Jim's Perspective…

Mediation

Mediation of insurance claims, both first-party and third-party, started to develop in the late 1980's. Back in the early to mid-1980's I usually had about 200 pending lawsuits that I managed on behalf of Farmers Mutual of Nebraska. I was not the attorney who tried the case in a court of law, but I was the Farmers Mutual executive who managed the claim for the company. I usually had a few civil jury trials completed each month. The decision by a jury as to liability and damages seemed like a fair and impartial way to resolve a disputed claim. However, the complete resolution of a claim through a court trial was expensive and it involved a considerable amount of time to reach complete resolution of the claim. I didn't particularly care for mediation when it first started and avoided it, but as time went by, I learned that it was a good legal process for resolving insurance claims. I did a lot of mediation of claims in the 1990's! With that background, and with attending an Alternative Dispute Resolution seminar, I have set forth bellow some aspects of mediation that you might find useful when your clients are a party to mediation.

Preparation.

1. I know I might be stating the obvious, but I found that it always helped the mediation process if the parties to the mediation made sure that they put forth all the facts that are out there about the claim which would help both parties enter mediation with what they thought was a reasonable settlement position before mediation began. Don't hide relevant information about the claim, and then surprise the other side by revealing the secret information during mediation.
2. Submit a written position statement regarding the claim in dispute. Just some verbal settlement attempts seemed to make it more difficult to move forward with the mediation process. Note too, that all written material submitted to the mediator is confidential, but you can waive confidentiality and share any written material with other parties to the mediation.
3. Mediators will read everything submitted for mediation, and the mediator will also read any pleadings that might be part of a pending lawsuit for the claim. Some mediators limit the number of written pages that can be submitted for the mediation.
4. I found that there were sometimes people who attended the mediation as one of the parties to the mediation, who might mistakenly believe that the mediation itself was "litigation." It is important to make sure the parties know mediation is not a lawsuit and that it is an informal meeting with a neutral mediator, and it is not a high pressure – intense and strenuous process.

Some of the mediator's preferences about the mediation process.

1. Advise the mediator about everyone who is attending the mediation in connection with your person who is a named party to the mediation.
2. Make sure the mediator knows the negotiation history.
3. Be sure to provide the mediator with all liens and subrogation claims.
4. The position statement should not be too long. Usually, these statements are three or four pages long.

5. Expert witness opinions should all be completed a reasonable amount of time before mediation is conducted. A mediation by ambush is not useful. This happens when the mediation is about to get started within the next few days, and one side says, "We just got an expert's opinion!" Suddenly, this party's demand doubles!

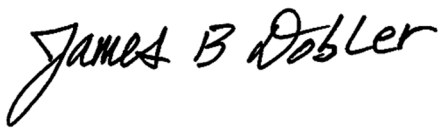
How to prepare the client for "excess emotion."

1. If a party to the mediation is feeling animosity towards the other party, be sure to emphasize that mediation is supposed to be a gentle, informal process. Back off! Relax!
2. Warn the mediator about a client that might be mean, have excess emotion or has some sort of "mental health" feelings about the whole claim process. Sometimes it may be necessary to put the parties to the mediation in separate rooms. It is useful for the attorneys and clients involved in mediation to discuss that they all intend for the process to be gentle and calm.

A few final thoughts on the mediation process.

1. I never gave any kind of "opening statement" about the disputed claim. That kind of behavior can affect rational negotiations during the mediation process. I preferred to just start a back-and-forth negotiation of the claim. As stated above, I usually included some form of position statement in my written material to the mediator.
2. Today, it seems like almost every disputed insurance claim that can't be resolved just through the claims process, is resolved through mediation. One unfortunate thing about this development in civil tort and contract law, is that we don't get very many formal court verdicts or appellate court published opinions anymore. It used to be, that I sometimes saw outcomes in court cases on various insurance claims, and this information gave me some help in determining the value of certain types of claims. Of course, it gave both parties to an insurance claim, some information on the possible value of the claim. I suspect it is a little more difficult today, to know where to begin your first dollar amount offer to settle the claim. However, plaintiffs' lawyers and defense lawyers will still interact about civil tort and insurance coverage claims in various professional ways, so there is still some information floating around out here about the outcomes of various mediation settlements.
3. One of the mediators involved in the Alternative Dispute Resolution Seminar mentioned that he had conducted roughly 5,000 mediations up to the point of the seminar. That's a lot of mediations!

I appreciate that there will be many mediation events that do not require direct agent involvement, but my intent is just to give you some understanding or appreciation about the process which might help you provide your clients with some understanding of the process and also hopefully help relax the client as the day for mediation approaches.



Jim Dobler, CPCU
PIA Legislative Coordinator
Questions or Comments? Please email jbdobler@outlook.com