CLM 2018 Annual Conference
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Upping Your Mediation Game, It Doesn't Have To Be What It Used To Be!

I. Creative Programs… Mediation Days

Mediation Days can save money and time for all involved

Mediation Days are when multiple files are scheduled in one day. The same Mediator mediates all the cases and the claimant's/plaintiff's attorneys all go to one location. The times are staggered for each file allowing a dedicated time slot to maximize chances of resolution. Depending on the files it is possible to schedule 3-7 files in one day. It is important to develop and maintain criteria for the files you want to consider for this program. It will make the selection process smoother and uniform as they will be in line with the company's resolution goals. In addition since it has become more popular that employees work remotely from home offices or out of state the criteria will also keep the teams aligned. The best suited files for this type of program are: two parties (not multiple claimant/defendants), conceded liability, soft tissue damages, claimant is pro per, treatment is completed and your waiting for medical records, there are offers and demands exchanged, and possible bad faith allegations. Another scenario for mediation days is when one claims representative has multiple files but separate plaintiffs with one attorney or firm. An entire day can be scheduled with just that firm.

The mechanics key for resolution

There are many steps to successful a Mediation Day. Consider working with an ADR provider to work the files. Target dates that are about 45-60 days out if possible, this will give you ample time to select the files. Ask the provider or Mediator their experience in this setting as it is an abbreviated mediation and a lot of steps will need to be shortened in an effort to keep on schedule. Experienced mediators know how to maintain a good pace and make everyone feel comfortable. The inexperienced mediators will not know how to gage the rights times to speed up the process which will not make people feel comfortable and they will leave therefore reducing your success rate.

Once the date and Mediator are selected, the next step is selecting the files. If the goal is to schedule five hearings in one day, then identify ten files. What typically will occur, is one/two

files will settle before they get to a hearing just by suggesting mediation. Another one/two will not be able to get the medical records in time but they will be scheduled for a future date. The remaining files will be scheduled. It is a good practice to reserve a minimum of 2 hours for each file. In most of these settings the insurance will pay for the mediator all day in essence paying for the plaintiff's portion of the mediation. This can be a double edged sword BUT doesn't have to be. When paying for the plaintiffs fee, the likelihood of getting them to the Mediation Day is a lot higher. At the same time it may allow for a perception that the Mediator is bias to the insurance company since the fees will be paid by them. Allow the ADR provider to serve as a buffer in this regard.

A Neutral Approach

A neutral presentation and environment is also important to success. Good practices include sending opposing counsel a letter suggesting your good faith offer to mediate in this setting and providing the details of the date, time etc. In utilizing a neutral ADR provider, the initial contact can be vital to their participating, questions can be answered about the process and mediator. Select a venue that is a neutral location and offers comfortable environment with snacks and administrative support for signed settlement agreements. Additional best practices include submitting a one page statement of facts. Also consider in lieu of submitting any documents to the Mediators, scheduling a thirty minute call before the Mediation Day to discuss all of the cases.

II. Out of the box Mediation approaches

Jury Mediation is a creative tool

Not all cases and counsel are created equal. Just because one approach or mediator worked well in one case doesn't always apply to the next case especially when it comes to "bet the company" cases and being on the court house steps for trial. Counsel has attempted mediation once or twice and it was unsuccessful. The positions taken were not even in the realm of negotiation due to a deadlock on the liability and/or damages, and legal issues. Once that case is determined by a Judge or jury one side will lose.

The tool of jury mediation is a process is incorporating a focus group into the mediation process. The jury consultant will work alongside counsel and the Mediator to achieve the results you want. The goal of jury mediation is NOT to "try" your entire case in front of a juror and see who has the be better case. It's a resolution tool in your toolbox. You will present evidence on a certain issue(s) to the jury which is agreed upon in advance. Once each side and the mediators views each sides presentation, the consultant will ask the agreed upon questions of the jurors. These questions will ask the jurors of their thoughts and feeling of the evidence presented. The

value-added information is utilized to immediately enter into a mediation and can now be considered and discussed during negotiation. The Mediator can also share his/her feedback of their jurors and how it may apply to counsel's settlement position.

Bifurcation of Liability and Damages

When liability is hotly contested, it can make it almost impossible to negotiate the damages. Whether there are two parties or multiple defendants, carving out liability with a binding arbitration will provide apportionment and/or dismissal. The remaining defendants can then enter into a mediation with the plaintiff and a different Neutral. This two-step process will allow all parties to negotiate a full settlement.

Alternative Structuring of Complex Cases

Particularly in large, complex cases, such as construction defect actions, the mediation process can get unwieldly in a hurry. Whether it is endless hours of downtime while the mediator concentrates on other parties, or whether the mediator's focus is tied up with coverage issues, the process becomes inefficient and participants get discouraged. Consider alternate structuring of your mediation to foster success. Are there discrete issues which can be parsed out and mediated separately, such as "A.I." claims or coverage disputes? Consider whether multiple mediation days might be justified by the breakdown of the parties and coverage issues on the table. For example, in a construction defect case, it may make sense for the general contractor, subcontractors, and design professionals to mediate first on their own to develop a framework for relative contributions to a global settlement pot at the "real" mediation with the plaintiffs. Further, consider whether the personalities/styles of the participants might dictate setting a time limit on mediation (i.e., all parties know from the outset that mediation ends at 3:00 PM). At mediation, the negotiations take place on whatever stage you/the mediator set. Accordingly, setting the proper "stage" for your mediation can go a long way toward maximizing efficiency, saving costs, and putting yourself in the best position for reaching a successful resolution.

Co Mediation

There are cases that will lend themselves towards working with two mediators. For multiparty party cases this can be extremely effective as all parties sit in separate rooms waiting around for hours for the Mediator. They work concurrently with all parties to build and maintain the momentum so the matter will often settle that day as opposed scheduling multiple sessions for months. Other options for utilizing this process include: assigning times and parties among the Mediators, dividing issues (e.g. coverage vs. liability vs. damages), dividing one mediator to

the Plaintiff(s) and the other to the Defendant(s). Areas of expertise is another consideration. Some areas such as construction defect, finance, intellectual property or class action expertise could be the component that makes the deal happen.

Mediation Fee, to pay or not to pay ..is the question

Typically, mediation fees are split equally among the parties. This ensures an equal vested interested in settling the matter. There are scenarios when offering to pay for the mediation will impress on opposing counsel in a way that makes them more appreciative and invested in settling. Cases with policy limits and multiple plaintiffs and injuries can benefit from the insurance company paying 100% for the mediation. Experience shows that this gesture will get them to the negotiating table. Mass tort and habitability cases are of the same genre, many times plaintiffs can't make the out of pocket investment. Assertions of bad faith is another opportunity to go to mediation with an offer to pay the entire cost. This "good faith" gesture will allow for more information to be exchanged at the mediation if there is a punitive damage claim, coverage, or a motion for summary adjudication.

III. Measure of Success

To achieve support from the company in building an ADR program is imperative to its success. In addressing management, A Best Practice and Best in Class Industry Approach has proven effective. How success is measured can also be different for each insurance company and risk management. Examples of benefits - ROI would increase as indemnity exposure usually increases over time as well as litigation and investigation costs. Inventory reduces which lowers staffing needs and costs. There is enhanced information gathering through information learned which increases reserve accuracy. Also, appropriate caseloads help reputational communication as being a fair carrier. Rapport with counsel through enhanced communication will benefit future negotiations on cases. There is risk mitigation via clear discussions re: constructive notice of liens, resolution of all liens, all claims known and unknown (focused discussion). If a consumer corporation, retention of customers, protecting brand and limiting public explore are all additional benefits.

The Measurements can also vary. A good base line and expectations include average payment severity (capped), reduced claims inventory (mediation for non-litigated), reduced litigation inventory (as % of overall claims), reduced litigation costs and reduced cycle time for non-litigated and litigated claims.

IV. Selecting the "Right" Neutral

Your "return" on your investment in the mediation process often depends greatly on what you put into it. The following practices will help you take full advantage of the process and set the stage for a successful mediation.

Interview your mediator if you are unfamiliar with him/her. There are times when the opposing sides will agree on a mediator, which makes it easy. Presumably, that means both sides are familiar with the mediator and believe him/her to be "right for the job." There are times, however, when you are forced to pick a mediator. Perhaps the court offers a small pool of individuals from which your mediator will be appointed by the court, or perhaps the other side presents three prospective mediators to which they will agree, and you know none of them. In those situations, do not be shy about reaching out to each prospective mediator for an "interview" of sorts. Does their personality mesh with yours/your insured's/client's? What is their experience with your type of case? What is their background? How do they view their role as a mediator and their place in the negotiation process? Do they require pre-mediation statements? Do they continue to "mediate" if the day ends without a full resolution? Most mediators are happy to discuss these topics, as they know a successful mediation often depends on each side's comfort and trust with the mediator.