



**2016 CLM Annual Conference
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Increasing Its Success and Effectiveness of Mediation

I. Evaluating cases for mediation

Proper evaluation of cases for mediation is needed to increase ability to obtain a successful outcome, and to save time and money. A key consideration is the timing of the decision and the signaling to plaintiffs of an intent to mediate and if it will be perceived as a sign of weakness, or desire to overpay a claim to avoid expense. Other important issues to be explored include identifying the specific factual and legal issues involved in a case, and evidence needed to assess liability, damages, and insurance coverage. We will explore the techniques and strategies that are designed assist in evaluating a case for potential mediation that include the following considerations.

- A. Information, facts and documents available
- B. Investigation and discovery required
- C. Identifying the relevant factual and legal issues
- D. Screening case for potential early mediation
- E. Timing of mediation and integration with litigation strategy
- F. Plaintiff(s) and opposing counsel
- G. Opposing counsel's litigation strategy
- H. Insureds actions and impact on jury
- I. Collaboration with defense counsel and the insured
- J. Strengths and weaknesses of the case
- K. Insurance coverage

II. Selecting a mediator and planning the mediation

Factors to consider in selecting a mediator

Not all mediators are created equal. Does a case require subject matter expertise, or specific litigation or judicial experience? Will a mediator of a particular gender, ethnicity, or sexual orientation be more effective in "getting through" to the insured and/or the plaintiff? Cost and location of the proceeding and availability of the parties? These are often difficult issues that get overlooked that may have a significant impact on getting the case to mediation, how much a case can be settled for, as well as whether relationships can be preserved.

Information about Mediator

Given the private and confidential nature of mediations, there is often little information available about a mediator's relationships with counsel or insurers, their mediation style, and the results they achieve. We will discuss obtaining information about a mediator's reputation such as his or hers marketing and relationships with law firms; professional associations and conferences; and experience with the disputed issues. An important consideration is the reputation the mediator has for actually listening to, and understanding important key points of contention, and his or her incorporating them into the negotiation to influence the result. We will identify resources and strategies available to gather the information necessary to make an informed selection.

Setting goals for mediation

The "success" of a mediation depends on the goals for the mediation, which is typically achieving settlement and closing the file. However, there are many other valuable benefits that can be achieved through mediation. We will discuss how it can lead to partial settlements as well as the resolution of important factual or legal issues related to liability, damage and coverage. It provides a platform for testing legal theories. It provides an opportunity to assess evidence and to strategize obtaining further evidence through investigation and discovery. It allows the insurer and defense counsel to assess the plaintiff, their attorney, their experts, and the case in general. We will discuss how focusing on the specific goals will assist in designing a mediation process that furthers them.

III. Preparing the case for mediation

It's all about preparation, perspective and expectations

The mere agreement of the plaintiff and defendant to mediate is usually the first step in moving the case closer to settlement. Normally, the insured, insurer and defense counsel's interests are aligned to terminate and/or reduce exposures. However, in order to achieve resolution, no matter how strong a mediator is, it will require the agreement of the plaintiff and his or her counsel to settle. We will be discussing strategies and techniques to "get behind" and understand the dynamics of the plaintiff's relationships with their counsel. This will include their respective expectations; strategy for liability and damages; and how to differentiate what they "want" to settle as opposed to what they really "must have" to settle.

Valuing Case for Settlement

The actual value of a case is determined when the parties settle, or when an arbitrator or jury makes an award or verdict. However, it is important for the insurer and its counsel collaborate to determine a potential value by building a financial model that analyzes the claims, defenses, and risk factors. There are various methods for constructing valuation models which will be discussed, including the use of spread sheet formats, utilizing assumptions, and results of similar cases. We will also discuss the typical formats used to project the demand, offer and counter-offer negotiations. Lastly, we will discuss strategies to internally round-table more complex cases and to make sure all of the decision makers have agreed upon settlement authority levels.

Preparing for predictable bumps in the road

Notwithstanding the best preparation, there will likely be barriers to overcome. This includes being ambushed by unpredictable and unreasonable settlement demands; dealing with a “cozy” a relationship between the mediator and plaintiffs’ counsel; mediator whose sole interest is settlement and has no interest in equity; listening to mediators “war stories”: a mediator who is un-informed as to facts and applicable law; lack of “decision makers”; unresolved insurance coverage issues; etc. We will discuss strategies and techniques for preparing for these contingencies and in controlling the process and outcomes.

Who, what when and where, and impact of technology

The very essence of mediation is a collaborative process, where the mediator facilitates the parties’ agreement on an outcome of a dispute. Given the un-structured nature of the process, the logistics are an important factor and should be given consideration as it can considerably improve the process. Typically, the personal attendance by all of the decision makers and stakeholders was the holy grail of the mediator however, for lots of reasons their personal attendance is impractical and un-necessary. Topics to be addressed will include the integration of technology that ranges from “telephonic” accessibility, to the use of video, online meetings, power points, and mobile access. This will also include a discussion of who should participate, use of joint sessions and various other tools available.

Pre-mediation communications

Generally, the better one is prepared for the mediation, the better the chance of achieving a reasonable resolution. To maximize the effectiveness, the mediation process requires a certain amount of “conditioning” and reducing expectations of plaintiffs and the mediator through conferences, briefing, and other communications. It should also include pre-mediation conferences between insurer, insured, defense counsel and possibly experts to make sure all are on the same page, and the problem issues have been vetted. This is an essential element of the process and should be part of its design. We intend to touch on the timing, nature, confidentiality, and substance of these communications.

Preparing to prove your point at mediation

An important element is the need to be able to convince the other party of the righteousness of your position and how you intend to prevail on the disputed issues. A story does not mean anything unless it is communicated and understood. Historically, this communication has been done through oral arguments and written briefing with related documents. However, the advancement of communication tools such as power point and demonstrative exhibits have not only raised expectations of juries, but also of ADR professionals as to how the story is presented. The session will include a discussion on how to incorporate technology and demonstrative exhibits in mediation presentations so the other side knows what you want them to know. The session will also include a discussion on using mediation briefs, including timing, length and contents.

IV. The Mediation

The mediation process

We will discuss ways to improve, de-mystify, and to standardize the *process* from start to finish and to make it “user friendly.” Mediation is a process for resolving cases that is an alternative to the court system which prescribes mandatory rules and regulations and a judge / jury making the ultimate decisions, not the parties. Mediation, on the other hand, is intended to be flexible that will allow the parties to make their own decision in the shape or “design” of the process and its results. There are a variety of procedural and logistical issues that arise from the decision to mediate that the session will address. This includes improving the collaboration and communications involved, as well as issues related to the timing and sequences of the activities.

Organization of mediation session

Most of the time there is little, if any, advance planning on how the session will be organized and it is left up to the mediator. We will discuss techniques of how to control the session, including who will be present, the use of technology to allow other decision makers to participate without the need to be physically present, what rooms they will be in, whether it will proceed in a joint session, how private caucuses’ will be used, what information and documents will be exchanged, the use of witnesses, and finally how and when the mediator will frame the all-important demand, offer and counter-offer aspects of mediation.

Getting to the goal line

The session started at nine in the morning, and it is four in the afternoon, and actual dollar and cents negotiations have not started or has stalled. One or both sides are frustrated claiming it’s a waste of time and are ready to walk out. It’s at an impasse. The session will address strategies to address these impasses that includes techniques to jump-start the negotiations, making the decision to terminate the session with the expectations of a subsequent session and identifying the “homework” needed to be done by the parties to bridge the impasse.

Settling the case and what happens after mediation – next steps for your case

While financial issues dominate, more often than not they are not the only issues demanding attention before a mediation is successfully concluded. Additional issues will be discussed and how to prepare for loose ends in advance of mediation. We will also discuss what happens when cases don’t settle, what steps to take to guide your plan for the final stages of a “successful mediation”.

V. Developmental opportunities

Licensing and certification of mediators

In many states, anyone can be a mediator. Should mediators be licensed? Should they be required to undergo legal or formal mediation training to obtain licenses? Should

mediators be trained and/or certified to handle cases in certain specialty practice areas which includes specialized and/or unique factual, legal, or coverage issues?

Access to information about mediators - disclosures

Who is that person that is supposed to get the case settled? Where can you get reliable information about the mediator's background, training, education, relationships, successes and failures and/or plaintiff – defense orientation? Should mediators be required to disclose relationship with opposing counsel?

Access to information regarding statutes governing mediation

Differing jurisdictions have differing rules and regulation governing mediators and mediations. Where can you find this information?

Development of best practices

Frustration with the process is typically the result of failed expectations. Would it help if there were best practice or other guidelines to use as benchmarks that address the mediation process in specialty practice areas?

Development of technology platforms for virtual participation

In our world of specialization and mobility, and need for multiple participants in certain decision making, the use of technology is becoming important. The development and use of technology platforms to allow remote participation is critical.