

# Mediation— When Insurance Not Law is Key

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Although all insurance disputes are basically contract related there are several distinctions. First party insurance disputes are those involving the insured versus the insurance company or vice versa and usually involve coverage issues or value of the claim. Those that involve third-party liability are disputes that not only involve the insured and the insurance company but also the underlying third-party claim against the insured. In some cases the dispute involves multiple insurance companies fighting over their obligation to the insured. Cases such as these that go to trial are far more costly to resolve and sometimes result in the insured incurring significant out of pocket expenses.

Mediation is prime for insurance disputes because it allows for a truly neutral expert in insurance coverages, customs and practices to identify the strengths and weaknesses of the case.

In the past quarter century, mediation has increasingly become a favored alternative to litigation. This move toward alternative dispute resolution has made its way into the insurance industry. More and more insurance disputes are being submitted for mediation in order to obtain a more efficient and less costly method of resolving disputes. In fact, as reported by Corporate Legal Times (Feb. 2004) 84.6% of general and in-house counsel find alternative dispute resolution equally or more suitable than litigation for insurance and reinsurance disputes. Should a poll be taken today, I'm sure this percentage would be even higher. The benefit of mediation is not only cost related, but mediation is a quick, practical, comprehensible, confidential means of dispute resolution that creates a "win-win" scenario for involved parties.

Mediation benefits the courts - by reducing its docket load; the insured - by resolving issues without the cost, time and resources needed for a trial; benefits the third party claimant because he receives his compensation quicker than he would had it gone to trial, and usually the insurance company benefits because it will not incur litigation expenses and the claim can be closed.

Success of the mediation depends on the selection of a qualified mediator. The parties should seek to identify a mediator who has a clear understanding of the key issues. The mediator with the appropriate insurance knowledge would be the most likely individual to assist the parties in reaching a settlement. All parties involved in the dispute need to have enough information to properly evaluate their position. An attorney, as a mediator, even if he has litigated insurance, remains an "expert in the law," not in insurance. If the matter in dispute is insurance related, your best bet is to locate a mediator that has been an insurance or reinsurance underwriter, claims adjuster manager, executive or agent for the type of insurance involved in mediation. The mediator who understands the complexities and purposes of different types of insurance coverage, and the variance in policy language interpretation is better equipped to help the parties involved come to realistic expectations of the resolution.

Preparation for mediation then becomes an important part of the process. The mediator should be provided with expert reports and related insurance policies to better prepare him or her to better facilitate the process. Typically, the mediator will hold a short joint session with all the parties and then meet with each of the parties separately. Clients should be properly prepared for the process so that they develop realistic expectations. Caucusing with the clients is an important and necessary part of the mediation process. Both the client and the mediator must have a firm grasp on the facts and damages. If both sides trust the mediator, there is a better chance of obtaining a resolution that is agreeable to all parties. A good mediator will be creative and can suggest several options to the parties that would bring them into agreement.

Mediation allows the parties to make their own decisions and come up with their own settlement. The process is voluntary and nonbinding. It is up to the interested parties to decide on the terms of the settlement. The mediator has no authority to impose a decision on the parties. The best possible mediator, however, can analyze the case and help the parties develop options for settlement.

Successful mediation avoids expensive litigation, provides rapid results, allows parties the flexibility to create their own mutually agreed upon outcomes, is more likely to be complied with, offers a greater degree of control and predictability of outcome, preserves an ongoing relationship between the parties and holds up over time.

However, choosing the right mediator is key to the successful resolution of insurance related conflicts. Choosing an insurance expert to mediate insurance conflicts is in the best interest of both parties, when the dispute is not legal in nature. A referral service that specializes in insurance can be very helpful in determining the type of mediator that has the best type of experience to insure the success of the mediation.

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