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CLAIMS IN REVIEW

Avoiding decision traps with mediation

Every claims professional has some of those stories: opportunities to settle a case are missed, leading to a higher payout at the end. How did it happen? Though these cases signal a need to examine the decision-making process, most people lack insight into their own errors that can diminish the effectiveness of a claims management program.

Psychologists studying decision-making behaviors have identified dysfunctional patterns; some appear frequently in the malpractice claims arena. Claims professionals should remain particularly alert for these, and search for tools to minimize their impact. In individual cases, they should carefully scrutinize their evaluations from time to time, as bad habits often creep back.

Because decision-making flaws are often insidious, outside help can improve the chances of catching an error in time to minimize its effect. In individual cases, mediation offers an opportunity for neutral examination of a case and the decision-making process while it is still possible to recover. Mediators are trained to ask hard questions, forcing parties to review the basis for their strategies and decisions, and avoid the pitfalls discussed below.

Anchoring

Do you start with a manufacturer's suggested retail price, a number that represents the "value" of that case, and then work toward settlement based on that number? Where did it come from? Research consistently demonstrates that even skilled professionals will adjust their "starting point" based on recent experiences, even factors as unrelated to the decision at hand as the last digits of their Social Security numbers. Should your initial "value" arise from the fact that the case at hand involves a retained sponge, for example, or is the better starting point the nature of the actual injury to the claimant? Or should it come from the claimant's specific needs in an early resolution setting? Do you subconsciously revalue all of your cases after a notable win or loss? Why? Do your claimants ask for more after a well-publicized plaintiff verdict?

Aversion to a sure loss

Sunk costs (bills written off, money already paid to attorneys and experts) should always be irrelevant to a decision to move forward now. Simply put, they are history and are no longer in play. However, in an effort to “make good” on that investment, we often continue to gamble, hoping that it will pay off. Have you ever said, “We have so much invested in this case already, we may as well try it?” Historic costs DO reduce the cost of going forward (because they are already paid), but they otherwise have no relevance to the potential risks and benefits of future actions on a claim. Avoid being entrapped by unwillingness to take an appropriate early loss.

Optimism and overconfidence

Even high-level executives (e.g., Hewlett-Packard’s ex-CEO Carly Fiorina) often overestimate the value of a chosen strategic path. One remedy for rose-colored glasses is group evaluation of decisions. However, experts also find that group discussion can lead to “group-think,” which amplifies the risk of overconfidence. Most experienced claims managers have seen group-think in action with claims committees. Careful management of group process can alleviate this risk. General Motors executive Alfred P. Sloan would tell his managers to go away from a meeting after they had made a decision and think about what was *wrong* with it. Presumably, those individuals were later evaluated based on the quality of their concerns. A culture that encourages divergent opinions minimizes the risk of overconfidence.

Self-serving bias

Research by Harvard professor Max Bazerman has confirmed that professionals (he used certified public accountants) tell clients what they want to hear. It’s human nature. His test subjects’ opinions varied depending on which party had engaged their services. He argues that auditors (or outside counsel) don’t overlook problems with intent to defraud, but because they are human. Executives must encourage and reward prompt and honest claim evaluations. Frequent surprise endings or claims that fall apart at the last minute are good indicators of either excess internal optimism or biased evaluations in the earlier stages. Eventually, outside reality controls and the case takes an ugly turn. Do you discourage your experts from honest early evaluations? Do you blame them after the fact?

Evaluating outcomes, not processes

After a bad loss, has your CEO proclaimed that it is time to get new lawyers? Malpractice programs will always face occasional big losers. The element of chance always limits the ability to predict those outcomes. Experts suggest that under similar circumstances, evaluation of decision-making must focus on the *process*, not its results. Of course, consistently bad results need review, but the occasional big payout does not necessarily indicate poor performance. Even the best decision-makers pick an occasional loser; the question is whether they picked it wisely. Sometimes life is just not fair.

Claims professionals always strive to evaluate each case appropriately, but human flaws complicate the process. Lack of objectivity about our own decisions makes mediation a prime opportunity to reevaluate a case. This is accomplished successfully with input from a trained neutral and from our opponents, whose viewpoint can have value. Ideally, all participants in the decision-making process should take part in mediation. If they can't attend, they should make themselves available by phone, and open their minds to honest evaluation of their decisions in the case. Improved decisions in each case will lead to enhanced global outcomes.

REFERENCES

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