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Seven Tips for Mediating Complex Insurance Coverage Disputes

Lowenstein Sandler LLP

Mediation can be a viable way to reach a satisfactory settlement on an insurance dispute. When successful, mediation offers a less costly and time-consuming alternative to litigation and often allows for more candor and creativity in crafting a successful resolution. Below are seven tips for mediating an insurance matter and achieving a resolution.

1. Deciding When to Mediate

Many mediations fail because the insurer claims to lack information about the claim or the damages or did not have the opportunity to

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review the information. Without information, substantiating your claim, mediation is unlikely

to be productive. It may be that some factual investigation or discovery is necessary to put the case in a position to be resolved. To get the

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policyholders should consider providing their insurer with factual information to substantiate the loss amount before any mediation so that the insurer has a better understanding of its exposure.

2. Selecting the Mediator

Selecting the mediator is often a negotiated process with counsel for the insurance carrier. Insurance coverage cases have some unique issues, especially in light of the rules of insurance policy construction, bad-faith damages, and claims-handling statutes. Several of the major insurers have “approved” lists of mediators, and there may need to be additional discussion if the policyholder wants to use a mediator not on the list. But, ultimately, when considering potential mediators, prioritize the ones who are familiar with insurance coverage cases, have a track record of success, and do not treat insurance companies as their preferred client.

3. Evaluating Your Claim

Understanding the strengths and weaknesses of your claim—and your insurer’s defense to your claim—is essential to a successful mediation. When preparing for mediation, consider creating a list with three to five

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questions that you think will be difficult for your adversary to answer, and then do the same for your claim. Policyholders need to understand that many insurance companies are frequent litigators and will not necessarily be



motivated to find a reasonable resolution that cuts off legal costs and reduces risk.

4. Understanding How Insurers Operate

Many policyholders get frustrated during mediation because of the lack of steady progress throughout the mediation day. As a result, a policyholder must be mindful of two concepts: First, claims representatives have only a certain amount of authority, and any sum above that amount must be approved by one or more senior claims managers or internal committees. Sometimes this is done in advance of mediation, but not always. Second, as a tactical matter, most insurers work slowly during the mediation process by taking long periods to respond to offers and negotiating in very small increments. This strategy is often designed to frustrate the policyholder because insurers have learned that forcing a long, frustrating mediation day will prompt some policyholders to jump at the first decent offer. Being mindful of these concepts will help prevent exasperation during mediation.

5. Helping the Mediator

It is important to have your key documents and legal authority on hand for the mediator. It is virtually guaranteed that your mediator will not have time to commit key facts, documents, or case law to memory in advance of the mediation. So if a specific decision or document is critical to your case, then have the material ready to highlight and hand over to the

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agreement on the terms of the settlement. Aside from the settlement amount, the two most common areas of dispute are the scope of the release and whether the insurer will insist on an indemnification provision. The parties should address these terms during the mediation day so that the settlement does not fall apart during the final drafting process. Importantly, insurers often do agree to settlements without indemnifications or with limited indemnifications. Policyholders can push back on this demand by noting that it is not a requirement under most insurance policies.

7. Having a Plan for Next Steps

You should create a realistic goal for the mediation. Be sure to have an ideal settlement amount in mind, with a range of options that you will agree to; also, create a plan for concrete steps to take if the mediation does not resolve the case. If you do not come to a resolution, will you file a complaint? Will you encourage the mediator to make a mediator's proposal? Or do you want to try another mediation later? Know the answers to these questions before going into the mediation so that you arrive ready to achieve your goals.

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About the Authors:



matters and takes a very common-sense approach to strategy." *Chambers USA* 2021

For more than a decade, **Joseph M. Saka** has been helping policyholders successfully resolve complex insurance coverage disputes, frequently through negotiated resolutions with their insurance carriers, on claims arising from bodily injury, products liability, environmental liability, defamation, intellectual property, antitrust, RICO, securities, directors and officers liability, and privacy issues, as well as such interruptions to their businesses as employee dishonesty, cybersecurity breaches, reps and warranties, cargo losses, wildfires, and criminal activity.

Rosemary A. Loehr represents policyholders through every stage of litigation, from pre-suit investigation to trial and appeals with a particular focus on claims from commercial general liability policies. Her approach to litigation draws heavily from her experience completing two clerkships on the United States Court of Appeals for the Tenth Circuit.

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