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**All's Well That Ends Well: Navigating Conflict Resolution**

## I. ADR Preparation – General

### A. Defense Counsel Role

ADR preparation typically begins with defense counsel who, in most cases, will have lived with the case longer and have had much more time to absorb the complexities of the fact pattern and legal analysis. Pre-mediation, defense counsel needs to condense the relevant information and present it to the claim manager with an analysis of why it is important and how it impacts the valuation of the case. Defense counsel must keep in mind that on large claims, such as are seen in complex construction cases, many adjusters may need up to eight weeks to perform their own analysis, roundtable the matter, and receive authority. If depositions and motions are ongoing until ADR, a basic report containing as much information as possible should be timely submitted and then continuously updated in the manner most helpful to the adjuster.

Defense counsel should also be focused on how to best help the claim manager position the case for a successful mediation, not just in terms of reaching a settlement agreement, but reaching the best settlement agreement under all of the circumstances. This analysis will depend on multiple factors such as venue, the experience/depth of opposing counsel, other parties liable (in whole or in part) for the same scope of damages, the number of carriers and their time on risk, etc.

The analyses regarding valuation need to be consistent throughout the life of the case, absent some significant change of facts. Of particular concern, is that the valuation does not increase from nominal to high simply upon threat of litigation.

Defense counsel must also play a role in educating the neutral about the value of the case, and any pertinent concerns that will affect settlement. As with briefs of motions, however, the analysis presented the mediator must be concise, especially in large cases, and hyper-focused on issues that will impact the value of the settlement if not addressed. In many cases, the only information conveyed to the mediator will be a brief description of the client's scope of work and the claims alleged along with the settlement value attached to the matter. In other matters, additional information significantly absolving your client or shifting blame to another will be pertinent if not taken into consideration by opposing counsel in its demand.

In many, although not all, matters, defense counsel also has a role to play in educating Plaintiff and/or other parties in opening statements. These statements will be highly personalized based upon defense counsel's method of negotiating and upon how hard of a line the claims manager has decided to take.

### B. Carrier Role

Prior to mediation the claims manager has to review defense counsel's reports to form a general understanding of the parties involved, fact pattern, liability issues, and possible exposure for the Insured. Importantly, the claims manager should never be shy about asking defense counsel for additional information or supporting documents s/he feels are necessary to fully and accurately evaluate the claim.

Each claims manager will prepare for ADR differently, but a command of Insured liability issues, coverage questions, damage exposure, and the underlying facts and parties are essential in order to effectively value the case and negotiate any demand. Having an idea of what you don't know is also vital to being able to ask questions not only of the Neutral, but also of your defense counsel.

An understanding of liability issues will largely fall on understanding defense counsel's verbal and written analyses (and from an independent review of expert reports), and a claims manager should ask questions until they are comfortable they understand any contested liability and/or damage issues.

If coverage issues exist, coverage counsel should be consulted to fully understand how that likely effects liability – fully, partially, or not at all – and/or damage exposure. Further, depending upon the amount in controversy and other factors, a decision needs to be made by the claim manager and his/her managers regarding to what extent coverage issues will be pushed during ADR. This is similar to an evaluation of cross-claims. For example, is a general contractor and its insurer willing to blow-up a multi-million-dollar mediation because of an insistence on full indemnification from the general contractor's subcontractors, or will the general contractor and its insurer compromise on indemnification to settle the case short of trial or ADR? These are issues the claim manager should have addressed in preparation for a successful ADR session.

### C. Coverage Counsel Role

Whether engaged from the outset of litigation or leading up to mediation, coverage counsel should review, consider, and analyze:

1. Current allegations;
2. Defense counsel's reports;
3. Expert reports and costs of repair; and
4. All tender related correspondence and policies.

Coverage counsel should assess and report to the claims professional whether and to what extent the claims against the insured are covered or uncovered. This evaluation needs to be provided to the claims professional well in advance of the mediation so that there is time for the claims professional to review and discuss with everyone involved in the decision making process.

Coverage counsel has to assess all risk transfer options to ensure that all other potentially responsible carriers are participating in the mediation. Tenders should have been sent at the outset of the litigation. Any denials analyzed and, if appropriate, consider pursuit of recalcitrant carriers.

Coverage positions of participating carriers should be reviewed and/or a conference should take place to discuss indemnity allocation as between co-carriers well in advance of the mediation. If there are significant coverage disputes, consider a coverage mediation. In large construction disputes, it is common for there to be significant coverage issues. In order to provide the best chance of success at mediation of the construction dispute, these issues and disputes should be raised and dealt with prior to the construction mediation.

### D. Neutral Role – Mediation and Arbitration

The mediator needs to have reviewed all of the documentation supplied by the parties. During the review process, the mediator should not only become familiar with the facts and law at issue, but should identify initial "disconnects." These disconnects can operate as potential barriers to resolution if they are not addressed early in the mediation process. If there is a significant disconnect, the mediator should identify it for the parties and potentially request specific pre-session briefing on the issue/s.

An essential element to a successful mediation typically includes a pre-session call with the participants. The mediator will typically cover the following topics in the pre-session call:

1. The identity of the parties and a brief discussion on the nature of the dispute and interests to be addressed in the mediation;

2. Status and need for exchange of documents and other information;

3. Answer questions of counsel about mediation process, mediator style and approach, disclosures, if any;

4. Status of litigation, if any, and any court deadlines that would affect scheduling and completion of the mediation process;

5. Pre-session statements and submission process: whether, when, topics to be addressed, length, how exchanged;

6. Names, titles, and roles of all persons who will be attending the mediation;

7. Are there other persons or parties that should be invited to participate?

8. Equipment/A-V needs; other special needs; and

9. Any suggestions of counsel to ensure a successful mediation process.

## II. ADR Virtual Session - Mediation

### A. Preparation for Virtual Mediations

For those who are new to the virtual platform being utilized for the mediation, it is strongly suggested that they should take time well in advance of the mediation to launch the platform, create an account (if necessary) and become familiar with the basic features and functionalities. Set forth below is a partial list of issues that should be addressed prior to the mediation:

- Check the speed of your internet connection using a "speed test" website that can be found by searching the internet. For a good connection, you will need a speed of at least 40 Mbps. If you don't have sufficient bandwidth, you may have to call in from a cell phone or land line rather than using the internet audio option. This audio only option limits the participant's ability to observe the other parties in the mediation.

- Audio strength can be increased if the participants use a dedicated microphone or earphones rather than the microphone on your laptop, tablet, or smartphone.

- If you will be multitasking during the mediation (i.e. working on other files during the mediation) consider using a separate laptop or tablet to connect to the platform. This will reduce the impact of potential inadequate processing capacity resulting in "freezing" or disconnection of the virtual mediation platform and the potential of inappropriate share screen information.

- Consider uploading a headshot as your avatar when the video is turned off. Be wary of using a casual or potentially inappropriate picture as it can lead to unfounded assumptions. Many platforms also allow the utilization of a virtual background for the video feed. While use of a virtual background can provide a more professional appearance, be aware that virtual backgrounds also require significant computer processing capacity that may impact platform connectivity.

### B. Conduct During Virtual Mediations

Virtual conferencing platforms allow for each side to have a breakout room, as is typical at in-person mediations. Most platforms allow users to view a list of everyone who is in the room, so you can ensure that everyone who should be attending is present and no one is mistakenly in the wrong room.

Similar to in person mediations, confidentiality is a cornerstone of the process. As such, only disclosed parties may attend or appear by video or phone. All participants need to confirm that they are alone in the room and cannot be overheard by anyone else. Participants should not video record or audio record any part of the mediation session. Finally, all participants should

agree that they will only use a secure WiFi or Ethernet connection for all conduct related to the mediation session.

Note that some platforms provide a chat function within each room, but the entire chat log is often provided to the mediator at the end of the session, so privileged or confidential conversations should not be conducted via the chat function. As a best practice, any sensitive conversations should be conducted via email, text, or audio on a separate device, rather than via the videoconference platform.

Also, be aware that, as the "host," your mediator can appear in your room without warning. Most platforms have a "help" button that allows you to call for the mediator to return to your room when you are ready.

Virtual mediation is surprisingly similar to in-person mediation, with the mediator shuttling back and forth between breakout rooms and, potentially, pulling all the parties together into joint sessions. There is often very little time for breaks, however, your mediator should provide each party with specific time block breaks while the mediator is working with other parties and/or issues.

## III. Impact of Covid-19 on ADR

### A. Settlement Considerations

In many/most states Covid-19 has caused a lengthy backlog of cases. In many states, that backlog is stacked on top of an already backlogged docket. Consequently, there is very little incentive for Insurers to negotiate high demands. Plaintiffs, and perhaps Plaintiff's counsel as well, may lack the resources to defer settlements until the matter works its way through the court's Covid backlog, which sets the stage for reasonable negotiations even without the threat of imminent trial or arbitration.

### B. Arbitration Considerations

The Covid backlog may also give the parties reason to discuss moving the case to arbitration, which, depending on the state, may be able to hear and decide a matter a year or more before it appears on the trial docket. If arbitration is agreed upon, meaningful negotiations are pushed forward, a plus for Plaintiffs, and the claims manager is much more protected against extreme verdicts. And while arbitration may lower the odds of a defense, or very low, verdict, the cost of reaching that verdict will likely be cut significantly. Jockeying for a particular arbitrator then becomes an important negotiation.