the plaintiff's underlying needs and interests. A good mediator will facilitate this process by keeping the information flowing back and forth. Effective companies take the time to listen and consider whether, in meeting the company's needs and interests, there is a way also to meet those of the plaintiff.

Bottom Line

Why are some companies better than others at settling mediated cases? Effective companies are better at settling cases because they use the best practices outlined here to help them make better risk analysis calculations. Their calculations are more robust, enriched with newly acquired information gained during the mediation process. They work candidly with the mediator in making good faith offers and generating creative settlement options. Effective companies are thus better equipped with a fuller understanding of the case and the prospects for settlement. BR