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Mediation and the Tripartite Relationship: Can We All Get Along When The Heat Is On?

A mediation can be an effective way to resolve liability claims with serious insurance coverage issues or extra-contractual risk. Here are some important considerations for scheduling and handling one of these mediations.

I. Pre-Mediation Considerations.

Develop a "united front" between insurance company and policyholder.
Liability claims with insurance coverage issues, particularly ones with potential extra-contractual risk, can be somewhat of a moving target and very fact specific. Such cases often pose their own substantial risks for both the insured and the insurance company. An insured may face the possibility of having to pay an uncovered or excess verdict and potentially incur a substantial amount of additional legal fees in order to bring a bad faith action against its insurer, which may ultimately be unsuccessful. Similarly, an insurer may face the possibility of having to pay an excess verdict and additionally incur a substantial amount of legal fees to defend a bad faith action, which may ultimately be successful. In some jurisdictions, if the insurer loses, it may also face liability for punitive damages and legal fees incurred by the insured in the bad faith action.

Because insurance coverage and bad faith litigation poses enormous risks for both the insured and the insurer, it is in both sides' interests to avoid this outcome. These risks increase if the relationship between the insured and the insurer becomes adversarial – *i.e.*, one of necessary conflict where it is the insurer's interest to avoid making payment and the insured's interest to avoid liability in excess of its policy coverage. The key to reducing this risk is a cooperative relationship between the insured and the insurer in recognition of the fact that the interests of both the insured and the insurer are ultimately aligned.

It can be a mistake if, for example, upon receipt of plaintiff's settlement demand the insured's personal counsel merely fires off a letter to the insurer requesting that the case be settled within the policy limits. Such a demand is not necessarily reflective of the insured's best interests. While there may ultimately be a "worst case" scenario in which there would be a judgment above the firm's policy limits, the insurer, having experience in handling similar claims, may honestly

evaluate the settlement value of such a claim well below the firm's policy limits. Yet such a letter, by itself, can create an adversarial relationship between the insured and his carrier.

It can be an even bigger mistake when personal counsel takes it upon himself to begin "sympathy" discussions with plaintiff's counsel. In extreme cases, such discussions may constitute a violation of the "cooperation clause" of the firm's policy. Additionally, such discussions play right into plaintiff's hands. Plaintiff, having learned of the insured's eagerness to settle, will be less willing to move off of his or her policy limits demand. Even worse, plaintiff may now believe that he or she can recover an excess verdict against the insured, and raise or withdraw the demand. The insurer, having the honest belief that the settlement value is well below the policy limits and that it is acting in good faith, may determine that it no longer has any incentive to negotiate when plaintiff is showing no willingness to be reasonable. The alternative result is that the insurer relents and pays the remaining policy limits.

On the other hand, it can also be a mistake if the attorney hired by the insurance company to defend the insured stands idly by as if his only role is to defend the litigation. Having been retained by the insurer as well as having established a relationship with the insured, defense counsel can now become the bridge of communication between the firm, personal counsel, and the insurer. Whether the case ultimately settles or goes to trial, defense counsel can play a primary role in ensuring that a coordinated response is given.

The insurer's claims representative should also have taken the effort to create a positive working relationship with the insured every step of the way. The insurer representative is the hand holder and listens to the insured's concerns, and a level of mutual trust and good will between the parties needs to be created.

Of course, many insureds have a deep distrust of all insurance companies. Certain comments or conduct that might be forgiven from someone else may not easily be forgiven from an insurance company and can in fact create animosity, making the united front difficult. The trigger can come from delay in issuing a position letter, vague answers to questions about what the insurance company might be intending to do in the case, delay in responding to a phone call, etc. When policyholders experience these sorts of things, it tends to trigger a reaction based on how they believe insurers act and it causes them to get counsel involved and the united front becomes a challenge. Insurance companies should consider creating a level of trust with their insureds well in advance of any possible mediation.

Mediate the case at an opportune time after you have reasonably evaluated the claim.
Once a united front has been created or attempted with the insured, it is important to consider when a liability case with coverage issues should be mediated. The length of the underlying case or coverage litigation, the costs associated with that litigation and whether those costs can be avoided, should be evaluated. If the insurance coverage issues are the subject of a declaratory judgment action, it may be better to wait until after the court rules on the coverage issues in summary judgment motions before mediating. Then again, depending on the case and coverage issues involved, mediating before a ruling on coverage may be optimal. At the most fundamental level, the case should not be mediated before the insurance company has had a reasonable opportunity to evaluate the liability, damages and coverage issues in the case so that the company can assign

an appropriate settlement value or range. Of course, what constitutes a "reasonable opportunity" will depend upon the facts and circumstances of each case.

Choose the right mediator.

Certain mediators are more likely to facilitate settlement with certain parties and lawyers than others. When coverage issues are present, whether simple or complex, consider whether the mediator has had experience with those types of issues. Even if the mediator is not a "coverage expert," consider whether the mediator nonetheless can mediate the case effectively after reviewing a well-written mediation brief. Making sure that your mediator will be familiar with the relevant insurance concepts and sensitive to the challenges surrounding around those issues is incredibly important. Vetting a mediator's experience and familiarity with insurance coverage issues is not only acceptable but essential. Parties should consider calling a potential mediator, or having their counsel to do so, before agreeing to use that mediator to help resolve your case. This is not the time to experiment with a mediator with whom you do not have a high level of confidence.

Make sure all necessary decision-makers can attend.

It can be very frustrating to mediate a case without all important decision-makers. Optimally, everyone necessary to resolve the case will be there. Consider whether the plaintiff, the insured, the insured's personal counsel, or the insurance company's representative needs to be physically present. If multiple carriers are involved with the risk, having one carrier attend without the other may be a significant hindrance to resolution of the case. In many jurisdictions, particularly in federal court, the court's local rules and other court orders may mandate physical appearance by all necessary parties with full settlement authority. One ignores those rules at his or her own peril.

Consider a pre-mediation call with the mediator.

Not every mediator holds pre-mediation calls with the parties or their lawyers, but with liability claims with significant insurance coverage issues, these calls can be critical. These phone conferences can include all parties together at the same time or can be conducted with each party separately (or both in the same case as needed). These calls allow the parties to know who is coming to the mediation and can help to identify the major issues. A pre-mediation call with the mediator can help flag any unmet information needs that a party may want answered before it can be prepared to negotiate. These calls can also begin to show the mediator the dynamics in the case. If an adjuster were to participate in the call, it can help establish a good working relationship between the mediator and the adjuster in advance of the mediation.

Submit an effective mediation brief.

One of the best ways to convey a party's position on the insurance coverage issues is through an effective brief to the mediator. These confidential briefs allow the mediator to understand the party's position and often set the stage for settlement negotiations. Unfortunately, these briefs are often prepared at the last minute or are not submitted at all. The parties who can articulate their coverage positions in simple language have a distinct advantage at mediations. Moreover, parties should give some thought as to whether they want to share their mediation briefs, or a version of them, to opposing parties in advance of the mediation. The mediation may be one of the first opportunities that a claimant or plaintiff may learn of the insurance company's coverage position

and defenses for the claim. Allowing a claimant or plaintiff to understand the insurer's stance in advance of the mediation may allow opposing parties to set more reasonable expectations with their respective clients.

Don't forget about any lienholders.
No one wants to pay twice. If there are liens on a claim, the parties should consider how and if they will be resolved before entering into mediation. Depending on the jurisdiction, potential lienholders can include health care providers, health insurance plans, workers compensation carriers and employers, subrogating insurance companies, personal injury protection (PIP) insurers, co-insurance companies, mortgage lenders or other parties with a security interest in property, joint property owners, etc.

II. Considerations for the Mediation Itself.

Continue to maintain the "united front."
Once mediation begins, it is important that the parties continue to try to maintain a high level of trust between the insured, insurer, and defense counsel. It is helpful if that level of trust was created prior to the mediation. Regardless, on the day of the mediation, the insurance claims professional should consider speaking with the insured and the personal counsel before the negotiations begin to establish ground rules regarding having a united front when the mediator or plaintiff's counsel and plaintiff is present. As our panelist Mr. Joseph has said, "I also give them permission to beat me up, throw me out the window and bang my head against the wall in private!" When opposing counsel or mediator is in the room, however, the presentation should always be one of a united front.

Part of maintaining that united front is a recognition that the insurer needs to maintain a level of good faith. The purpose of a mediation is to have an open mind and if presented with new facts for the insured and the insurer to consider, that information has to be taken in consideration. If the prudent course of action is to pay the policy limits, that should be considered. However, sometimes, it is the opposite. The case seems to be better. Or the case simply stays the same with the same evaluation. Arguments brought in from the other room fall flat, but there is no correlation to the continuing unreasonable demands. A discussion with the insured and personal counsel about the developments is imperative. Maintaining a united front between insured, insurer, and defense counsel will go a long way to resolving the case at mediation.

Determine whether a "joint session" or "opening statements" may be helpful.
Claims adjusters should consider whether a "joint session" or "opening statements" of the parties at mediation would be helpful to them. The trend in mediations seems to be moving away from these sessions, as they can irritate the parties more than facilitate resolution of the case. Nevertheless, a mediation may be one of the first opportunities for the parties to learn of the other's positions on coverage. They can also provide an opportunity to see the attorneys in action, which can provide useful intelligence. They can allow an opportunity to observe the plaintiff or claimant either speaking or just reacting to others. If used correctly, an opening joint session can allow the insurance company the chance to set a tone, should the claims adjuster wish to do that, or make a connection with the other side. Whether or not joint sessions or opening statements are typically

conducted in your local jurisdiction, parties should consider whether an opening discussion of the coverage issues, at least amongst the lawyers, may be helpful.

Convey that while there may be a duty to defend, there may not be a duty to indemnify.
Whenever the insurance company decides to provide the insured with defense counsel for a given liability claim, the plaintiff and her lawyer may get the false impression that the carrier believes it must indemnify the insured as well. While maintaining a united front with the insured, the insurer should consider working with the mediator to dispel any such notions on behalf of the plaintiff.

To that end, any time there are substantial coverage issues regarding the duty to indemnify, it is important to have coverage counsel present, regardless of how clear the coverage issues may be, or how knowledgeable the adjuster may be with those coverage issues. The presence of coverage counsel is needed to show the seriousness of the issues, and coverage counsel should also be employed to provide the mediator with a mediation statement prior to the mediation in order for the mediator to be prepared with respect to the coverage that is available.

It should be made clear at the mediation that the coverage issues presented with respect to the action is a regular occurrence and not a unique situation. It is important to stress that any position taken in this mediation needs to be consistent with positions that may come up in any claim down the road.

There is also always an issue as to whether the insured may be judgment proof, or if the insured needs to make a contribution towards a settlement even if it is for the purpose of giving the other side the mindset that they got some "pound of flesh" out of the insured. In that regard, one issue that may be considered in some circumstances is whether the insured received substantial benefit in terms of a profit, fees charged etc. and whether that is being made part of the claim being asserted against the insured. Insurance companies should tread very carefully in asking for contributions from insureds, however, as doing so in an improper manner could be considered evidence of bad faith in some jurisdictions. Establishing a good working relationship and a "united front" with the insured is particularly helpful here.

Keep considerations of "good faith" in the forefront.
As mentioned above, there is a level of good faith that an insurance company must maintain in its settlement negotiations. That said, a plaintiff's attorney may raise a bad faith argument at mediation in order to increase the value of a claim or when there are deficiencies in either the damages or liability portion of the claim. In most jurisdictions, the focus of the discussion of the case with the mediator should not be on theoretical liability exposure (no matter how remote), but what may be described as a "reasonable home run." That is, the insurance company should discuss with the mediator the best verdict or outcome that a plaintiff may reasonably obtain in a given case. The objective of the insurance company, whenever possible, is to create a negotiation between a "reasonable home" run number and zero.

Of course, it may not be possible to settle a case at mediation within those parameters. Indeed, it is often when that reality hits that allegations or arguments of bad faith begin to surface. When confronted with this situation, insurance companies would be well-served to consider offering the policyholder protection beyond the four corners of the insurance policy. For example, the

insurance company could consider agreeing to defend and indemnify the insured without regard to any insurance coverage defenses or the policy limits (*i.e.* "blue sky agreements"). Alternatively, the insurer could allow the insured to assign its alleged bad faith claims over to the plaintiff in exchange for the plaintiff agreeing not to collect a judgment against the insured. The insurance company certainly would have to assess the relative underlying liability, insurance coverage and claims-handling positions before making any such offers. Moreover, these kinds of offers can only be done when a high level of trust has been created between the insured and insurer representative. In the right situation, these kinds of offers can negate the ability of the claimant or plaintiff to utilize a "divide and conquer" strategy between the insurer and insured when traditional settlement negotiations fail.

Bring any helpful evidence or documents.
Parties should bring the relevant evidence and documents to the mediation that they feel best support their positions. When there are insurance coverage issues, this definitely includes the insurance policy. Many times a good portion of the mediation is spent with the mediator sitting down with the parties and physically going through the policy. Often times that exercise can make the parties' positions better understood than their mediation briefs. If the insurance company has rescinded or may rescind the insurance policy due to a misrepresentation in the policy application, bringing a copy of that application and evidence showing the statement to be false is essential.

Consider the confidentiality of the proceedings.
Generally speaking, discussions in mediations should be considered confidential and should not be used against parties in subsequent litigation. Nevertheless, when bad faith issues are potentially afoot, it never hurts to reaffirm that understanding with the parties before discussions begin on the day of mediation.

III. Post-Mediation Considerations.

Liability cases with serious insurance coverage issues can be quite complex and frequently do not settle until after mediation with some follow up. A new complication could have arisen at mediation. Sometimes the parties need additional information. Perhaps the court needs to rule on a key motion. With this reality in mind, consider whether your mediator is willing to assist with negotiations after the mediation. This is another critical qualification for a mediator that you will want to vet ahead of time.