

## HOW COUNSEL CAN PREPARE THE INSURANCE CLAIMS REPRESENTATIVE FOR MEDIATION

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Prior to mediation, thorough preparation by counsel is essential, but it is equally important that the claims representative who will be attending the mediation be prepared as well. What follows is a brief primer for insurance defense counsel to help get the insurance representative ready for mediation day:

- Make certain the insurance claims representative knows the file from top to bottom. Review the file together to make sure that nothing is missing.
- The claims representative needs to understand the plaintiff's situation and case completely. In serious personal injury cases this would include long-term care, family situation, living needs, etc. In a property damage case, it would include the costs of repair/reconstruction and the effects on plaintiff's business. Defense counsel should make certain the representative is familiar with the pleadings and responses to interrogatories or Bills of Particular.
- Make sure the insurance representative understands the full story concerning all other defendants, including available coverages and the position their carriers have taken. If possible, the claims examiner should reach out to the other defendants' claims representative prior to the mediation.
- Defense counsel and the insurance representative should work together on the pre-mediation submission to ensure that the mediator will be familiar with the entire situation. Make sure that he/she receives all relevant documents.
- Thoroughly understand and discuss coverage/deductible/SIR issues (if applicable) with the claims representative and the insured before the mediation.
- If there are multiple policies applicable to a loss covering more than one policy period, defense counsel should make sure everyone is familiar with those issues and any complications.
- Defense counsel should advise the insurance representative about any liens that may exist with regard to the file, and try to work out agreements with lien holders so that the case can be settled at the mediation.
- Find out who will attend the mediation for the insured and have a conference call beforehand. Make sure you are all on the same page. Work out any "issues" between the insurance company and the insured so that you are united at the mediation.

- If you are going to need a monetary contribution from the insured to settle, the claims representative should get that straightened out prior to the mediation. If some claims are covered and others are not, defense counsel needs to review with the claims representative and the insured. Let them know your position. Try to work out a negotiating/mediation agreement with the insured and insurance representative before the mediation day, on contribution or agreeing to set aside that issue for future resolution, possibly through arbitration.
- A good mediator will have a pre-mediation telephone caucus with counsel prior to the mediation (or an in-person meeting when a case is complex). During this process, the claims representative should also be included. The mediator should have a thorough understanding of your position, and will gladly welcome an active role by the insurance representative.
- If a structured settlement broker will be involved, do so during the pre-mediation phase.
- The mediation is not the time for the claims representative to take a passive role.
- When the insurance representative joins both the plaintiff and defense counsels at the mediation, they should observe the parties and evaluate their credibility as witnesses, in case the matter does not settle. That is why it is so important that they “be there” ( along with the fact that it helps the insurer truly evaluate their exposure and the risks involved of not settling).

Although this checklist focuses upon defendant’s counsel and their insurance clients, it is also helpful to plaintiff if the defendants are united in interest and approach the mediation from an informed posture. A plaintiff’s case and ability to negotiate a dispute to conclusion is materially helped if the defendant group (counsel, insurer and insured) is “on the same page” among themselves. Too often mediations reach a stalemate if the defendants are not acting in concert, preventing the plaintiff from bringing the matter to a conclusion. This is especially true when there is more than one defendant and more than one insurer involved. In such case, the defendants and their respective insurers need to meet before the mediation and try to agree on a joint approach to the case; or at least agree to jointly negotiate with the plaintiff and set aside any internal dispute for another day. Plaintiff’s attorney will appreciate knowing that defendants are taking a positive, united approach to resolution.

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