

5 Things a Claims Rep Can Do to Improve the Mediation Experience

By: Christina Magee

1. **Be prepared on the file.** Seems too obvious to mention. Nevertheless, there is no question that the Pandemic times we live in today translate to continuing disarray in the courts and tremendous backlogs in litigated cases. Mediations are being set without the traditional lead time adjusters may have become accustomed to and at points in the litigation life cycle that seem too early – i.e., before discovery has been completed. Additionally, adjusters are being asked to step in on files where they haven't been the assigned "desk adjuster" or handler for the file. Adjusters who are learning the case on the fly during the mediation can slow the process, unduly frustrate the opposing side and make it harder for the Neutral to settle the case. But reality must be reckoned with: if you find yourself in this spot, a sincere request to take the time to figure out what you need to be able to decide whether or not to increase an offer on a case is usually acceptable. Don't forget that your Mediator has the means to help both sides pare down the issues so that even imperfect information can be better assessed.
2. **Let your counsel prepare adequately for the mediation session.** Mediators work alone. When we do gather, one of the discussion topics since the Pandemic has been a sense of general unpreparedness among counsel at mediations. There is a general sense that lawyers graduating from law school since the turn of the century take courses in ADR, and thus, an assumption that these lawyers know how ADR proceedings differ from trial's opening statement, closing statements, etc. Mediation summaries prepared in advance for the Neutral appear to be losing currency for many lawyers, on plaintiff or defense sides. That trend, coupled with the popularity of dispensing with an opening statement in the general session, can leave a Mediator in the dark about a case until well into the opening caucus with the respective parties. A well-done Confidential Mediation Summary that highlights what is at issue between the parties and what counsel views as obstacles to reaching a settlement is invaluable. It allows the Mediator to prepare more adequately: searching for relevant verdicts, mining the Neutral's own experience with similar cases and outcomes that could assist the parties, and providing insights into the obstacles that keep the parties apart.
3. **Will you be the only carrier representative who is contributing settlement funds?** If multiple insurers are involved in a claim, it is helpful to understand the coverage that is available in terms of limits, time on the risk and any coverage defenses that will bear on the decision to pay out money on the claim. If there are multiple policies involved, do the carriers need to meet in advance to work out any cross claims, tenders, or other issues that would preclude a unified approach to the plaintiff? Resolving these issues prior to the mediation session in advance can dramatically improve the mediation process for all.
4. **In a similar vein, if there is more than one defendant/plaintiff in the case, do these parties need to meet in advance to assess their respective claims and defenses?** Are there indemnification cross-claims? Can the parties agree to stick together up to an agreed amount to settle and only break apart after a certain threshold in settlement dollars is reached? The preparation theme may seem redundant but can be difference between settling or continuing to another conference.

5. **Attend with an open mind.** The mediation process can be amazing at getting parties to shift positions. Fundamental to the mediation alchemy is the parties' willingness to at least consider moving off a previously well-established demand or offer. Carefully evaluate what the Mediator is telling you about the dynamics in the opposing room. Even in cases where the parties are in opposite universes regarding the settlement numbers, getting a feel for how the opposite counsel works and their effectiveness with their client can be enormously valuable. Likewise, gaining information about the issues driving the opposite side's position provides the basis for assessing whether to proceed with discussions to settle or wait for a case development that will change the parties' posture.