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

Episode 34 -
Mediating Complex Insurance Coverage Disputes Series Part 2 – What Goes on in Mediation?

By Lynda A. Bennett, Joseph Saka, Adena Edwards, Larry Pollack
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Lynda Bennett: Welcome back 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 in today's episode, we're going to pick up with our discussion about how to engage in a mediation that leads to a successful outcome. And today, I'm very pleased to have with me three guests. I've got my Senior Counsel, Joe Saka from Lowenstein Sandler to give us the policyholder's perspective on this. And I'm very pleased to welcome Adena Edwards from Starr Insurance Company who will share insurance companies views. And we've got Larry Pollack from JAMS ADR who will give us the mediator's perspective on how to participate in this successfully. So Adena, welcome and happy to have you today.

Adena Edwards: Thank you. I'm really happy to be here. Really appreciate the invitation. I am just making sure that my statements are made on behalf of myself and my personal views. And I wanted to make sure that everyone's aware that they are not being made on behalf of Starr or any Starr-related companies, but solely on my own behalf.

Lynda Bennett: Really appreciate that. And Larry, thank you for joining us as well today. Appreciate that.

Larry Pollack: Thanks very much for having me, Lynda.

Lynda Bennett: All right. And Joe, you're back to keep us on the straight and narrow on the policyholder side, so that's great.

So why don't we just jump right in? And I'll start by asking Larry what is the right time to mediate a dispute? And I'm sure you've never had experience with parties showing up before it's the right time. So give us some input on when's the right time to do this, start this process?

Larry Pollack: Well, I must say that as an advocate, and I was a trial lawyer for 28 years and I was a big fan of early mediations because I felt that it was very helpful

for my clients to have the view of somebody who didn't have any skin in the game and to get some free information because once you get into litigation, you're constrained by the rules as to what you can and cannot get. So my advice to them and my feeling now is that anytime is a good time for a mediation and sometimes it's a process that you have to work through. And it's always good to start it, even if you don't succeed at the outset.

As the mediator, one of the first questions that I ask is why are you here? And the good answer is because we want to be here no matter what time in the sequencing of a case it is. What's a more difficult answer for me is because somebody told us to come here or some other semblance of that. It makes my job very difficult because there's no ownership of the process. And so to answer your question simply, Lynda any time is a good time and no time is a good time not to come.

Lynda Bennett: So Adena, in your experience, is there a particular point in the life cycle of a case that works better, or are you seeing what Larry's seeing on the insurance company side that, hey, if the iron's hot at the front end, let's go and get it done?

Adena Edwards: I would actually 100% agree with Larry actually. The earlier the better. In our view, we're spending money if we keep going. Discovery costs a lot of money. The earlier we go and mediate, the less money we spend. And coverage money is out of our pocket. It's not the insured's money, it's our money. It's not part of reserves from the policy. It's our own company reserves. It's separate entirely. So we really want to mediate as soon as possible.

And it's the kind of thing where you want to mediate over the life of a claim. So, hey, early on, you had a mediation. Didn't work out so well, but you got some information. You have a rapport now. Maybe you had a really good mediator that you really liked and you want to go back to that mediator. Over the course of the litigation, as things develop, as you learn more and maybe start a dialogue and can keep that dialogue going. By keeping that dialogue and keeping that rapport, even better likelihood of settling at some point.

Lynda Bennett: So we're at the very beginning of the mediation. Larry, what are some of the obstacles that you typically see right at the very beginning? One I think you already alluded to, which is that people are not coming at their free will, a judge has ordered them to be in front of you. But what are some of the other obstacles that you commonly see at the beginning of the day of a mediation?

Larry Pollack: Well, I wouldn't call them obstacles. I would call them difficulties. And you can put them into two broad categories. One is the substance, that there are distinct differences of views on the issues that are in dispute. And the second is the people. There are many instances where the mediator has to kind of figure out why there is, people are at loggerheads. And sometimes it's because somebody just doesn't like somebody else. Sometimes it's because someone has dug in and felt strongly about a position and they may be right or they may be wrong. Another reason is simply because something has gone off track and it's the mediator's job to try to figure out what that is.

I typically, before mediation, have individual separate telephone calls with each side, kind of an informal separate session, if you will. One of the things I try to figure out is what's wrong. Is this purely a substantive issue that people need to perhaps look at a different way? Or is it something else? And I try to poke around and figure that out before we get to the mediation. And so with that information, one creates their job of how to go about the case. Every case is different. And you try to map out your schema, your way of dealing with it, whether it's substance, the people, or both.

Lynda Bennett: Adena, how about you? What's the number one challenge for you going into the mediation typically?

Adena Edwards: Assessing whether or not we have the appropriate information to make a proper settlement analysis and to come into it with the proper reserves necessary to settle the case. If we don't have enough information in advance to reserve our file properly, it's just going to be a waste of mediation.

Lynda Bennett: That's a nice way, Adena, of you saying our clients don't give you the damages.

Adena Edwards: Sometimes it has nothing to do with our clients. Sometimes it's...

Lynda Bennett: Yeah.

Adena Edwards: ... the information wasn't even provided to them.

Lynda Bennett: Joe, how do we deal with, on the policyholder side, the number one obstacle of our clients not believing Adena's client is coming in good faith?

Joseph Saka: I see one of the biggest obstacles in a lot of mediations is, in coverage disputes is that it's an all-or-nothing game where one side's interpretation is going to rule the day or it's not. And so it makes it hard to bridge that gap when both sides are coming at it with completely different interpretations. And that's where it takes someone skilled, like Larry, to kind of make the other side see the holes in the other's arguments.

Lynda Bennett: Yeah. So Larry, that's something I wanted to probe a little bit. We all, all of us participating in today's episode knows there's quite a bit of a dance to meditation. There's a time to knock heads over that legal dispute that Joe just alluded to. And then there comes a time when it's time to talk turkey. So how do you as the mediator orchestrate that dance beautifully so that we can get to yes at the end of the day?

Larry Pollack: Well, I do it in two phases. I think that you really can't effectively mediate a case without knowing it as deeply as you can. And so I put a lot of time into studying the materials provided to me prior to the mediation. And from those materials, I develop a series of points. They're my points. They're never rocket science. But they're designed to develop a point-counterpoint between the parties to the mediation.

I spend the first part of the mediation developing that point-counterpoint and have everything come from the parties. I take careful notes, and I listen and convey the information from each of the parties, not from me. I then subtly move from the facilitative stage to the evaluative stage. But never with an anvil, usually with they may have something here and on this part you're strong and on this part you're weak. And maybe it would help to look at it this way or that way. And maybe we can ask this question to the other side.

It's kind of funny when I was practicing, my mediator of choice used to say, "Well, we have a problem with this." And I would say to him, "Wait a minute, who's we?" Now I've adopted that because people need a sense and an ability to trust the mediator. And from that trust develops the ability to perhaps see things a little differently.

Lynda Bennett: What about you, Adena? What are the carriers looking for? Do you agree with what Larry just said? Or is your group coming in wanting to just cut right to the chase and see if a business resolution can be negotiated here today?

Adena Edwards: So it's a little bit of both. It's sort of a hybrid. The first thing we look for is somebody to actually read the papers, understand what took place. And we come in, we cut to the chase. So we don't need to have everybody present their case. They did it in the brief. Person coming in prepared to mediate that case, we could cut right to the chase when we get there. Otherwise, you tend to spend half the day having everybody present, make their clients more entrenched in their position, and you never get to where you want because everybody's busy arguing their position. You come in that day, you come in ready to settle, and the mediator's prepared by reading the papers, you don't need to get entrenched in your position and hear it and suddenly go, "Oh yeah, I really like my case. Forget it. I'm not settling."

Larry Pollack: I totally agree. It is the very rare instance that I allow for independent oral presentations because I find that they do as Adena mentioned entrench the parties. And I'm not a control freak, but you do lose control if somebody says something that will take you far off the reservation and it's three o'clock before you're able to put everything back together again.

Lynda Bennett: Yeah. I think it's a careful balance that has to be done though because, Joe and I can speak for outside counsel, you want to come and show your client that you're ready to be a zealous advocate. So Larry's had to put me back in my corner a few times because part of this dance is showing that you're not afraid to go back to court and to go litigate this. And so I think a little bit of that posturing, frankly, has to happen during the day. I agree opening statements are not necessarily the way. But Larry has to put up with a little posturing in both rooms I think. Don't you think?

Adena Edwards: So I have a really funny anecdote actually in that regard. It was this mediator that I used to be in front of periodically. And he wanted everybody to present because he had a poppy seed bagel he used to eat in the very beginning of every session. He started 8:30 in the morning. But he needed to start then so he could eat his whole poppy seed bagel and proceed to pick all the seeds out of his teeth. Once that was done, then he was ready to do everything. But he wanted people to present so he could eat his bagel and pick his teeth.

Lynda Bennett: So you instituted a no bagel rule for all future mediations, right?

Adena Edwards: Yeah. So I stopped using him because it was a waste of time.

Lynda Bennett: All right. So Joe, let me throw it over to you. We've talked a little bit about the mediation briefs, and we touched on this in our last episode. What's the right approach for that mediation brief that you're going to give to Larry and maybe to Adena to look at? Are we staying in summary judgment mode or are we going to express a little bit more commerciality, I'll make up a word, in what we're communicating in the written brief?

Joseph Saka: I think it's a blend of the two. I think you need to have all the arguments that you're going to make in summary judgment in the brief to the extent that you think they're going to be persuasive to the other side. But I don't think you need to be expounding on 12 different cases. I think you need to show the mediator the two or three most significant cases that he or she needs to know about so he can be prepared to discuss them with the other side.

Lynda Bennett: And Adena, do you agree? I want to ask two parts to that one. Do you agree that that's the approach you want your counsel taking in the brief they're submitting to the mediator? And how does it land to your eyes when you're getting essentially the summary judgment brief again versus something that's a little more collaborative in tone, I'll call it?

Adena Edwards: So I actually don't like to read a summary judgment brief. I like it to tell a story because that's really what the mediator wants to understand, the big picture. They don't want to hear your summary judgment brief. You can attach the brief and have them read it if you want. You can summarize it by a paragraph or two, maybe cite some key cases. But really the key is to tell the story, to tell where you got your position from and why and what the basis is. And to kind of give some kind of insight into why you feel the way you do.

Lynda Bennett: What say you, Larry? Are we giving you summary judgment? And for you, I want to add on the question of what is the importance of the side letters that parties sometimes use to get a little more real with you before they're in the room?

Larry Pollack: I see all different types of written submissions, and I really don't favor any one of them. I take whatever information I can get and I do my own cut. And as I said, I create the list of points that I'm going to go over with each side. And it's designed towards improving commercial negotiation. And I go over the points. So I will make the judgements as to how the case can get settled, not who wins or loses but how the case could get settled, when I read the written submissions. And if they're of an advocacy nature, I take that into account. If they're a little bit more nuanced, I take that into account. But I develop the points with a view towards creating what the dialogue's going to be in our mediation session.

If the parties agree to exchange the written submissions, then I invite what I call the private option, which is at any time before the mediation either side can send me something that you've just mentioned, Lynda, kind of for my eyes only. And that's a little bit more stark. It could take the form of a reply

brief. Could be what I call the ice cream sundae approach where people share the plain vanilla stuff and the sugary goopy stuff they send to me. I give people the option of being very commercial in their private submissions. Virtually nobody does that. They wait for the meat.

And then the fourth option is that you don't submit anything separately, you stand on your original brief. And I take it from there. And I'm not fussed one way or the other whether I get a pure advocacy brief or I get something that's more commercial in nature. I take it as it is. I can tell right away what it is. And I adapt my approach based upon what I'm reading.

Lynda Bennett: All right. Well, that's great. We have so much more to cover that I'm going to go ahead and wrap up this session. We're going to continue. Larry and Adena have graciously agreed to join Joe and I again to continue this discussion in a future episode. So we'll see you next time and thanks for joining us today.

Larry Pollack: Thank you.

Adena Edwards: Thank you.

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