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# Resolving Complex Insurance Coverage Disputes Via ADR

## I. Timing of the Mediation: Dealing with the Unknown

In its most basic form, mediation is a process in which a neutral third party encourages and facilitates the resolution of a dispute between two or more parties. It is a non-adversarial process designed to help the disputing parties reach a mutually acceptable agreement. Unlike litigation or arbitration, decision-making authority in mediation typically remains with the parties. The role of the mediator typically is to assist in identifying issues, fostering joint problem solving, and exploring settlement options.

The opportune time for mediation is once the parties have a handle on the strengths and weaknesses of their case. But sometimes, the parties do not have the benefit of perfect information and can try and resolve their disputes while trying to predict some of the unknowns – especially when future litigation costs on both sides is still seen as a significant future burden. Another good time for mediation is when both sides have identified pressure points (e.g., while a dispositive motion remains pending) or when the parties still have some leverage points (directly following a decision). If an information disconnect or bad blood between the parties is preventing the flow of quality information about the merits and potential exposure of a claim, a good mediator can help facilitate the flow of information.

While mediation may not be appropriate for disputes where the primary goal of one or more of the parties is to seek a definitive ruling on the law of a particular issue or issues

to guide their actions in the future, in many cases the issues are far too complex for one definitive ruling to resolve all disputes that complex cases raise. Through mediation, the parties can assess their respective litigation risks and costs and arrive at a voluntary resolution. Mediation can streamline the case by narrowing the issues in dispute and can offer the parties creative settlement alternatives not available by way of a trial.

### A. Resolving Coverage Disputes While the Underlying Claim is Still Ongoing

#### 1. Identify Practical Challenges to Resolve These Coverage Disputes

When you are dealing with a claim where there is a dispute over coverage for that claim, the question is: when is the right time to try and resolve that insurance coverage dispute? Can you resolve the dispute early on while the claim is still ongoing? You can try, but there are many unknowns that could make it more difficult to resolve the coverage dispute. For example, the parties may not be able to accurately predict the monetary size of the underlying claim dispute or how the underlying claim is likely to play out. Will the underlying claim be resolved quickly on motion? Or, will the underlying claim be one that ultimately goes to trial? The answers to these questions will have a significant impact on the value of the underlying claim and what the insurer and/or policyholder will ultimately have to bear once there is a determination on coverage.

#### 2. Process to Overcome These Hurdles

Even in situations where there are many "unknowns," an early mediation can be useful. Disputes can arise between parties that have an existing relationship. Mediation may preserve that relationship which could otherwise be destroyed in a traditional litigation forum. Another advantage of mediation over litigation is it empowers the parties to fashion creative settlements or resolve certain issues while others remain disputed. For example, in complex insurance coverage disputes, the insurer and policyholder may be able to devise some mechanism to resolve the underlying dispute while certain coverage issues, like the scope of a particular exclusion, or the duty to defend remain unresolved. In such a situation, the insurer may agree to share in the cost of a settlement of the underlying action while preserving coverage defenses to be

determined at a later time. This approach could serve to mitigate the ultimate exposure for both the insurer and policyholder.

### 3. Evaluating Risk Factors with Imperfect Information

Even when the parties are operating on imperfect information, a mediation can still be successful. How do we define a mediation "success"? Not all mediations are successful. Some mediations require several mediation sessions to resolve the case. Even when resolution is not reached, the experience may prove invaluable because the information that is gleaned during negotiations may compel the parties to take a new approach to their dispute. Defining "success" at mediation can mean many things, including: (1) the matter settled and you paid nothing; (2) the matter settled and you paid a reasonable amount relative to covered exposure; (3) the matter settled and you paid a reasonable amount relative to excess and underlying insurers; or (4) the matter settled and you wrapped in multiple, related disputes (e.g., a related coverage dispute).

Some other mediation goals to consider are that a mediation may be an opportunity to: (1) evaluate an opponent's advocacy and negotiating styles; (2) to better understand the themes an opponent will be emphasizing at summary judgment, or beyond; or (3) assess how well an opponent responds to a probe of perceived weaknesses in a case.

The panel presentation will discuss some real world mediation scenarios where the parties were able to resolve insurance coverage disputes with less than perfect information.

## II. The Three-Way Mediation: Resolving the Underlying Claim and Coverage Dispute at the Same Time

### A. Turning the Unknown in to the Known

One way to turn the unknown exposure (defense costs and indemnity) of an underlying claim to a known, is to try to resolve the underlying claim and the coverage dispute at the same time. This could give both the insurer and policyholder a better sense of what they are giving up and gaining by a settlement. For example, there is a big difference if an insurer and policyholder agree to split the cost of a settlement 50-50 when the insurer and policyholder know that the underlying claim can definitely settle for

$10,000, as opposed to agreeing to a 50-50 split when the underlying claim may ultimately settle for as high as $1 million.

If the insurer and policyholder try and resolve the underlying claim and coverage dispute at the same time, the insurer can have an input in valuing the underlying claim and assist the policyholder in resolving that dispute while simultaneously evaluating its own exposure.

B. Dealing with Parties with Different Goals

The insurer and the policyholder do not always share the same goals entering into a three-way mediation. For example, if the insurer has agreed to defend the underlying claim but has a basis to deny indemnity coverage, the insurer may be more incentivized to settle the underlying claim before significant defense costs are incurred. On the other hand, the policyholder may rather use the insurer's defense cost dollars to fund a full blown defense to prevent against any indemnity exposure (potentially uncovered) down the road. The plaintiff in the underlying claim may have entirely different goals than both the policyholder and the insurer, especially if the insurance coverage issues do not impede a recovery for any ultimate judgment.

Because of the parties' divergent interests, it may be hard for the mediator to find common ground. Some impasse-breaking techniques include:

- Objective Criteria/Reasoned Offers
- Negotiating with Brackets
- Exchange of Information
- Explore Creative Options (Non-Monetary Value)
- Mediator's Proposal
- Arbitrating Individual Issues
- Small Group Discussions

- Expert Neutral Evaluation (Non-Binding)
- High-Low Arbitration
- Baseball Arbitration

C. Pros and Cons of This Multiple Party Approach

As discussed, a pro of the multiple party approach is that it could give both the insurer and policyholder a better sense on what they are giving up and gaining by a settlement. On the other hand, the negotiation dynamics are always tricky when multiple parties are trying to push their individual agendas.

## III. Our Own Perspective: What the Other Side Should Know

Successful mediation strategies require each party to do their homework. Identify what's at stake for your adversaries, what drives their behavior, and what will motivate them to settle. Also, there is a huge advantage to being able to accurately articulate your counterparties' arguments to show you understand their case.

Flexibility: Every mediation is different – even with the same parties and mediator. Be prepared to pivot from your negotiating style, if necessary. Frame reasonable outcome expectations: Understand your positions, including your weaknesses.

Good faith: Take the process seriously and be open to reconsidering your settlement or coverage position if you learn something new and relevant to your position.

Willingness to listen: Listening can draw out the issues and outcome needs that will drive mediation outcome; listen for unspoken signaling from the other parties to the mediation.

Creativity: Think outside the box to come up with mutually agreeable solutions.

Non-Adversarial Approach: Explain your position in a non-adversarial manner; invite others to see the benefits of your way of thinking; welcome them to adopt your view of the issues.

Utilize the Mediator to Carry Tough Messages: The mediator can do all sorts of things you can't (e.g., pressing an insured to make an insured contribution to settlement). The mediator can deliver messages to the other side and can be brutally honest in ways you can't.

Keep the faith: maintaining trust and confidence through your discussions with the mediators and counterparties.

Understand the process each side needs to go through to reach a settlement. For example, the plaintiff, policyholder and insurer may each have different processes in place to obtain settlement authority. Some are more cumbersome than others.

Understand the ramifications of a settlement to each party. For example, a settlement in this case may have a direct bearing on other cases with similar issues.

## IV. Best Practices

Seek common ground on issues where possible; focus on how to achieve an acceptable outcome; utilize constructive dialogue and assurances to build trust and rapport with the mediator.

Define the issue(s) to be mediated and evaluate potential outcomes.

Reconnaissance: Use your relationships with the other parties to determine expectations and gain useful intelligence.

Prepare the mediator: If there are significant insurance issues likely to impact your settlement position at mediation, request a pre-mediation call with the mediator and address any impediments before the mediation.

Prepare other participants: Make phone calls; float your ideas with other parties; identify common pressure points; and work to build consensus on an approach to negotiations.

Exchange mediation briefs or letters, if appropriate. Consider whether you want your mediation brief or letter shared with just the mediator, the mediator and the insured's counsel, or with all parties (particularly if you are seeking to reset the plaintiff's settlement expectations).

| **Do** | **Don't** |
|---|---|
| Present your case in a collaborative tone | Use the same style you would use in a courtroom to present your case |
| Take the opportunity to listen to the other side | Assume you know everything about the other side's case |

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| Acknowledge the strengths of the other sides' case | Negatively characterize the other side |
| Ask clarification questions | Question the other side "cross-examination style" |