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A Proposed Mediation Preparation Checklist

by

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The Mediation Objective

- What is the client's desired outcome to the mediation? (settlement, delay, compliance with mandated process?)
- Client's best outcome?
- Client's worst outcome?
- Client's best alternative to a negotiated outcome (BATNA)?
- Worst alternative (WATNA)?
- What does the other side want: money, an apology, an external modification that will change the way one party operates (e.g., a trademark tweak, a change in how promotions are made, an updated vaccine, an assignment of a contractual right, etc.)
- What can your client offer to the other side that allows the other side to avoid its WATNA or achieve more than its BATNA?

Mediation Timing

- Is this mediation taking place:
 - Before significant discovery has occurred?
 - Before a complaint or other charging document has been filed?
 - Within thirty days prior to trial?
 - While a dispositive motion is pending?
 - After verdict but prior to appeal disposition?
- Is this the first time the parties have attempted to negotiate a settlement to the case?

- Is the mediation to be used in conjunction with an evaluative proceeding, such as an arbitration or judicial resolution of a dispositive motion?

Potential Funders of a Settlement

- Liability insurers

- Front line adjusters and their reporting hierarchy

- Reinsurers

- Self-insured retentions – does this trigger need for approval by board of directors or other corporate management authority mechanisms

- Deductibles

- Non-covered allegations and reservations of rights

- Simultaneous declaratory judgment actions resolving coverage issues

- Bad faith assignment of claims from policyholder to plaintiff

- Co-Defendant contributors

- Do you want them present?

Yes – more paying parties means a bigger pie and/or a smaller slice for paying party

No – first to pay may pay less because early payment funds litigation war chest to pursue other defendants but may create an “empty chair”

No – last defendant standing may be a valuable source of recovery for injured party

- Non-Party Indemnitors

- How to bring them to the table when they haven't been brought into the suit and there's no verdict yet as to value?
- Is the indemnity question a distraction from mediation or a viable basis to acquire settlement funds?

Costs of Litigation

- Who is paying for the litigation costs?
 - Insurance policy with defense costs that are outside the policy limits?
 - A liability policy with defense costs that erode limits?
 - A contingency agreement?
 - Fee-shifting for costs by statute or agreement?
 - Financial capacity of paying party

Who Attends Mediation

- The funders of the settlement (e.g. insurance representative and policyholder; public adjuster; injured party or family member)?
- Ultimate decision makers vs. litigation monitors
- Non-party attendees

Position Statements/Midpoints/Brackets

Mediation Position Statement:

- Confidential or shared with other parties?
- Disclose a demand or offer?
- Planned offers and midpoints
 - Whose money is at stake? Consider when planning offers/demands
 - Does a portion of the settlement have to be allocated for tax considerations? If so, what impact on settlement strategy?

Medicare set aside issues – do these have a potential value impact?

Brackets

Timing

Who initiates

Can you plan one or more brackets? How to respond to the counter-bracket proposal?