"Think of an insurer as a cruise ship"

The reason there are "rules of thumb" for mediation is that they are most often true

By Arnie Levinson

There are some simple things attorneys can do to maximize the potential for a successful mediation result. These are mediation rules of thumb. While there are good reasons to depart from them on occasion, I offer them because they are most often true.

Ships turn slowly

In a talk I recently gave, the picture of a cruise ship seemed to have the greatest impact of anything I said. Think of insurance companies as cruise ships. How long do you think it takes a cruise ship to turn around? A long time. That is what happens with insurance companies. Something I see periodically is that a plaintiff provides an insurance company important information at or shortly before the mediation and expects the insurance company to process that information and make a decision quickly.

In the vast majority of cases, the insurer simply does not have the ability to quickly respond to that information and make a decision. Like a cruise ship, it takes a long time for it to assess new information or to reverse a previously held position.

And there are reasons for this. Once an insurer has arrived at a mediation, the claim has been reviewed and evaluated by the handling adjuster, and most of the time at least one supervisor, and often a claims committee which must approve any settlement offer. Thus, when an insurance representative appears at a

mediation, that person comes armed with instructions from supervisor(s) and often the claims committee. Before those people can act, they need recommendations from counsel handling the case. In other words, they need the file papered with the information on which the decision is based.

New information presented shortly before or at a mediation has no ability to go through this process and cannot be "vetted" by those not in attendance. A plaintiff may believe that the information is so powerful or obvious that it needs no vetting or approval from others. And occasionally that is true. But insurance companies don't normally work that way.

People who work for insurance companies have superiors and their superiors have superiors and there are superiors above them. They also all have metrics, budgets and reviews that help judge their performance. Those performances are often judged by actions taken based on what is on paper in the file. If an adjuster were to accept representations made at a mediation without proper review, that person would be subject to questioning from a superior as to why the adjuster took that action when it was not documented in the file. And the superior is in turn subject to his or her superior questioning why the adjuster was allowed to act in such a fashion.

In other words, on many, many occasions, insurers need more than one set of eyes to evaluate information and they need it documented in the file. That normally can't be done until the information has been properly received through counsel, documented in the file and the decision based on that information can then be properly documented.

As frustrating as it may be, this is just how insurance companies work. Accountability is important to overseeing the risks involved. This is not to say that information presented at a mediation is not going to be effective. It just may not have the immediate effect one may hope to obtain.

There are, of course, exceptions to this rule. The longer the case has gone on, the more familiar the adjuster is with the case and the closer the case gets to trial, the more quickly the insurer is set up to act. Insurance companies do know that once a matter is close to trial, they need to be prepared to act quickly and the processes are usually in place to do that. Similarly, where an adjuster has been working the file for a while, that person sometimes can expedite the process – even to the point of actually making hard decisions quickly.

In general, however, think of an insurer as a cruise ship. If you have the right evidence and authority, the ship will eventually turn around. The word "eventually" is the key word here.

Give your mediation brief to the defense

It is increasingly more common for the defense not to provide its mediation brief to the plaintiff. Generally, there is nothing confidential in the brief that the plaintiff doesn't already know. However, in the name of simplicity to avoid the occasional error, a lot of insurance companies just have a rule that their briefs don't get provided to the plaintiff. I often ask permission to provide the brief to the plaintiff if I think it would be helpful, and that permission is usually granted.

Regardless, I believe that a plaintiff needs to provide his/her brief to the defense. Consistent with the cruise ship analogy above, the insurance company needs the information. Adopting the approach that "I am not going to give them mine if they don't give me theirs" certainly has its merits. But it also throws sand in the gears of the cruise ship. How do you expect to convince the opposing party of the merits of your case – and the need to settle it – without providing them your arguments and information?

A helpful approach can be to write your brief as if it were titled "Dear supervising adjuster" because that is the person you want to reach.

If there is confidential information that a party does not want to disclose to the opposing party, the best approach is to simply provide a modified brief to the opposing party and *clearly* advise the mediator in a separate communication of what is confidential.

Confidential information

There are many times when it is a tough call whether to tell the other side information you think they do not know but would have an impact if they did know. Do you save that information for trial or do you disclose it in mediation in hopes that it will help in settlement? There is no right answer to that question. It is obviously case dependent. In most instances, the defense is eventually going to learn about it and figure out how to defend against it. Again, the key words are "most instances."

One of the problems with confidential briefs is that it is unclear what, if anything, is actually confidential (usually, the answer is nothing).

I have a strict rule around confidential information because, when I was representing parties, there were too many times when confidential information was "leaked" to the other side. My rules are these: I will not disclose to the opposing party any information a party clearly advises me is confidential unless: (1) I believe it would be helpful; and (2) in light of my belief, the party agrees to permit disclosure.

Absent both elements, the information remains confidential. It may be, of course, that the other side already knows about it, in which case it is not confidential. Or it may be an argument that is naturally going to come up in discussions. I ask that if a party wants information to be confidential, that the party makes clear what is confidential and what is not, so that there is no misunderstanding.

Demanding the presence of a representative with authority

It is beyond frustrating to plaintiffs when a defendant shows up at a mediation without a person with authority or otherwise unprepared to negotiate. The reality is that this is sometimes part of the settlement dance. A party can demand that the other side send someone with authority all day long and the defense will often assure that such a person will be present. But there is authority and there is authority. There is no realistic way in which a plaintiff can require that the right person be present at the mediation. The fact is that sometimes insurers send "bodies" and at other times, they send exactly the right person.

I once attended a settlement conference in federal court in Arizona. The magistrate called everyone into open court and went around and had each person introduce themselves. A minor defendant was a major bank. The magistrate eventually got around to the bank's representative and asked him his name and position at the bank. After introducing himself, he explained that he was a teller at a local branch and that a supervisor told him to come down to court that day. So much for any contribution from the bank.

There is effectively no way to control who the defense brings to a mediation, regardless of what you are told. Even defense counsel often has little ability to control who is there. Sometimes the insurer does not even realize that the person it sent is not the right one to get the job done. Insurance companies play the system all the time (as do plaintiffs). It is a good idea to find out who is in the other room and we can draw some *general* conclusions about that:

a. The right claims people cannot physically be at every mediation/settlement conference. They handle too many cases and would never get any work done if they couldn't send a representative.

b. If no representative appears, most of the time the defense doesn't have a lot of money.

c. If the representative is from a third-party adjusting company (TPA), generally that person has limited authority and limited ability to get more authority.

Notwithstanding these issues, understand that in the vast majority of cases the defense wants to explore settlement. It is just a matter of when and how. Insurance companies are not in the business of gambling and taking high risks. They want to settle most cases. When they are ready, they will generally get the people in place to make those decisions. Unfortunately, sometimes their speed is frustratingly sloth-like. Which brings me to my next point.

One session is not a "failed" mediation

It is often said that a mediation was a waste of time when the case doesn't settle. Sometimes that is true. But most often, that was a case that either could not settle at some early stage or was going to need more than one or two sessions. There actually is progress that goes on with the insurer much of the time; it just is not apparent. Part of it can be preliminary work that needs to be done to get that cruise ship to turn around. It needs to be done and may not have been possible without that mediation session, even if it did not result in a settlement the first time.

Settling cases is like picking fruit

You can't pick fruit until it's ripe and you can't settle cases for the right amount until the case is ripe for settlement. Well, actually, you can pick fruit before it is ripe but it will taste pretty bad. The same is true of settlements. You can settle cases before they are ripe, but it is going to taste pretty bad to someone.

Don't always assume the defense knows the limit of authority

Way back when, defense attorneys would request a certain amount of authority and the insurance company gave it to them. The attorneys were considered the most knowledgeable people on the case. That's not the way it works anymore. It is common for insurers not to provide the authority requested. Indeed, it is common for supervisors not to provide the authority requested by their own adjusters. There are many reasons for this, including (1) the insurer doesn't evaluate the case the same way; (2) it doesn't want to evaluate the case the same way; (3) it believes that the case can be settled for less; (4) it is concerned that if it gives the full authority to counsel or the adjuster, that counsel will eventually provide all of that authority, leaving no more negotiating room or (5) it can always provide more authority later.

The fact of the matter is that everyone is negotiating with everyone else. The supervisor is not providing the adjuster all of his or her authority, the adjuster is negotiating with the defense attorney, who is negotiating with the mediator, who is negotiating with plaintiff's counsel who may still be negotiating with the client.


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For over 30 years, Arnie Levinson has assisted over 1,000 clients in coming to resolution. He has been routinely involved in shaping state and national legislation in insurance law. He was a founding partner at Pillsbury & Levinson, *leaving after 20 years to bring his skills to the field of mediation. He has been a member of ABOTA; served as President of the San Francisco Trial Lawyers Association; and is a three-time recipient of the Presidential Award of Merit from Consumer Attorneys of California.*