



By Cynthia F. Pasternak

## How to mediate effectively with insurance carriers

Mediation is a process. An experienced mediator can use the same techniques he or she uses in other litigated cases to resolve any mediated matter. But in mediations where an insurance carrier appears on behalf of a named defendant – its insured – mediations are more successfully resolved if certain issues are considered.

### Preparation for the mediation process

Most mediation-training courses teach students to begin mediation with a joint session. In this setting the attorneys, sometimes assisted by their clients, present their respective positions to the mediator and opposing parties. While this works well in business and other cases where the parties are sophisticated and the issues are solely about money, initiating a mediation with a joint session between a frightened, emotional plaintiff, who is angry that the case did not resolve long ago, and a comparatively dispassionate, businesslike insurance adjuster can easily result in a very short, hostile mediation with permanent damage to the prospects for any future informal resolution.

Therefore, in insurance cases, it is often advisable that the mediator conduct the initial meeting in private caucus with the parties and their respective counsel. These private, informal conversations allow the parties to speak more freely to the mediator about the strengths and weaknesses of their case. The mediator can explain the mediation process, address any concerns each side might otherwise be afraid, embarrassed or unwilling to share in a joint setting, and can give full attention to all of the parties' contentions and their impressions of opposing claims. In contrast to the limited revelations each party would otherwise be willing to share in joint session, this low-key, "safe" approach generates trust in the process, the mediator, and in most cases, results in a greater likelihood that there will be the productive exchange of information necessary to reach a successful outcome.

### Completion of basic discovery

Most insurance carriers require their claims adjuster to "document the file" with plaintiff's responses to basic discovery before they evaluate the existence and extent of the carrier's liability and set reserves for their exposure. Such information includes written discovery (e.g., interrogatories, production of documents), plaintiff's deposition, and, when the injury is more complex, a defense (or "independent") medical examination. Recognizing this requirement, the plaintiff attorney is wise to voluntarily provide, cooperate with, and encourage defense efforts to obtain as much special-damage documentation as possible in advance of the mediation. This allows the adjuster to be sufficiently informed about plaintiff's claims and secure advance settlement authority so that the case may resolve at mediation within parameters acceptable to the plaintiff.

### Presence of adjuster at mediation

California Rules of Court, rule 1634, requires someone with full authority to settle the case attend the mediation for each party. These persons with authority are expected to be physically present throughout the duration of the mediation. In the case of an insurance carrier which insures a named party, the appearance is generally made by a claims adjuster or other insurance representative, authorized to agree to a binding settlement. In most instances, the only time a named defendant (who has no authority to bind the insurance carrier for any monetary sum) appears at mediation is when there is potential for a recovery that exceeds the policy limits.

Even if it were not a court rule, to have the best chance of settling a case it is important that an adjuster with authority be present at mediation. The adjuster's attendance shows the plaintiff and plaintiff's counsel that the carrier takes the case seriously and is interested in having it resolved.

Also, as a case progresses, a defense attorney typically provides an insurance-carrier client with regular status reports. Among other things reported are the defense attorney's impressions of how the plaintiff and other witnesses may be perceived at the time of trial. By personally attending a mediation, the adjuster can meet the plaintiff to formulate his or her own impressions. Furthermore, the adjuster's preconceived notions may be addressed, and consequently altered, by hearing a mediator's more impartial assessment of the plaintiff as a witness. An adjuster who fails to attend the mediation abandons this important opportunity to evaluate the plaintiff. For these reasons, in anticipation of a meeting with defense counsel, the adjuster and the mediator, plaintiff's counsel should prepare the client to present a favorable, but genuine, trial impression.

### Plaintiff's demand

Insurance carriers rarely make the initial offer. Plaintiff, as the party who brought the lawsuit, is generally expected to propose the first settlement demand. Only after a demand is made will most insurance carriers consider giving any response.

If a carrier views the plaintiff's demand as unreasonably high, the defense will either not respond or will reciprocate with a correspondingly low offer. Therefore, as a general principle, the plaintiff's initial demand should not exceed a number that may be justified by supporting documentation already provided to the defense. If new documentation becomes available to support plaintiff's claims, it should be provided to the defense at the earliest opportunity so that the adjuster (and supervising management) may give it due consideration.

Some situations warrant plaintiff starting with a policy-limits demand. Most, if not all, insurance carriers will

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refuse to give any response to such a demand. To do so has the potential of opening up the policy limits, exposing the insured to an excess claim. Accordingly, if the plaintiff is inclined to make a policy-limits demand but is willing to discuss another number below that amount, plaintiff's mediation demand should be less than the policy limits.

### **Basic "principles of negotiation"**

At the start of monetary settlement discussions, I often explain to plaintiff that there are some basic "principles of negotiation" when dealing with insurance carriers. One principle is that plaintiffs tend to take "big steps" downward from their first demand, while defendants' insurance carriers take "baby steps" upwards from their first offer. As previously noted, the plaintiff is customarily expected to start negotiations. Once a number is proposed, it has the effect of setting the outer limit of plaintiff's claim. For this and many other reasons (e.g., not

wanting to undervalue the case, uncertain about defense case strategy, to leave adequate room for negotiations), plaintiffs customarily begin with a high demand. Thereafter, plaintiffs tend to reduce the demand in proportionately larger amounts than the increased offers proposed by the defense.

Another principle of negotiation is that plaintiffs frequently "mentally" split differences. Insurance carriers do not split differences. An insurance adjuster walks into a mediation with a certain amount of authority. The adjuster will not offer more than that authority. The adjuster may make a phone call or two to ask a supervisor for a small amount of additional authority. Generally, after these one or two calls, the negotiations are over. Whether out of a sense of compromise, impatience or some other reason, plaintiffs look to close gaps between settlement proposals by "splitting the difference." Controlling the money, having no personal interest in the outcome, and

motivated by continued employment, an insurance adjuster is guided by the extent of authority authorized by the carrier prior to mediation.

### **Conclusion**

Knowing how to deal effectively with insurance carriers in mediation will enhance a plaintiff's opportunity for a successful, informal resolution. That opportunity is maximized when good liability, damages, an appealing plaintiff, competent counsel and an effective mediator, experienced in insurance matters, complete the package.

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