MEDIATION POINTERS FOR INSURERS: PREPARATION, POSITION, POWER

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The exorbitant costs of trial and limited judicial resources have spawned the mediation industry as an alternative form of conflict resolution. As a result, just about anyone, lawyers, retired judges, even motivational speakers have opened up mediation businesses, making a self-proclamation of expertise. The fact of the matter is that mediation is not the ultimate solution, but one of the processes used during litigation.

This article is designed to put the mediation process in perspective and provide suggestions on how to use that process to your full advantage. The principles set forth apply whether the litigation involves coverage disputes, first party claims, or third party claims. This article is written from the insurer's perspective, but is equally applicable to self-insured corporations.

PREPARATION

"Success is not the child of luck, but of vision and faithful preparation."

The mediation processes is a combination of negotiation, stage drama and war. One cannot negotiate without knowing the facts, or perform on stage without rehearsing their lines, and certainly war will be a disaster without training and preparation. The same is true for a mediation, one cannot just show up and hope to fell a giant with a pebble and a slingshot. This initial chapter provides a road map for preparation.

A. Understanding The Mediation Procedure

There are essentially two types of mediations, those that are required by statute or court order, and those that are voluntary undertakings by the parties. Statutory or court ordered mediations usually have built-in procedures for preparation of confidential mediation briefs, assignment of a mediator, a negotiation forum and, in some circumstances, penalties for failure to resolve the litigation. The problem with court ordered mediations is that one has no control over the selection of the mediator. If the mediator is incompetent, the process can be a waste of time. Thus, court ordered or statutory mediations are most effective where the mediators are required to give their opinion as to the settlement value of the case.

An example of this process is the three member panel mediation found in the state of Michigan. There, the mediation is not so much an attempt by the mediators to negotiate the parties to a settlement, but rather a forum to provide an opinion as to settlement and issue a recommendation at the end of the procedure. If a rejecting party does not improve upon the mediator's recommendation by at least 10% at trial, that party is responsible for all attorney's fees and costs of its opponent from the date of the mediation through verdict.

B. Investigate Your Mediator

Whether it is a mandatory mediation or a voluntary mediation, it is essential to investigate the background of the mediator. This includes the mediator's litigation and judicial experience, his or her area of expertise, that person's conflict resolution skills and, finally, prior relationships or affiliations with lawyers in the case which may have an undisclosed impact on the negotiations. In a voluntary mediation, this investigation should be done prior to selecting a mediator. So often after a frustrating mediation experience, the participants comment that the mediator was "worthless." This usually means that the mediator did not have the requisite conflict resolution skills to force the parties into what the participants viewed as a reasonable settlement range. While absolute control cannot be guaranteed, selecting a mediator can be as important as jury selection before trial.

C. Obtain Market Consensus

In preparation, if there are subscription, co-insurance or reinsurance relationships, it is essential prior to the mediation to obtain full market consensus as to the positions to be taken at the mediation. This may require a meeting among various Underwriters to lay out the issues and reach a united front. By doing this, it is one less issue to worry about when the mediation process begins.

D. Obtain Company Consensus

As we are all well aware, sometimes there is a lack of understanding between representatives on the placing side of an insurance company and the adjusters on the claims side over the need for and participation in a mediation. The presence of market representatives at the mediation can result in considerable expense, especially with intercontinental travel in the global insurance market. It is important for the participating adjuster at the mediation to know he or she has full support from their own company, regardless of the outcome of the mediation. The justification for participation in a mediation should never be conditioned on obtaining a successful settlement. We all know there is no guarantee that cases will settle at the mediation. Thus, the placing Underwriters should be fully aware that the claims adjuster may come back without a settlement. If the adjuster at the mediation is under pressure to justify participation by bringing back a successful settlement, this undermines the power needed to negotiate. A good mediator or skillful opponent will pick up on this issue and successfully use it against the representative.

E. Request Pre-Mediation Detailed Report from Counsel

The late Richard J. Daley was the Mayor of the City of Chicago from the mid-50s until his death in 1976. As he consolidated power and ruled the City, his hands of influence were everywhere from state and presidential elections, to the authority of the Executive Office of Mayor and even to judicial elections. Mayor Daley was known to say that on election day he hated "surprises," and he worked consistently to get out his vote. He maintained power by knowing each and every precinct and who could be counted on for a vote.

One of the most unsettling things that can happen at a mediation is for the insurance representative to hear bad news about their case for the first time from their opponents. It is not easy to bring bad news, which may explain why some attorneys like to gloss over the negatives. Nevertheless, prior to a mediation, a detailed report should be requested from counsel with the good, the bad and the ugly. The insurer should request that a specific section of the report identify the weaknesses of the insurer's position so that there are "no surprises." The preparation for mediation continues, in part, in Chapter 2 - Position.

POSITION

"If you don't know what you stand for, you may fall for anything."

It is important to develop, prior to the actual mediation, what the insurer's position should be, whether this is a first party coverage dispute, bad faith, straight defense, or excess insurance interest. A good position on liability should be captured in one or two sentences. The greatest strength for the position is the truth. A position should not stretch too far from reality or it will lack credibility no matter how vociferously it is stated. There are procedures for developing the position, which begin with a pre-mediation meeting with the insurer's counsel.

A. Meeting With Counsel

1. Our Side

Sufficient time prior to the mediation should be set aside to meet with counsel and other principals who will advocate the insurer's position. At that meeting, evidence such as photographs, or the product and key documents should be reviewed and a coherent presentation made to give the insurer a full flavor of the case. The issue as to what really happened should be discussed. The plaintiff's theory of liability and the law should be addressed as well as the defenses to each of those arguments.

2. The Other Side

It is often useful to have an attorney from the firm make a presentation arguing the plaintiff's position. This role play will assist the insurer in anticipating the arguments of its opponents. One of the most important aspects of preparation is to fully anticipate every argument by the plaintiff's counsel, and be familiar with the adverse evidence contained in testimony and documents. Once again, the goal is to prevent any surprises at the mediation. If there are too many surprises at the mediation, this may undermine the insurer's confidence in its own counsel.

3. Rehearse Responses

In the 1980 presidential election, candidate Ronald Reagan was vulnerable in debates with then president, Jimmy Carter, because Reagan had made off-the-wall statements during many of his speeches over the years. For example, the following statement was attributed to Reagan: "trees cause pollution," and "we should have bombed Viet Nam into a parking lot."

The Reagan campaign people knew that Carter would attempt to embarrass Reagan with some of his prior statements during the debates. They rehearsed what potential responses Reagan could make. Fortunately for Reagan, Carter came across with a bit of self-righteousness and as a whiner. At one point during the debate, as expected, Carter began to recall a litany of Reagan statements in an attempt to discredit him. Reagan just laughed, shook his head and said "There you go again." Carter's whole attack was derailed with humor as the audience laughed. What appeared as an off-the-cuff remark was actually a statement that had been rehearsed and agreed upon prior to the debate.

We frequently know what arguments are going to be made against the insured or insurer in coverage litigation. While one cannot prepare for every contingency, it is essential in developing a position to identify and rehearse responses to key arguments.

B. Who Will Advocate

At the meeting with counsel, the format and structure of the mediation and how it will be conducted should be covered. In addition, guidelines should be set down between the insurer and its counsel as to who will advocate particular positions. It is preferable that the insurer not be put in a position where they have to advocate its own argument, unless there are elements to the position that need to come from the horse's mouth.

Generally, the presentation should be left to counsel. If the mediator ask the client a direct question, the insurer can simply defer by requesting its counsel to respond. This is not meant to demean or restrict the ability to negotiate, but a typical negotiation strength is to have one person advocate the position to avoid a divide and conquer technique.

Very often substantial factual and legal work is done by a lawyer who does not have an immediate relationship with the adjusters present at the mediation. Of course, there is always a temptation for the partner with the relationship to want to represent his client's interests at the mediation even if that partner is not completely familiar with the case. In these circumstances, it is helpful and somewhat imperative that the lawyer with detailed knowledge about the file attend the mediation as well to negotiate facts and refute untrue statements from the opponents.

C. Determine Opening Offer

There is usually a time at mediations after the initial presentations are made, when the mediator turns to the plaintiff and asks for a demand and receives it. Then the mediator turns to the defendant's representatives and requests an opening offer. Whereupon, the lawyer, the insured, and the insurers look among themselves with a quizzical expression, confused as to what figure they should declare. Often they request a brief minute to discuss the matter. The opening position on the value of the case, and the bottom line that will eventually be offered at the mediation should be determined well in advance. Whether additional money is offered after the opening figure is a matter of tactics and negotiation skills as the mediation progresses. But with respect to the initial figure, it should be stated forthrightly, without hesitation and without apology and with a brief explanation justifying that amount.

POWER

"The one who holds the money, holds the power."

Frequently, one hears complaints after a mediation that the mediator made no attempt to reasonably resolve the dispute or put no pressure on the plaintiff's attorney and that the entire experience left a bitter taste in the adjuster's mouth. This is often the comment that arises when more money than had been anticipated was paid.

This complaint comes from a misconception that mediators are neutral arbitrators of the dispute. They are not. The purpose of mediation is to get money out of the insurer's pockets into the claimant's pockets. Insurer's representatives are requested to be present at the mediation to put pressure on them to transfer the wealth. A good mediator looks for soft spots in the merits of the case and in the personalities of the participants and uses all of the persuasion techniques available to him or her to transfer the wealth and resolve the litigation. A mediator is not a person to whom the insurer should confide. In the end, the mediator will use that confiding relationship and turn it on the insurers to get more money if he realizes that he has reached the plaintiff's bottom line. Nothing should be revealed to the mediator that you don't want everyone to know.

A good mediator will also look for soft spots in the plaintiff's side of the case. He may sense the plaintiff's attorney has a cash flow problem and needs to settle the case. He may sense that the plaintiff doesn't have the stomach to try the case and is desperate for money because of financial obligations. He may be aware of problems in the plaintiff's side of the case and certainly would use that as leverage against them to reduce their figure. But, in the end, the goal is the transfer of wealth.

But no one can make insurers pay money at a mediation. There is no gun to the head which requires insurers to write a check before they leave. The fact that the insurer is the holder of the money gives it more power than it believes it has at the mediation. That power can be exercised when one has the belief that one has the power. That power is attacked by the mediator through the persuasion tactics set out below.

A. Identify The Persuasion Tactics

A good mediator is more interested in using persuasion to resolve the litigation than in discussing the merits of the case. Time-honored persuasion tactics are used by police interrogators, foreign policy negotiators, even standard employer-employee negotiations over wages and benefits. Below are a few; there may be others that will come to mind as we begin to discuss these.

1. Isolation

Frequently, after the parties initially meet, the mediator isolates them into separate rooms. The isolation accomplishes a number of objectives. First, as a practical matter, it prevents tempers from flaring if there were face-to-face negotiations. But, more importantly, it allows the mediator to control the flow of information. It is not uncommon for the mediator to not fully disclose all of the information that he has from the other side. The mediator attempts to shift the power from the insurer, who holds the money, to himself, as the holder of all the information. Second, isolation creates an illusion of a confidential relationship when the mediator comes in to meet with one side alone.

The illusion of confidentiality, at times, will cause the parties to disclose to the mediator more information than they should. The practical way to break the feeling of isolation is to get up and leave the room when the mediator is not there, wander around, engage in conversation with other people, visit the water fountain, and even make mock telephone calls. Show the mediator, and reaffirm in yourself, that you control your world.

2. Accusation

We all like to perceive ourselves as being reasonable and fair in the affairs of life and business. Thus, it becomes unsettling when accusations are made against us during the mediation process such as the following:

"You are not negotiating in good faith."

"Your opening offer is so unreasonable, I think we should just stop the mediation right now."

"You came all this way and your conduct in the negotiations simply has been a waste of my time."

The problem with an accusation is that it puts the recipient in a defensive posture and raises some level of emotional anxiety. Accusation moves the debate from the merits of the case to the personal conduct or character of the participants. It is an insidious, but effective tool.

One should walk into the mediation expecting accusations and be fully pre-prepared to have a tin ear. Moreover, an Underwriter should never have to defend a personal accusation against him or her. Your defense should come from your counsel who disagrees with the comment and advises the mediator and/or the plaintiff's counsel that personal characterizations as a negotiation tactic will not advance the mediation and suggest that the mediator return to the merits. Third, and this will vary with the style of counsel negotiating on the insurer's behalf, sometimes it is very effective to simply state that an accusation will get nowhere and refuse to specifically respond to the accusation. This silence after the accusation is exposed can shake the process and put the accuser on the defense.

3. Vulnerability

In this increasingly global insurance market, it is not unusual for adjusters to leave their country of origin with its familiar business practices and culture, and travel to another country to participate in a mediation process. There is a certain level of vulnerability that always attaches when one is outside his or her own cultural comfort zone. The mediator is well aware of this element of vulnerability. A mediator may play on the vulnerability by making statements about the horrible things that can happen in litigation. Of course the antidote for vulnerability is confidence in the negotiator on the insurer's behalf who neutralizes any feelings of discomfort. This issue of vulnerability is another reason why, in the preparation and position phases of mediation, a person is specifically identified to advocate the insurers' position so that the insurer does not become the primary advocate for its own position.

4. Fear of Trial

The mediator, at times, will attempt to use the fear of trial or a potential runaway verdict or the costs of trial in an effort to put pressure on the insurer's representatives. This persuasion tactic can be completely neutralized during mediation preparation, by discussing with counsel the full range of the potential adverse verdict and by knowing that you have a good trial attorney in place. With this in mind, an ultimate settlement value for the case has already been determined before mediation begins.

5. Divide and Conquer

On occasion, a mediator attempts to divide and conquer between the members of one negotiating team or between co-defendants. I recall one circumstance where the co-defendants, prior to the mediation, had worked out an agreement, unbeknownst to the plaintiff, not to take adverse positions against each other during the mediation procedure. After a day of mediation, the mediator threatened that this co-defendant was now prepared to cut its own discounted deal with the plaintiff and go their own way. Since the negotiating teams for each defendant were isolated from each other, there was no way to know whether this was true. At that point, one member of the negotiating team simply got up and went to the room of the co-defendant to ensure that the deal that had been made prior to the mediation was still in effect -- it was.

The divide and conquer method needs to be exposed for what it really is. In addition, it has been observed that sometimes mediators will make disparaging statements about the insurer's counsel, such as "Your counsel is not telling you the truth about how big the exposure is." This type of statement should not be answered on its merits, rather the tactic should be exposed by advising the mediator that you see it as an attempt to drive a wedge between insurer's representatives, the insured and their counsel. Confrontation will neutralize the tactic.

6. Fear of Missing The Deal

It is not uncommon after a day of unfruitful negotiations for the mediator to come into the room at 5:30 p.m. to create an artificial emergency. Everyone is tired, anxious and hungry, and the mediator alarmingly declares that if the Underwriters do not put a substantial sum on the table, Plaintiff's attorney is going to walk away and the mediation will cease. The mediator is using a fear tactic to wrestle more money. At this time it is most important to remember the negotiating position and not to give in to the tactic. Mediation can be a way to see who caves in first. Stand firm and hold your position.

7. Deprivation

Invariably during the session, the mediator leaves the negotiating team at 12:30 p.m., advising them he'll be back in 15 minutes. As the negotiating team waits, time slips by and before you know it, it is 2:30 p.m., there has been no lunch and no real refreshment since the early morning when the mediation began. In addition, it is not unusual for the mediator to insist on negotiating into the evening hours without dinner. Unfortunately and amazingly, the deprivation of food is an intentional ploy to wear the parties down. If the mediator says he'll be back in 15 minutes and it's time for lunch, a simple response should be made that if he is not back within 15 minutes, the group will break for a short lunch and be back within an hour. Because of this issue, site selection for the mediation is important. The site must be accessible to a cafeteria, small restaurant or a place where someone can run for sandwiches. It is important not to reach a position where the negotiating team is tired, hungry and irritable.

Meals can also be used as an offensive tactic. If your strategy would benefit from contact with the other side, then order food for delivery and provide enough for everyone. All parties will have to come out of their rooms to serve themselves from a small buffet, where informal contact can happen.

B. Make The Mediator Your Advocate

A good negotiating tactic is to turn the tables on the mediator. When the mediator is not able to move the plaintiff to a reasonable position, advise the mediator that you investigated his background and you thought that he had a better reputation for resolving disputes. Advise him that you are placing confidence in him to obtain a better deal and to move the plaintiff. Express disappointment to him with respect to his own skills when the plaintiff's counsel remains intransigent. Advise the mediator that you have high expectations for his abilities, that you expect him to always tell you the truth and point out to him when he fails to meet the standards that you have set.

C. Be Willing To Walk Away

Mediation is not the ultimate or final solution for resolving litigation. There are occasions when resolution is achieved through mediation. But many times, the mediation is a process whereby both sides feel each other out and obtain first-hand knowledge of the strengths and weaknesses in the case. It is not unusual for cases to settle within 30 days after a mediation procedure once the parties get away and reflect on the arguments and evidence that were considered. It is essential for the exercise of power to be willing to walk away from the mediation. One cannot successfully conduct a mediation if he or she feels they have to resolve it on that day. The insurer is not a failure if it is unable to resolve the litigation at the mediation. If the insurer is not willing to walk, it has given up the majority of its power because the mediator knows that they will take the final deal offered. I know of one situation where the insurer walked away, and the mediator, in desperation, contacted them by telephone at the airport with a favorable figure to close the deal. It is essential that the insurer obtain market consensus as to the position to be taken at mediation so it has the power to walk away.

CONCLUSION

Successful mediation, whether the litigation is resolved then or later, rests upon proper preparation, development of and confidence in a position, and the exercise of power. It is my hope that, with this information, you will be armed to skillfully negotiate and perform in the drama of mediation with confidence, and win the war of litigation.