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## Mediating Insurance Cases in a Changing Landscape: 5 Steps to Sustainable Solutions

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Claims professionals and the insurance industry have been adjusting to the new landscape that the pandemic created. Insurance matters have always been multifaceted—and then there was COVID-19. As a tool, alternative dispute resolution (ADR) is more effective than ever in the strategic settlement of cases. There is a psychology to negotiating. Using advanced listening skills to discern human condition to influence a settlement is key to navigating the emotional turbulence that can occur at mediation.

Negotiating at mediation, whether virtually or in person, should accommodate the parties' need to be heard (and sometimes seen). The chosen format of participation for any mediation should reflect party preferences, the severity of the damages, emotional factors, and the risk based on the damages, both visible and invisible.

Mediators are the shepherds to the dispute resolution process, and they are responsible for setting the stage for the parties to find areas where compromise is possible. Patience is key for identifying the underlying interests, which are not always readily articulated. Insurance-related cases can have layers to them, sometimes leading to multiparty mediations. The mediator has the (sometimes arduous) task of sorting the interests and issues in segments to ensure all possible options are explored.

Insurance-focused matters with a personal injury component can add an emotional dimension to the negotiations, which can cause the rounds to take longer so that the mediator can gain the trust

of the parties and later influence settlement. Claims adjusters depend on the partnership with the defense counsel and the mediator to enable a progressive negotiation environment, along with counsel on the plaintiff side.

Seeing these interdependent relationships as pieces to the resolution puzzle can bring all participants into a mindset of collaboration versus adversarial posturing.

My insights come from more than three decades of negotiating experience in this space as a former commercial claims professional and now a neutral. In conversations with colleagues, I have noticed that there are varied philosophies about mediation preparation and its process. As we continue to figure out how to effectively address and resolve disputes across subject matters, there are considerations for optimizing negotiations, especially in insurance matters. Insurance touches everything, so it is possible that almost any mediation-worthy case could be insurance adjacent.

Most seasoned commercial claims professionals are very sophisticated negotiators. They do not usually depend on the mediator to guide them on general process. The value of the mediator, as the



only person in every room during the process, is to exercise discernment around what is possible. An effective mediator can use shared information, timed communications and negotiation points to influence the parties, but must always be respectful of the self-determination canon.

For the mediator's purpose, personal lines, commercial adjusters and independent adjusters are the people with the authority. They have been sent to the mediation to act on behalf of the carrier. Who is required to be at the mediation table varies by state. Mediators must not interfere with the charge given by the insurance company to the adjuster who is present. The mediator is not privy to the nuances that exist regarding policy structure, internal matters and negotiation strategy. There are many scenarios that could exist, such as self-insured retentions, coverage issues and excess coverage issues—the list goes on. Strategically, there may be reasons why the adjuster is negotiating in a particular manner. The defense attorney may or may not be aware of the mediation strategy. This can be for a variety of reasons: company practice, trust factor, and relationship. Generally speaking, the defense attorney is not in charge at mediation, especially in commercial matters where a seasoned claims professional is present. The mediator is there to facilitate. The stage of a case determines what information is available to be shared and plays a part in the negotiation strategy. Pre-litigated and litigated cases are evaluated and managed differently. Depending on company policy, the adjuster may or may not have personal authority with which to negotiate. On complex cases, an adjuster may be negotiating with the authority granted by a direct superior or from several levels up, if the evaluation was escalated due to complexity.

Post-COVID mediation continues to be an evolving process as newer subject matter areas, such as cybersecurity, arise. Hearings should be constructed with

the requests, needs and interests of the parties in mind. As the dispute resolution landscape changes, solutions will follow. Here are five practical steps to consider when navigating insurance-related negotiations in a mediation:

1. Choose a mediator with appropriate subject matter expertise, and leverage the mediator to assist in crafting and delivering tough messages.
2. Be deliberate about considering diverse mediators to manage cultural competencies.
3. Communicate early and often (as appropriate) with the adjuster, and make every effort to have them present at the mediation table as a show of goodwill, especially in complex matters.
4. In complex cases, consider using two mediators in co-mediation (no additional cost) as a strategy to leverage mediator skill sets and perspectives and address various aspects of the case.
5. If no resolution is reached, adjourn the mediation rather than call impasse. The parties will interpret this as an opening to continue negotiating. This opportunity to continue negotiating after mediation always exists, but the terminology used can change the parties' dispositions.

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