



Fraud Squad. The Role of Mediation in Settling Insurance Fraud Disputes

By Alan J. Nisberg, Esq.

Alternative dispute resolution in a fraud dispute is a unique beast. The parties begin diametrically opposed, horns locked in a fight to the death. Emotionally charged with righteous indignation, anger, and fear, tensions permeate the discussion. Perhaps too focused on dominance, even experienced fraud litigators continue to beat their chests. The parties seem intractable (perhaps emboldened by their legal counsel). Both sides appear incapable of compromise. Is the prospect of successful settlement talks a futile daydream? Of course not. The parties may simply need the assistance of a highly qualified mediator.

Benefits of Mediation

Mediation is the single most effective method for successful resolution of insurance fraud disputes. It allows the parties to reach an agreement on an acceptable outcome. By contrast, litigation (which is decided by judge or jury) strips the parties of their power to decide the ultimate resolution. Mediation allows the parties to engage in confidential discussions with the mediator and the opposition to better assess the risks of litigation. It also offers the expertise of a professional moderator

who not only hosts the discussions, but also guides the parties toward a practical solution. Essential to a successful fraud negotiation is an understanding of the difference between genuine and false issues raised by the parties. Often, a mediator—through private caucus—is the only one who can flush this out.

Selecting a Mediator

The parties to any fraud dispute will require an insightful and tenacious mediator who has excellent interpersonal skills. The mediator's personality has to be strong enough to control the visceral instincts and sometimes excited reactions of the mediation

participants while relentlessly directing the parties to a mutually beneficial settlement. Most importantly, to be effective, the mediator has to recognize the specific interests of the parties.

The 'Other' Interests of the Parties

A litigated outcome in a civil insurance fraud trial only resolves who gets the insurance money (plus interest, legal fees, and costs). A settlement means that both parties can avert the expense and distraction of litigation. We should presume

that these risks and expenses are taken into account at the outset of the dispute. However, the parties often have "other" significant interests to consider. Identifying these other interests is essential to finding the proper motivation for a negotiated resolution of a fraud case.

For example, insureds alleged to have engaged in misrepresentations or believed to have intentionally caused a loss may want to stay under the radar. They may be willing to forgo policy benefits and surrender their policy in the hope that a resolved civil case will dissuade prosecutorial intervention.



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The insurer may be satisfied with this resolution, even without recoupment of attorney fees and costs.

Similarly, if the alleged fraud is based on a multiclaim investigation involving third parties (e.g., claims by an assignee for medically unnecessary or unlicensed treatment, claims based on illicit referrals, claims by contractors/engineers for goods and services not actually rendered, etc.), then the parties alleged to be engaging in unlawful conduct might be interested in a low-profile resolution, both to protect their reputation and to avoid possible criminal prosecution. The insurance company may be interested in modifying the claimant's conduct, and the

claimant might be willing to sign a forbearance agreement. Indeed, the insurer could find deterrence to be of greater value than recoupment of insurance proceeds.

Conversely, the claimant may assert allegations such as defamation, intentional interference with business relations, or unfair trade practices in response to the insurer's claim of fraud. The insurer should meaningfully evaluate the risk of potential exposure for such claims in advance, including potential exposure to punitive damages and/

or a class action. The insurer's interest in protecting against such exposure and the risk of negative publicity may recalibrate the scales between the parties and provide incentive to the insurer to settle.

Time to Mediate

When is the best time to mediate? This depends on risk tolerance and financial resources. There are essentially three opportunities for settlement of a fraud case:

- **Before litigation.** This is the intersection of greatest risk and least expen-

diture of time and resources. Early intervention may preempt expensive litigation. So long as the parties are reasonably knowledgeable about their respective positions, an early mediation is something to consider. However, since the parties have not expressed their positions in pleadings or investigated their positions through discovery, considerable forethought into the likelihood of success in litigation is essential. The parties should consider not only their own position, but also the possible defenses and counterclaims of the other party.

- **When pleadings are closed.** Once the complaint, answer/defenses, and counterclaims are interposed, the parties will have a better recognition of the risks involved in litigation. The question at this point is whether some discovery also is needed for the parties to meaningfully evaluate the likely outcome at trial.
- **At the point of litigation fatigue.** This is the point of least uncertainty but greatest expense. Both sides fully recognize the other's position through the pleadings and discovery. The parties should be able to best evaluate whether trial is a better alternative than a negotiated settlement.

It is important to note that, in deciding when to mediate a fraud case, careful strategic consideration should be given to the timing of work product disclosure. Timed properly, exchanging impactful work product at mediation may be very effective in bringing about a resolution. However, the parties in a fraud case may be reluctant to share work product if mediation occurs before key depositions are taken.

Mediation often will result in a favorable settlement in lieu of a civil insurance fraud trial. The likelihood of success is reliant upon a thoughtful risk assessment, appropriate timing, a strong mediator experienced in fraud negotiations, and thorough identification of the parties' respective interests. **CM**

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