



**Lowenstein Sandler's Insurance Recovery Podcast:
Don't Take No For An Answer**

**Episode 33 -
Mediating Complex Insurance Coverage Disputes Series
Part 1 – Preparing For The Mediation**

By [Lynda A. Bennett](#), [Andrew Reidy](#), [Joseph Saka](#)
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Lynda Bennett: Welcome to Don't Take No For An Answer. I'm your host, Lynda Bennett, Chair of the Insurance Recovery practice here at Lowenstein Sandler. And today we're pleased to launch a new series on a very important topic in the insurance space, which is mediation. As many of our listeners know, there are lots of ways to get an insurance company to pay the claim. One that many are familiar with is to go to court and get your legal relief from the judicial system. But another way to do it is through the use of mediation and that's something that we've seen in our practice being used with increased frequency, not only after years of coverage litigation but also sometimes using mediation before you ever have to go to court. We thought it would be a good idea to break down the mediation process through a series of episodes that we're going to do that will walk you through the nuts and bolts of how to prepare for your mediation, how to conduct the mediation itself and then also to make sure that you leave the mediation with actually a signed settlement agreement where you get paid.

In today's episode, I'm very pleased to welcome my partner, Andrew Reidy and Joe Saka, senior counsel in the Insurance Recovery group, so that we can start with step one in that series, which is the nuts and bolts of preparing for the mediation, how to set yourself up for success. Andrew and Joe, welcome to the show.

Joseph Saka: Thank you for having me.

Andrew Reidy: Thanks Lynda. Glad to be here. This is one of my favorite topics.

Lynda Bennett: All right. Great. All right. Since it's your favorite topic, Andrew, let's just jump right in. What's the right time to mediate a case?

Andrew Reidy: That's a great question. I think it really depends on what your needs are but the primary thing that I think dictates the timing for mediation is how much information does the insurer have about the claim? If they have no information, it's really hard to mediate a resolution. On the other hand, if they have a lot of factual information, perhaps not everything they want but a lot of

factual information, a lot of damages information, then the claim is typically ready for mediation.

Lynda Bennett: All right. It depends, the typical lawyer answer. Thanks Andrew for joining us. That's really, that's a great tip. And so how do you go about selecting the mediator? Is that something that the policyholder gets to decide? Do you use the mediator the carriers want to use? What's the best way to set this off on the right foot in selecting the mediator?

Andrew Reidy: Well, the selection of a mediator oftentimes, most of the time, is a negotiated process with counsel for the insurance carrier. I like to look at a couple of things. One is the knowledge of insurance cases. Have they mediated insurance coverage case before? Insurance coverage cases have their own language, their own rules of construction, their own factors in how insurance companies and their levels of authorities work. You want somebody who has experience with coverage cases. Also like anything, you want a track record of success. You want somebody who actually has closed these cases out. Anybody can mediate a case but bringing them to resolution, that's what you're looking for. And the good ones are hard to get. Oftentimes there is a couple of months before you get them to mediate a case but they're worth it because they close cases out.

Lynda Bennett: Yeah. And what I've found is for a long time, I was reluctant to use the old standby list from the insurers list of mediators or preferred mediators. And I've really come around to the idea that sometimes that knee jerk reaction may not be the best sometimes. Using a mediator that the carriers are comfortable with will actually at least expedite if not entirely facilitate the process of getting to yes, on getting a claim paid. Joe, tell me who should attend the mediation on your client's behalf? And are there any other players in the insurance space who should come besides just your client?

Joseph Saka: Sure. I think you'll certainly want your client and you'll want counsel to be there on your client's behalf but you're going to want somebody who knows the facts of the case. Oftentimes if we're dealing with a liability claim, it's helpful to have underlying defense counsel there to answer questions regarding some of the facts of the underlying claim. But from the insurance side, the key is making sure that you have somebody who has real authority to being in a position to settle the claim. Even if the person who shows up himself doesn't have authority, you want to make sure that they'll be able to get there to the full demand level on the day of the mediation.

Lynda Bennett: From the client, you need someone from the risk management department there too?

Joseph Saka: Sometimes it's helpful to have somebody from the risk management department, if there's questions regarding the underwriting and the purchase of the claim. But typically if something like that's not an issue, then having just in house counsel who has authority is sufficient.

Lynda Bennett: This has never happened before, what do you do when the insurance rep wants to have someone available by phone? What's going to happen with that?

- Joseph Saka:** Oftentimes, as we find in a lot of mediations with insurance, it could lead to a long lag time in between your last settlement offer and receiving a response. But these last two years have really given us a lesson in virtual mediations where there's really no excuse that somebody shouldn't be available.
- Lynda Bennett:** Well Joe, I'm really glad that you brought that up because we are being forced into the virtual world doing Zoom mediations. And do you find that that has facilitated the process or is it obstructing it? And Joe or Andrew, either one of you can jump in on that.
- Andrew Reidy:** Yeah Joe, I'm not sure whether I have a view on that. I would say this though, whether it's in person or virtual, you have to be prepared to be frustrated. The insurance company plan is to slow down the game. Really make it, if you give an offer at 11:00 o'clock, you may not hear back from them until 3:00 clock. Not because they're in there analyzing your claim for four hours, just part of the game. They like to go incrementally in their responses and they like to slow it down.
- Lynda Bennett:** Yeah. Andrew, to that point, back in the olden days, when we used to be able to do this in person, I always loved the question at the beginning of the day, "What time's your flight?" Or, "What time's your train?" Because then of course folks work back from that to see how long they have to string you along before it's going to get real. Joe, what about you? What do you think about the virtual world and whether that has facilitated or obstructed the mediation process? As you said on the one hand, it's great that the carrier can't have the excuse that the person it's too hard for them to travel or their schedule's too tight but what have you seen in practice with that?
- Joseph Saka:** Yeah, I think my view is that it certainly makes it easier to get mediations done. The flip side of that coin though is that I think sometimes parties come less invested to the mediation process itself. That results in not coming really the vision of trying to get a deal done.
- Lynda Bennett:** Yep. And it's hard to twist an arm over a screen. Hopefully we'll all get back in person soon enough. All right, Andrew, what about this all important issue? You mentioned before how important it is to have your facts, have your damages. Where do you come out on whether to give that demand that's going to start the mediation process? Where do you come out on the question of whether it makes sense to make that demand before you get to the mediation and or whether to present it for the first time at the mediation? And I'll expect that you'll say it depends and you'll give us both sides of the coin.
- Andrew Reidy:** Yes, it does depend. But the first thing that springs to mind is where is the claim in the process? Is it pre-suit? Is it the complaint's just been filed? Is it pre-summary judgment? Is it pretrial? Is it on appeal? All of those are possibilities and it will inform in my mind whether you make a demand going in. If a lot of things have happened in the litigation, you should probably make a demand because you have to recognize what's happened so far. If you're starting out fresh, oftentimes I'm reluctant to come into a mediation having already made a demand because I don't want to set a ceiling before I even know whether the insurance company's willing to play.

Lynda Bennett: Yeah. I think one other edge to that double edge sword is sometimes if your client wants to go in super aggressive, for example, there could be the concern that if you come in so high the mediation is off. And one of the benefits of going through the mediation process is you're going to have that third party intermediary who will be able to turn down the temperature. Sometimes I won't do a demand, especially if it's going to be nearly 100% of the claim where we're graciously agreeing to forego pre-judgment interest. I'm usually going to save that until we actually have everybody assembled in the room. Whereas if you're really wanting to streamline the mediation process, sometimes it does make sense to make that demand before you get there so that people have an idea of what neighborhood you're in to get the claim resolved. Joe, what about you? You want to weigh in on that debate of whether to make that demand in advance or not?

Joseph Saka: Yeah, I guess my view is it depends where the parties are and whether the parties know each other, respect their positions. If you know that a carrier's at zero, then you might find that it's less fruitful to go in making a demand but say you're in a dispute regarding valuation or business interruption type claim and they know they're going to pay something, then it's probably good to get that number out on the table.

Lynda Bennett: Andrew, what are the most important factors that go into formulating that opening demand? What are some of the things that our clients need to be thinking about before they put that number out there?

Andrew Reidy: I think the number one thing is a healthy analysis of the likelihood of success on the claim. Understanding the case law and the facts of your claim and being real whether it's a really strong claim or a weak claim or something in between. That starts the process I think. Secondly, I think understanding the carrier and the carrier's viewpoint on the claim is important. If you're going to resolve it through mediation, you have to have the ability to not only understand the carrier's position but rebut it and respond to it.

Lynda Bennett: Yeah. I think one other thing I would throw out there that I always like to know before I get to the mediation is what is the business relationship between the policyholder and the insurer or insurers? And to think very broadly about that, not just for the policy that was issued that's the subject of this dispute but is there a broader business relationship there that can be leveraged? Are there other coverage lines that this carrier's getting premium on? That will be a very useful arrow to have in your quiver later that may be useful to break a log jam later.

All right. Joe, tell us another sort of key issue that's discussed before you ever get to the mediation in addition to whether you make that demand is tell me about what the process is with the briefs and the statement of the case that you're going to submit to the mediator. What are some of the considerations that go into one, preparing that document, should it be the equivalent of a summary judgment brief or something else? And then two, what are the pluses and minuses to exchanging those statements before you get to the mediation or reasons maybe you don't want to do that?

Joseph Saka: Sure. The form of it itself, I think, it comes down to knowing your mediator. We find some mediators who are going to look at a couple of documents and maybe read the most important case but I don't know a lot of mediators who are going to read every single case like it's a summary judgment brief. And hopefully you've chosen somebody who actually understands insurance and can at least grasp the concept quickly. As far as whether to share, I think that comes down again to the stage of the case. If you're at a beginning stage and you don't really know each other's positions very well, then there might be some benefit to actually agreeing to exchange briefs. But if you've been at it for a while and you've already briefed summary judgment then it's probably less valuable to exchange summary judgment or exchange mediation briefs.

Lynda Bennett: Yeah. Just I'll add my two cents there on the issue of exchanging or not. I've had instances where we don't agree to exchange and the very first thing the mediator wants us to do when we get to the mediation is share the briefs because they think it's going to be very valuable and whatnot. And so for that reason, I just think it streamlines the process to agree right out of the gate to share. And if I've got super sensitive things or I want to be a little bit more commercial in my view of the claim, one thing that I've done in the past is given the submission that gets shared and then send a separate side letter that's for the mediator's eyes only, if there's a particular issue that I'm not ready to share yet in the mediation process. Andrew, what about opening statements once you actually get to the mediation? Is that something that you're in favor of? What are the pluses and minuses of doing that?

Andrew Reidy: Over the years, I've kind of moved away from them. Early in my career, that was a big thing. You'd spend a half a day doing full presentations, oral arguments with PowerPoints and the whole nine yards. And we've kind of moved away from that. More now it's the coverage lawyer's positions and you sort of start getting right into the merits. The one time I still think its useful is if you feel like the people with the authority in the other room are cold to the claim and you want to bring them through the claim factually and legally, then it may be of benefit. But I would say more often than not, we skip the opening statements.

Lynda Bennett: Yeah. I agree. The times that I've had opening statements, all it does is entrench people's positions more. I've never once attended a mediation where an opening statement had the other side say, "You know? You're right. How much should I make that check payable for?" Anyway, all right, well before we wrap up, I'd like to ask Andrew and Joe, each of you to give your top three most important steps that need to be taken to prepare for a successful mediation.

Joseph Saka: Yeah. I can go first on that one. I think number one, come up with a list of three to five questions that you think are going to be very difficult for your adversary to be able to answer. And on the other side of that is understand the warts of your claim and be prepared to be able to respond to some of the difficult questions that you know are coming.

Lynda Bennett: Free tip there. That's a great tip.

Joseph Saka: And then finally, start the day kind of knowing where your client wants to end up and with a goal in mind so that way you can steer the day in that direction.

Lynda Bennett: And then you can subtract X percent from that because they're going to be negotiating with you as much as they're negotiating with the other side. Andrew, what about you?

Andrew Reidy: Number one, know the strengths and weaknesses of your damages claim. Number two, have your key document or case annotated and ready to hand to the mediator in the private room because he or she has been hearing things all day long. You want to put right in front of them the key document or the key case. And number three, have a strategy to get close but you don't finish how you finish. It may be whispering in the mediator's ear. It might be asking for a mediator's proposal. It might be something else but have that strategy to bring it home if you're close.

Lynda Bennett: All right, well, that's great to get ready and it sets the table for us beautifully for our next episode, where we are going to have all sides of the mediation represented. We'll have obviously the champions of policyholder counsel, the folks from Lowenstein Sandler, we will have a claims representative who will give you some insights into what's happening in the other room and then finally we will be pleased to be joined by a mediator who's going to tell us some of his secret sauce skills on how to get us moved from our entrenched positions to actually starting to talk, to get somewhere in the middle. But I'd like to thank both Andrew and Joe for sharing your insights. I think you gave some really great nuggets for what our clients need to do to position themselves to succeed before they ever get to the mediation. Thanks for joining us today and sharing your insights.

Andrew Reidy: Thanks Lynda.

Joseph Saka: Thank you.

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