



Litigation Industry Snapshot: Participants' Report

**Perceptions and Observations of Senior Industry
Chief Litigation and Claim Officers**

On the Subject of:

**Measuring the Effectiveness of Mediators
on Litigated Files**

Spring 2017

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A Thank You to Our Participants

We would like to thank the 84 senior claim and litigation executives who participated in this Industry Snapshot. These studies, and the information produced as a result, would not be possible without your participation.

CLM Advisors conducts these periodic Snapshots to capture how industry executives feel about different litigation and claim strategies. Your willingness to spend a few moments sharing your thoughts is a reflection of your commitment to the industry, and supports our efforts to promote and further the highest standards of claims and litigation management.

In contrast to our more formal “Industry Studies”, these Snapshots are intended to serve as more informal, point-in-time, views on a particular aspect of our industry. In our Snapshots we provide very little analysis, leaving each participant to draw what conclusions they wish from the raw data presented.

We trust you will find this information to be both interesting and helpful, and we look forward to including you in future Snapshot surveys.

About This Industry Snapshot

Most claims organizations voice a desire to resolve claims short of trial in all but a small percentage of their litigated files. Strategies to reduce cycle time and achieve early resolution are commonly deployed in an effort to reach fair and equitable resolutions as early as possible in the claims process.

Mediation has played an increasingly visible and important role in this resolution process. The purpose of this Snapshot was to better understand what the industry’s executives feel and believe about their use of mediators generally. Specifically, we were interested in executives’ observations in several key areas, including:

- Mediator Value
- Mediator Selection
- Measurement of Mediator Utilization
- Measurement of Mediator Effectiveness; and
- Overall interest in mediation-focused metrics and analytics

Snapshot Methodology

Twenty-three (23) questions on these topics were answered by 84 distinct claims and litigation executives. While the majority of respondents serve in roles of chief claim officers or chief

litigation officers, several senior executives delegated the provision of answers to members of their team more closely aligned with the use of mediation across their litigation portfolio.

Participating organizations varied widely in the size of their litigation portfolio. The largest organization maintains roughly 50,000 open litigated files; the smallest only ten. Average open litigated files for this data set was just over 2,300 files; the median open litigated file count was 800.

All survey responses have been de-identified. Particular care has been taken to ensure that no specific responses or data elements can be attributed back to any specific organization or participant.

Distribution of this Report

It is our policy to distribute our Participant Reports only to those who took the time to complete our short survey. However, we fully encourage and support the wide distribution of this information. We feel the industry as a whole benefits from an open and curious discussion around the topics covered in our Snapshots.

If you participated in this survey at the request of a more senior claim officer in your organization, please send a copy of this report to them. If you have staff or industry colleagues, who might enjoy seeing a copy of this Report, either internal or external to your Company, you are free to share this report with them as well.

In doing so, please encourage them to ensure that we have their contact information so that we can invite them to participate in future Snapshots.

Questions About this Snapshot

Questions or requests for more information can be directed to:

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High-Level Summary of Findings

- Mediation plays an important role in getting a file settled when ADR has been identified as an appropriate file strategy. (Ranked as 4 out of 5).
- Executives believe that mediator skills vary widely (4.5 out of 5)
- At mediation, the mediator is believed to contribute the most to successful settlement, followed by the claims handler, followed by defense counsel
- Defense counsel is most likely to suggest which mediator to use (58%); followed by a “collaborative” identification with the file handler (26%); followed by the claims professional (10%).
- Ninety-three (93) percent of the executives polled report not having or using a “panel” of pre-approved, previously vetted, mediators
- It is relatively difficult for many claims organizations to obtain information on which mediators they’ve used (2.7), how many mediations they’ve had (2.9), or what mediations fees they’ve paid (2.8); only 15 percent reported that they formally track any mediator success performance data. The most common response (mode) relative to ease of finding data about mediation frequency or specific mediators used was a 2.0 on a scale of 1-5.
- Executives define mediator success much more along outcome (settlement) parameters (4.8) vs. cost parameters (2.6)
- Claims executives prioritize mediation settlement success metrics over metrics that capture settlement amount, mediation conduct, mediation cost, or other factors. A significant majority (75%) of executives would pay more for mediation services if they could capture these metrics at the same time
- In fact, armed with such metrics, executives would be more likely to encourage or suggest the use of certain mediators to counsel (4.1). Further, they anticipate that in doing so, they would encounter very little push-back or resistance from defense counsel (2.4)

Overall we believe the data suggest that claim executives recognize the high value of finding the right mediator for the right situation. They value the contribution of mediators, and believe that mediator skills vary widely, but struggle with laying their hands on objective performance data that would help to make more informed decisions about which mediators they should use more often and which they should use less.

Given the perceived high correlation between effective mediators and successfully resolved claims, we think this is an interesting area of strategic and operational opportunity for many claims organizations.

Snapshot Response Data

Litigation Volume

Generally (an estimate is fine), how many open, litigated files does your organization maintain at any given point in time?

Response(s):

Average	Median	High	Low
2,309	800	50,000	10

Mediator Value

Mediation Importance

In your view, when ADR has been identified as an appropriate file strategy, how “important a role” does mediation play (generally) in terms of getting a file settled?

1= Not important role

5= extremely important role

Response(s):

Average Score	Median Score
4.0	4.0

Mediator Variability

Do you perceive that there are significant differences in mediator skills, or do you think that most mediators have generally the same skill level?

1= not much difference in skill

5= skills vary widely

Response(s):

Average Score	Median Score
4.5	5.0

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Mediation Promotion

In the absence of a mandated mediation, and after traditional file strategies have been used, how strongly do you tend to “promote” the use of mediations in your claims organization?

1= not promoted much

5= use whenever possible

Response(s):

Average Score	Median Score
3.9	4.0

Who Contributes Most to Resolving Cases at Mediation?

When a case goes to mediation, please rank the relative value of the following three roles, in terms of which role is most likely to contribute to whether the case settles or not: (5= highest value)

Response(s):

	Average	Median
The Mediator	4.2	4.0
The Claims Handler	3.9	4.0
Defense Counsel	3.7	4.0

Mediator Selection

Who identifies the mediator?

In general, which statement best describes how specific mediators are identified for use when needed on your litigated files:

- _____ Defense counsel identifies and proposes the mediator
- _____ our in-house file-handler identifies and proposes the mediator
- _____ other (please describe) _____

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Response(s):

	Percentage (%)
Defense Counsel Identifies	58
Other: Defense Counsel and File Handler Together Identify	26
File Handler Identifies	10
Other: Depends on case and venue	2
Other: In-house claims leadership	1
Other: Agreement with Plaintiff Attorney or imposed by Court	1
Other: Assigned by State	1

Mediator Panels

Do you require either counsel or in-house file-handlers to pick mediators from a previously vetted, pre-approved, “panel” of mediators that you maintain?

Response(s):

	Yes	No
Percentage (%)	7	93

Please note that 7% of the respondents said that, while they do not use a pre-vetted, approved “panel” of mediators, they frequently use “preferred” or “already-known” mediators whose work they trust.

Measurement – Utilization

Capturing mediation volume

On a scale of 1 to 5, how easy it is for your organization to quantify how many mediations took place on your litigated files over a specific time-frame?

1= not possible at all ----- 5= it is very easy

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Response(s):

Average	Median	Mode
2.9	3.0	2.0

Identifying Specific Mediators Used

On a scale of 1 to 5, how easy is it for your organization to identify the specific mediators used over a specific time-frame?

1= not possible at all ----- 5= it is very easy

Response(s):

Average	Median	Mode
2.7	3.0	2.0

Quantifying Mediator Fees Paid

On a scale of 1 to 5, how easy is it for your organization to quantify mediator fees paid over a specific time-frame?

1= not possible at all ----- 5= it is very easy

Response(s):

Average	Median	Mode
2.8	3.0	3.0

Measurement - Performance

Who Knows the Most About Mediator Performance?

In general, which statement is most accurate?

- _____ Counsel has the best sense for which mediators get good results
- _____ Our claims handlers have the best sense for which mediators get good results
- _____ I'm frankly not sure either group knows which mediators get good results

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Response(s):

	Percentage (%)
Defense Counsel Knows Best	45
Claims Handlers Know Best	33
Neither Group Knows Very Well	12

Where to Turn to For Data on Mediator Effectiveness

In general, which statement is most accurate?

- We track which cases settle during mediation, or shortly thereafter, by mediator
- We have a vague sense for mediator effectiveness but would generally poll our claims staff
- We have a vague sense for mediator effectiveness but would generally poll our outside attorneys
- Honestly, we don't capture this information at all

Response(s):

	Percentage (%)
We have a vague sense – but would poll our claims staff	36
We have a vague sense – but would poll outside attorneys	26
We track which cases settle, by mediator	23
Honestly, we don't capture this information at all	15

Defining Mediator Performance

Relative to how you might define “mediator performance,” please rank the following two components (5= highest value):

- ___ / 5 **Outcome** – whether the mediator helps all parties reach a resolution
- ___ / 5 **Cost** – whether the mediator’s fees are reasonable

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Answer(s):

	Average	Median	Mode
Outcome – Ability to Reach a Resolution	4.8	5.0	5.0
Cost – Reasonable Fees	2.6	3.0	3.0

Traits of a Good Mediator

Please provide 3-5 words that describe what the traits of a good mediator are in your view. (I.e. what makes a mediator stand out as a “high performer”?):

Response(s):

Please note: answers have been combined into larger categories for ease of analysis.

FIRST Trait Identified By Respondents	Number of Mentions
Knows the file Understands Issues Knowledgeable Diligent Prepared	26
Listens Fair Focused Neutral Intelligent Patient Good communicator Calm Thoughtful Creative	21
Reputation Industry experience Credibility Trustworthy Knows the law Result oriented Non-biased Has done both plaintiff and defense work	17
Persuasive Aggressive Emotional Intelligence Persistent	13

Metrics that would demonstrate performance

What would be several metrics that would, in your view, demonstrate mediator performance?

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Response(s):

Metrics Listed By Respondents	Number of Mentions
Settlement Success (ratio of settlements to assignments; overall number (frequency) of settlements; number of subsequent contacts required to resolve; resolution within certain time-frame after mediation; Impasse (failure) ratio; time to settlement post mediation)	179
Settlement Amount (vs. anticipated amount; vs. initial demand and initial offer; vs. last offer; vs. indemnity reserve; vs. settlement range;)	27
General Conduct (whether mediator was prepared; general conduct; ability to manage parties; creativity; adjuster satisfaction; defense counsel satisfaction)	22
Mediation Cost (vs. anticipated legal expense; time (duration) the mediation takes; hourly rate)	18
Other (Request Rate by Plaintiff Bar; Availability for Scheduling; Time from hiring defense attorney to settlement; jury success if not settled at mediation; years of experience; number of mediations annually)	10

State of the Future

Value of a Preferred Mediators Map

If a company could provide you with a “Preferred Mediators Map” --- showing you the Top 3-5 mediators preferred by each of your primary defense counsel across the country – how valuable would this be to you?

1= not valuable at all

5= very valuable

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Response(s):

Average	Median	Mode
3.9	4.0	4.0

Industry Interest in Mediator Statistics

If a company could provide you with a variety of detailed statistics regarding your use of mediators, how valuable would these statistics be to you? (5= highest value)

Response(s):

Please note: Answers have been ordered high to low by the average value assigned by respondents.

	Average	Median	Mode
Number of times cases settle at mediation (by mediator)	4.4	5.0	5.0
Number of times cases settle shortly after mediation (by mediator)	4.1	4.0	4.0
Number of time a specific mediator has been used	3.8	4.0	4.0
Subjective surveys that measure satisfaction with mediator traits	3.7	4.0	4.0
Average duration (billing time) by each mediator	3.6	4.0	3.0
Fees spent on each mediator	3.4	3.0	3.0

Willingness to Pay More for Data

Would you be willing to pay “slightly more” in mediator fees if you could have these data points delivered to you?

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_____ Yes, but depends on how much more

_____ No, I would not be willing to pay any increase in fees

Response(s):

	Percentage (%)
Yes (but depends on how much)	75
No	25

Likelihood of Recommending Specific Mediators to Counsel

If you were confident in the data you were provided, how much more likely would you be to mandate or “strongly encourage” the use of specific mediators to your defense counsel? (Scale of 1-5)

1= not likely at all

5= much more likely

Response(s):

Average	Median	Mode
4.1	4.0	4.0

Current Influence on which mediators are used

Do you feel your organization already mandates or “strongly encourages” the use of specific mediators to your defense counsel:

Response(s):

	Percentage (%)
No	52
Yes	48

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Push-back From Counsel

If you were to mandate the use of specific mediators to defense counsel, how much “push-back” or resistance do you believe counsel would give you?

1= no push-back at all ----- 5= lots of resistance

Response(s):

Average	Median	Mode
2.4	3.0	3.0

Additional Thoughts and Comments

What have we not asked you about mediation or your use of mediators that believe is important to the overall topic?

Response(s):

Comments from Respondents		
I think we have to always remember that the plaintiffs have the choice in mediator as well. Dictating mediators can be difficult.	Is PI's preferred mediator a factor in determination of who you use? Yes. Their comfort in my mind is more important than ours.	Both sides need to be prepared. Too often we see the plaintiff side not ready etc...
The biggest obstacle in my view is not necessarily the mediator but rather carriers not taking it serious & claims personnel not being prepared, coming w/o authority, not being able to reach people at their company to discuss the case, etc. If WC is involved my experience has been that they are very difficult to reach and usually unreasonable. This really slows mediation up and may	We have to guard against weaker claims professionals relying on mediation as a crutch, and not exercising adequate initiative and creativity pre-mediation. Not every case needs to be mediated, but it seems that as the years have gone by the reliance on mediation (at time the singular reliance on mediation) has steadily increased.	(1) How frequently do I find the parties have difficulty identifying a mutually agreeable mediator? (2) How frequently do I find that a mutually agreeable mediator has no mutually agreeable open dates in the 60 days following selection? (3) How often do I need to identify a second mutually agreeable mediator due to scheduling or other conflicts?

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make it very difficult to settle a case.		
Pushback usually comes from plaintiffs' counsel, or we will push back to certain of their recommended choices	Average settlement value of cases that were resolved informally vs. mediation. Average defense costs on cases that were resolved informally vs. mediation.	How readily available is the mediator, i.e. wait time for a mediation date
Whether usage is concentrated or spread across many jurisdictions	Many times selection of mediators are court ordered.	I think former judges who are now mediators are not the best mediators.
Whether the mediator is part of a JAMS or is independent. Mediators that are independent seem to work harder to get cases resolved than those associated with a JAMS type vendor	Is there a determination process before a claim is ever given to a mediator to determine if it is "mediation worthy"? (Do you have analytics or metrics built around that question?)	Some mediators are better at certain types of lawsuits/claims, i.e. construction/contract vs auto liability/valuation construction/contract vs auto liability/valuation
Geographic or LOB specifics	Bios and relevant background experience. / Mediator experience levels	Is there a way to line up a mediator with a line of business or industry: D&O, Environmental, Life Sciences, etc? Some lines of business require an understanding of the industry in order to effectively mediate the case.
Nothing. Very comprehensive survey on the issue.	Not much. It's a great topic however.	

About CLM Advisors

CLM Advisors is the consulting and advisory arm of the Claims and Litigation Management (CLM) Alliance, an organization of 40,000 members and fellows focused on promoting and furthering the highest standards of claims and litigation management. We provide advisory, market intelligence, and talent acquisition services — including the provision of Industry Snapshots such as this one. Any questions about this Snapshot can be directed to:

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