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Coverage to Compromise: Mediation Tricks and Strategies to Resolve Litigation

I. Construction Litigation Mediation

Mediation is a cornerstone of construction litigation. Whether the case involves residential homes, commercial properties, mixed use properties, condos, etc., the matter is likely going to be mediated. Construction litigation is an ever-evolving scope of disciplines. Your case could revolve around defects, catastrophic injury, delay claims, or a combination of all the above. As construction litigation continues to evolve, so have the tactics and strategies at mediation. The goal is to resolve the case and there are often different points of views on how to get that done. Mediation has different participants and points of view as to how a mediation will proceed. The point of views from the adjusters, defense attorney, coverage attorney, and the mediator and how they act will determine whether a mediation will be successful.

II. Preparing for Mediation

A. The Mediator

The first step in preparing for a mediation is making sure you have picked the right mediator. This can be a process that takes longer than it probably should. You need to understand the claim you have, i.e., is this a pure construction defect claim, a delay claim, an injury claim, or a combination of all types of construction claim. If you have a mediator who doesn't understand the basic principles of the claim, the mediation is not likely to be successful. Construction claims can be driven by the contract and so it is important to make sure the mediator understands the contract principles.

You will also have to consider the how many parties are in the case and whether it is realistic all parties will agree on a mediator. Counsel for the parties and the parties themselves will carry their own bias to the table when selecting a mediator. Therefore, it is always best to suggest multiple mediators you are comfortable about your claim. A mediation will not be successful if you do not select a mediator the parties are comfortable with.

B. Preparing for the Mediation

Successful mediation requires preparation. Make sure that the appropriate decision-makers are in the room or are available. Additionally, mediation that is premature often leads to wasting money on both sides of the "V" and will sometimes harbor resentment toward the other party.

In construction litigation we need to ensure the proper discovery has been conducted. You need to make sure the experts have had a chance to inspect the subject property. If the matter contains an injury component, you need to make sure you have all the necessary medical information and future treatment information. that essential information (necessary to evaluate the dispute) has been exchanged; and that the mediator is well-informed about the nature of the dispute, the history of prior attempts to resolve it, and any roadblocks or opportunities that may affect the conduct of the mediation.

C. Coverage Counsel

Construction litigation often presents a need often to decide as to whether a claim is covered. The contracts between the owner and the general contractor will have insurance provisions and the contracts between the general contractor and the subcontractor will have insurance provisions.

clauses typically specify: (1) the types of policies that are to be provided; (2) the number of years for which insurance coverage is to be obtained; (3) the insurance policy monetary limits; (4) the form of the policy (claims made vs. occurrence); (5) the hazards that are to be covered (e.g., completed operations vs. ongoing operations); and (6) what evidence of compliance with these insurance requirements must be supplied.

Many insurance clauses, also require that the policy be a primary policy. Primary policies are those which obligate the insurer to be the carrier to respond to a claim. Secondary policies are only obligated to respond when the primary policy limits have been exhausted.

The types of policies that usually are required on a construction project are: (1) general liability (GCL); (2) automobile liability; (3) excess liability; (4) workers' compensation and employer liability; and (5) professional liability. The general liability policy is intended to provide indemnity and a defense against third parties who seek damages for bodily injury and/or property damage.

Another aspect of the coverage is whether an Additional Insured ("AI") endorsement is in play. AI requirements for CGL policies are very common in construction contracts. An Owner routinely requires its general contractor to provide AI coverage for itself, its affiliates, and sometimes a handful of other entities (lender, architect, etc.). In turn, the general contractor mandates its subcontractors to provide AI coverage to it, the Owner, and a cast of other characters.

Coverage counsel plays a role in determining what is and what is not covered by a policy. There may be instances where defense costs are owed to a party, but indemnification is not owed to a party. Often you will find yourself at a mediation where a single carrier is funding the mediation and paying multiple parties to argue claims against one another. A clear role on what is covered prior to a mediation will make the mediation run smoother.

D. The Claims Handler

Another aspect of being prepared for a mediation is making sure the Claims Handler is prepared. Defense counsel needs to make sure they have provided the Claims Handler with all the information they need to properly evaluate the claim. This will likely include information from the attorney regarding what they believe the value of the claim is at trial vs. the value of the claim at settlement. Additionally, defense counsel needs to provide the Claims Handler with a budget as to what it will cost to bring the matter to verdict and what the budget will be at other stages of the litigation.

The value of claims in a dispute is not a matter of precise science. Based on discovery, prior verdicts and settlements, and the budget going forward, it should be possible to formulate a range of settlement values, from "best case" to "worst case," and some sense of a "likely case." The ultimate settlement (if it occurs) generally involves an overlap between each party's individual settlement range. Working through your own settlement range, and "guesstimating" what the other party may think is the range is a very useful exercise in preparation for mediation.

During the mediation, moreover, when settlement demands and offers are exchanged, efforts to explain the justification for your position on the range of settlement values (often, an assessment of the probability of success, multiplied by the amount of damage recoveries at stake, minus the costs of litigation) can help you to advocate (often, through the mediator) for the reasonableness of your position. And, where an adversary offers a number "out of the blue," a useful response is often to inquire as to the basis for the calculation of their number.

III. The Mediation

A. Zoom Mediation vs. In Person Mediation

The parties need to determine what type of mediation is the best. In a post COVID world most depositions occur via ZOOM or some other video conferencing software. Zoom mediations have been largely successful during the pandemic. Many reasons are available as to why zoom mediations are as successful as in person mediations.

One reason is higher decision-maker participation in the mediation. Pre-COVID, often the behind-the-scenes party with decision-making authority would be available by phone. This might be a higher-level adjuster, an attorney in a general counsel's office, or some other executive who is consulted on offer and demand moves. Pre-COVID, distance, travel cost, and other office obligations stood in the way of attending the mediation in person. The mediator can gain information from the interaction, words, and body language communicated via Zoom., Direct communication becomes more common than pre-COVID. Some such higher-ups will attend without video, but even then, the access makes it easier to gather details and express concepts that can help settle the case.

When it comes to injury related construction cases, it is often a preference to have the mediation in person to see the Plaintiff in person. Often the deposition will now occur via zoom

and the ability to see the Plaintiff in person will provide additional information to the defense group.

Additionally with Zoom, the number of exhibits shown on screen-share to the mediator seems to be lower than in person. It may be the cumbersome nature of screen share results in more essential documents getting the focus. The amount emailed to the mediator beforehand seems to be the same as pre-COVID, but the time looking at the extraneous appears somewhat reduced on Zoom. This means that focus on key issues is more likely and less diluted by red herrings.

B. Multiple Mediators

Now more then ever there are complex construction cases where multiple mediators my help settle a case. We are in a construction boom where high-rise mixed-use buildings are being built an expedited rate. Often there are multiple high value defects affecting different trades. For example, there may be window issues and plumbing issues with alleged repair estimates in the millions of dollars. Often these trades have nothing to do with one another. Although it may cost more money to have multiple mediators on a case, you may be able to settle a case when a mediator only must focus on one area.

If you can focus on a particular trade at a mediation, you are much likely to settle out that portion of the case instead of trying to settle the entirety of a case and possibly not providing the focus that is needed to a particular trade to resolve the issue.

C. Game Plan at the Mediation

For a mediation to be successful, the parties need to have a game plan. Mediation can be a tedious process, including lengthy periods when the mediator spends time in private caucus with the adversary, only a non-response from the other side. Stay positive. Everybody postures. Everybody wants to maintain a broad latitude for negotiation. An experienced mediator will remind you the process works, even in some very tough cases. Resist the temptation to walk out on the conclusion that the other side is "not serious" about settlement. Work with the mediator to formulate strategies that can produce useful progress. This is where the game plan can help. Think about what happens if the other side is not engaging. What can you do to move the needle? Work with the mediator.

As we all know, most disputes are about money. However, there often are valuable items that may cost little to offer, to "sweeten" a deal. A contractor claiming losses on a project might accept "structured" payments, or additional work, in lieu of the full amount of money that could be claimed. An owner could accept correction of defective work, or an extended warranty, in lieu of direct monetary compensation. Both sides might benefit from agreement on a public statement regarding successful completion of the project. Further, even if the entirety of the dispute cannot be resolved, the parties may agree to resolve a portion of the conflict.

D. Learn from The Mediation

No two mediations are the same. But parties can learn a great deal about the process, and about the needs and capabilities of their own organization, from conducting a mediation. Do some form of de-briefing, after the mediation, as to what went well, and what can be improved.

In the construction world, we are often working with the same firms, same insurance carriers, same plaintiffs' counsel, and the same mediators. Knowledge of how a firm or specific attorneys work will help you in the next case.