Best's Insurance Law Podcast

Advantages of Mediation and Alternative Dispute Resolution in Resolving Claims - Episode #213

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Hosted by: John Czuba, Managing Editor
Guest Attorney: Greg Lewis of Vernis & Bowling of Charlotte, PLLC
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John Czuba: Welcome to Best's Insurance Law Podcast, the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, managing editor of Best's Insurance Professional Resources.

We're very pleased to have with us today, attorney Greg Lewis. Greg is the managing attorney of the law firm, Vernis & Bowling of Charlotte, PLLC.

Greg is a trial and appellate attorney, and his practice areas include tort litigation, insurance law, coverage issues, first party claims, construction defect, professional liability, premises liability, trucking liability, and appellate practice.

Greg also has extensive experience utilizing methods of alternative dispute resolution and has been approved by the North Carolina Dispute Resolution Commission as a certified Superior Court mediator. Greg has counseled clients including pre litigation consultation and claim evaluation and has tried over 200 cases to verdict in the District and Superior Courts of North Carolina.

He also has appeared multiple times at the appellate level as lead counsel before the Supreme Court of North Carolina and the North Carolina Court of Appeals. Greg is approved as an instructor by the state of North Carolina's Department of Insurance. He's also a frequent speaker for continuing education courses for attorneys and clients. Greg, we're very pleased to have you with us today.

Greg Lewis: Good afternoon, John, and AM Best listeners.

John: Thanks again, Greg. Today's discussion is the advantage of mediation and alternative dispute resolution in resolving claims. Greg, for our first question today, what major changes have you seen in the legal process since you first began handling claims?

Greg: Well, you just mentioned the most major change. I've been admitted to practice for 34 years. I've been in an active defense civil litigation practice for 32 years. The major change is the advent of alternative dispute resolution.

When I started practicing, a good example of the efficacy of ADR and mediation in particular, when I started practicing, I do practice out of the North Carolina office for Vernis & Bowling, which is in Charlotte, North Carolina. I'm from Asheville, which is Buncombe County up in the mountains for those of you that are familiar with the Biltmore House.

A good example is that when I started practicing, it was taking about three years for a civil lawsuit to get into the courtroom for resolution. Most often what I would find is that I might be number 15 on a trial calendar for any given week, and report to calendar call at 10:00 AM on a Monday morning, and suddenly I'm number one, because the parties have been talking over the weekend.

We were seeing a lot of courthouse steps settlements, which is certainly not advantageous to those of us on the defense, where we're looking to resolve claims as promptly and efficiently as possible. With the advent of alternative dispute resolution and mediation, now in Buncombe County, I'm showing up on a trial calendar in about 11 to 15 months.

I tried a case the first week in January, and I think it had been filed within 11 months of our trial setting. I'm a strong advocate of ADR. I think it works. That's a great example of how it works. I've tried over 200 lawsuits to jury verdict, but a lot of that was in the early '90s. I was part of, I guess, the test audience among participants for alternative dispute resolution.

The first salvo that the court system implemented was in certain pilot counties, what we refer to as settlement conferences. I would attend a settlement conference, usually with a claims adjuster or risk manager, and a plaintiff would be required to attend along with counsel. We'd report to generally the judge's office, the judge's conference room of the county where the case is pending.

The pilot program was two weeks in advance of the trial setting. We would have a judge assigned who was not going to be the judge to actually serve as the trial judge but would act in effect as a mediator. We would meet together, the attorneys generally with the judge, similar to what are now opening statements in mediated settlement conferences.

Each attorney would give the judge an overview of their side of the case. More often than not, the judge would then meet with the plaintiff's counsel and plaintiff and, similar to a mediator, take demands from their side to our side seeking an offer in response. That proved relatively successful.

You're two weeks out from trial. Generally speaking, the parties had to incur expenses to prepare the case for trial. We usually have to get medical evidence, doctor, video depositions taken well in advance. While it was something that was accomplishing its purpose, it wasn't doing it in a timely manner.

The plaintiff's side was having to take into account the cost that they had incurred. I had clients over the years on various ends of the spectrum about, are we going to include plaintiff's costs in our settlement evaluation and the offers that are coming out of our side? Some would take the position that well, that's part of it, and that is certainly something that they would be entitled to recover.

The plaintiff would be entitled to recover costs once the case was concluded by jury verdict and a judgment, and they're seeking reimbursement of their costs. Other carriers were of the opinion that, in effect, that just encouraged claimants to file litigation and pursue the matter through the court system.

I once had an adjuster in response to a mediator say, "Well, they've got X, Y and Z costs." Her response was, "I didn't tell him to go out and file a lawsuit. I'm not giving them a $200 filing fee as part of the settlement offer." From that initial sort of opening salvo of alternative dispute resolution, mediation developed out of that.

I got certified as a mediator back in 2002. There were a couple of things that impacted my decision to become a certified mediator. My primary reason for taking the 40-hour course was to assist me in being an advocate in mediation.

Of course, another reason was I got 40 hours' worth of continuing education credits. That took me through several years of not having to take CLE courses. Again, ADR has had the most significant impact on litigation, since I think it was rolled out in the mid '90s.

In our court system here in North Carolina, there are two levels of trial courts. You've got District Court, which currently the jurisdictional amount is for claims up to $25,000. For Superior Court, it will be claims worth over $25,000, keeping in mind that that's a subjective assessment, and it's totally in the hands of plaintiff and plaintiff's counsel as to where they file a lawsuit.

Now, I'm seeing the majority of lawsuits and lawsuits where we ultimately settled for, let's say, less than $10,000. I'm still seeing those filed in Superior Court because the default ADR method in Superior Court is mediation. District Court at one time statewide when it was funded by the North Carolina legislature, District Court, you defaulted to arbitration. It was a nonbinding, one hour hearing.

The parties split the one hour. If it's a straight up plaintiff and defendant, plaintiff gets 30 minutes, defendant gets 30 minutes. The rules of procedure and the rules of evidence are relaxed, and you get an arbitrator. At one point, the parties could select an arbitrator.

Once it was defunded by the legislature, certain counties decided to keep it going. The parties would combined, pay a $100 fee, which was the fee that the court system was paying the arbitrator. A disinterested attorney would come over and serve as arbitrator and make $100, basically, for an hour.

You get a decision within three days, and each party has the right to appeal by requesting a trial de novo, if you will, how it's referred to even though we hadn't been through a trial yet. You file a request for trial de novo, and you get your District Court trial.

Mediation, obviously you have a mediator. If you reach an agreement, it's reduced to writing that's considered contractually binding and enforceable. As I put it to the parties when I'm mediator or to the plaintiff when we are about to consummate a settlement agreement, "Once you sign off on this agreement, and you're walking across the parking lot leaving the building today, and you decide, 'Well, maybe I shouldn't have done that.' Well, it's a little bit late once you've inked that agreement."

I've seen much better success and a greater ability for the parties to control the outcome with mediation. Arbitration, back when the parties could agree on an arbitrator, I think had a much more favorable outcome in terms of it being less likely that it would get appealed than I'm seeing now with court appointed arbitrators.

I'm seeing a higher appeal rate now that they've changed the process. I understand why they did it. Number one, the legislature defunded arbitration. The counties were having to support it. You have to generate an order assigning your case to arbitration, giving the parties 21 days to designate somebody. I'd say maybe 50 percent or higher didn't respond. They got appointed an arbitrator anyway.

Again, the outcome was much better when we could stipulate to an arbitrator. That's fairly true with mediation. Thankfully, the state court system is rolling out electronic filing and electronic access to the court files, which we oddly have not had in North Carolina.

We're working through some quirks in the system, one of which is being alerted to the fact that, "OK, it's time for you all to get together and either agree to a mediator, or the trial court's going to appoint one for you." Again, I've found much better success with agreeing to a mediator, who we have some sense of their qualifications and their track record and so forth.

I'm on the appointed list. As I said, I'm an advocate for mediation. It gives the parties a much greater degree of control over the outcome than walking into a courtroom, having a judge in a black robe act as a referee as to what comes in and what doesn't, and

12 disinterested people who don't really want to be there anyway, trying to assess what a case is worth, when generally speaking, the parties and their attorneys have a much better idea of what I would consider or suggest as a "reasonable settlement range" for any given case. That's a long version, John, of the answer of the big change.

John: Greg, what impact has big data and software programs had on the legal process?

Greg: That's a wide-open question. As I said, North Carolina has just started going to electronic filing and electronic access. Certainly, social media has had an impact on claim evaluation. To dovetail into mediation, I had an instance where a plaintiff alleged that he couldn't do all these various activities, and he was a young fellow.

"I can't do all the fun things that I used to do. It's impacted my job." We're talking about – what was basically a soft tissue, spine injury. Unfortunately, the young fellow had forgotten to whitewash his social media.

We had found during the period of time that he said he couldn't do all these things, that he's actually at the end of a tow rope behind a ski boat, bouncing all over Lake Norman, having a grand old time.

The tactical question for me was as a defense attorney, do I spring this on him and potentially not settle and have him cook up some reason why? "Well, I just had a good day, but man, I paid for it for months afterwards." My choice was, I shared it with the mediator. As a mediator, I tell the parties, "I'm going to feel free to share with the other side what you tell me unless you tell me not to."

I shared these photographs and social media posts with the mediator and with the statement that, "You can't tell him what you saw, but you can tell him that what you saw is going to be very detrimental to his case." We ultimately settled the case. It was a plaintiff's attorney that I'd worked with numerous times over the years.

He came in to thank us for our efforts and wish us well and goodbye for the day. He said, "What was the smoking gun?" I said, "What do you think it was?" He said, "Social media." He said, "Yeah, what did my guy do?" I showed him the photographs of the posts of bouncing around on Lake Norman.

Another thing, the way technology has impacted litigation is, and I have told my children who are now adults this, assume that you are on a camera wherever you are. A good example of that for those of you that have followed the Murdaugh murders down in South Carolina.

The way that hit the fan was, Murdaugh's son is partying with his friends, and he was filmed at various places over the evening consuming alcohol. You've got people posting things on social media. My son got himself caught by his mother.

My wife had access to his social media accounts. There was a "party porch" that all the parents were aware of at one of the youth's houses, and on my son's post, he was not on the party porch.

She went through his account to one of his friend's accounts. There's the same photograph with my son. My son had photoshopped himself out of his post. [laughs] He was present on the friend's post. It's kind of Big Brother-ish. There's always somebody watching you. There's always the chance that whatever you're doing is going to be captured, and that can be of benefit.

You might have a dash cam in an auto case or trucking case showing a very minor impact, or it could be good or bad for either side. Of course, having the ability to sort of look into the criminal and civil history of claimants has been invaluable. They've got a string of convictions for things that would be admissible as basically an attack on their credibility. You've got access.

Now there's civil records of all the lawsuits they filed supplementing what the insurance industry uses in terms of ISO, background checks and things of that nature. That's some of the ways that I've seen technology impact the legal process. Of course, the software programs now that the local trial court administrators are using, are keeping cases moving.

Back in the day, basically, if you didn't file a request to set your case for trial or a certificate of readiness, your case just sat there until somebody realized it's on the radar. Now we've got a Chief Justice of the Supreme Court, who is the overseer of the state court system.

He has made it very plain to the local officials, the senior resident Superior Court judges, and Chief District Court judges and the trial court administrators and coordinators.

He's made it very plain that similar to what the insurance industry is about, wanting to move cases along and reduce pendings, and not having claims hanging around forever. He's set some very, what some might consider strict guidelines about how quickly lawsuits should be resolved.

To a certain extent, I agree. To a certain extent, you have to take into account the complex cases that are going to fall outside the average of when a case should be scheduled for trial and be resolved. Those are some of the impacts that technology and programs have had on the legal process.

John: Back to ADR, Greg. How does that offer an advantage for insurance carriers, say, as opposed to going to trial?

Greg: Well, I'll tell you this. Prior to COVID in North Carolina, you met in person. You would gather at an attorney's office or Mecklenburg County here in the Charlotte Courthouse has an ADR... they call it the ADR suite with a larger conference room and then breakout rooms. That accomplished a number of things.

Number one, part of the mediation, the ADR process, is to give the plaintiff the sense that they've had their day quasi "in court" albeit in a formal required manner, but yet a more informal process than going into a courtroom with a judge and a clerk and a bailiff and 12 jurors and that scenario.

It gave the plaintiff that, which is a psychological thing that they need to feel that they've had their day. They've had their say. Either they said it, or the attorney has said it. They're sitting across from the party that they wanted to express that to.

The flip side of that is, you've got Greg Lewis or some defense attorney sitting across the table and explaining to the plaintiff that, while we understand that their evaluation of their case is very subjective, "What is my pain and suffering worth?" From our standpoint, it's more of an objective evaluation.

I go so far as to tell the other side, "We're not just pulling numbers out of the air." I'm representing an insurance company, part of the insurance industry, and this is what they do.

They evaluate cases and they have tools available to them where they can plug in all the facts, and evidence, and property damage, and type of injury, and extent of treatment, and come up with, what I argue is a reasonable settlement range based upon objective factors. "Here's what other cases are settling for."

We are also factoring in what's coming out of the jury boxes in the state of North Carolina and judgments coming out of the court system. This was supported by our local trial court administrator. There was a period of time there where the trial court administrator here in Charlotte was documenting the top offer, the lowest demand, and what was the judgment.

Similar to what I understand insurance industry metrics tracked, he was reporting that roughly between 70 and 80 percent of plaintiffs were leaving money on the table. I can make that argument and the plaintiff can understand that, that "This isn't directed at me. They're not lowballing me. They're coming up with a range of what other people have settled for."

COVID had somewhat of an impact on that. We went to all remote. We are still doing remote. I would say that there are cases that are perfectly appropriate for remote type mediations.

By remote, I mean right down to a plaintiff might be sitting in his living room, his attorney's in his conference room, I'm sitting here in my office, and I've got an insurance or company representative at their office. Of course, a lot of us went home and have a home office now.

There are certainly claims that I have resolved through remote mediation both as a defense attorney and as a mediator.

However, there are very clearly cases that warrant that in person conference because, yes, the plaintiff has had their day, but there's also an anxiety factor for the plaintiff. They've got to come in.

They're sitting in a room with lawyers, and claims professionals, and people hammering them on why their claim isn't worth what they think it is, and how "70 percent of juries are not going to do better by you."

I even go so far as to say, "At 70 percentile of us being more right than the other side, it's like going out to Harrah's in Cherokee and playing against the house at the casino. Yeah, you might win some of the time, but is your case so distinguishable that you're going to fall into the 30 percent versus the 70 percent?"

A good example, I had one case, slip and fall. We mediated it remotely, didn't settle. Plaintiff, for whatever reason, did not go to trial immediately, filed a voluntary dismissal without prejudice, and refiled it. We went through everything again, streamlined discovery since we'd already done all that.

Everything was on all fours right down to the mediator, same mediator, with the exception of we were all there together in person. The case settled. It's an assessment on the part of the attorneys and the mediator as to whether to have it in person or remote these days.

As I said at the beginning, it gives the parties the opportunity to be in control. We've been dug in on an evaluation and an offer. We go to mediation and my claims professional is sitting next to me. We hear the opening. We split up into caucus breakout sessions. Then, he looks at me and he says, "Man, that was impressive, and we've got this case under evaluated."

Flipside, we had an opportunity look at the plaintiff, size up the plaintiff, hear what the plaintiff had to say, and either we think our evaluation is spot on or, "Man, maybe we had too much money on this case. I don't think that person's going to come across very well."

It's all about who's going to be in control of the ultimate outcome. With ADR, particularly mediation, the parties have the greatest degree of control.

John: Greg, you talked about a lot of change in recent years. How have the demands of insurance carriers changed over those years?

Greg: You're probably asking me that at a not too opportune time. I just had to go through some audits of my bills by third parties, which is the rub. [laughs] Never had a problem back in the day with the adjuster, claims professional sitting down and reviewing what I've charged and what I've charged for. We've got that factor.

Seeing a lot more requests for reporting that, frankly, one client who shall remain nameless comes to mind, that has one of the most extensive initial reports that I have ever seen.

I'm having to bill them a significant amount of time to get this report when, back in the day, I could talk to the claims professional about it and then document our conversation in a letter or an email and, in effect, save them a whole lot of money from me having to spend several hours doing a report that contains a lot of information that, in my opinion, doesn't impact the ultimate evaluation of the case.

Seeing some, I wouldn't call them necessarily arbitrary timelines. I might have a client with a guideline that says, "We need an initial evaluation within 10 days," and the lawsuit was our first notice of the claim.

All I can tell you is, based on what I'm seeing, either we owe it, or we don't. That could change with discovery. Beyond that, I don't have anything about injury or damages other than what's in the complaint. North Carolina follows notice pleading.

The other day, I answered a 165 paragraph complaint that gave me a pretty good idea of what the injuries and damages were versus the normal 10 to maybe 15 paragraphs where it just says, "And this person was thrown about, and injured, and proximately caused by the negligence of the defendant."

Those are some of the major things that I have seen in terms of what the claims professionals are seeking as far as input from me.

John: Greg, one final question today. What do you expect for the future?

Greg: I expect that the plaintiffs' bar will continue to employ new and innovative ways of wringing money from the defense. I know that I saw, and we discussed that your listeners particularly concerned about trucking.

A good example of what I expect and the tactics that the other side are using, you used to have a trucking accident and they'd sue the driver, and they'd sue the trucking company. That was the end of it. I've got several open cases now where the playbook has changed. Yes, they started with the driver. Then, they sued, of course, the owner, trucking company.

Now, they're bringing in the broker. I am currently representing a shipper. The allegation is that my shipper of product was negligent because of the manner in which they vetted a carriage broker. Similarly, they brought in the carriage broker and alleged they were negligent in the way they vetted and secured a carrier.

Then, you've got your carrier and you've got your driver. They're continuously looking for ways to advance the cause of their clients, similar to what we've all heard using psychological tactics, the reptile theory, various methods of, what some might say are trying to inflate the value of cases.

The trucking case stands out in my mind as the most vivid example of, "OK, let's see how we can blow this case as large as possible, get as many deep pockets at the table, and paint the whole industry as everybody's trying to make money to the detriment of the folks on the highways of the nation."

John: Greg, thank you so much for joining us today.

Greg: Thank you for having me, John.

John: It was a pleasure, Greg. Very informative podcast. Thanks for your time today. You were just listening to Greg Lewis, managing attorney of the law firm Vernis & Bowling of Charlotte, PLLC. Special thanks to today's producer, Frank Vowinkel. Thank you all for joining us for "Best's Insurance Law Podcast."

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I'm John Czuba, and now this message.

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