Kluwer Mediation Blog

Effective Strategies for Mediating Coverage Disputes

Paul Van Osselaer (Van Osselaer Dispute Resolution PLLC) · Friday, October 10th, 2014

I. Introduction

The mediation of insurance and risk transfer disputes involves interpretation of contracts and insurance policies, challenging legal issues, and the interests of multiple stakeholders. Such mediations are not just a matter of exchanging numbers. For parties, how do you advocate your position while, at the same time, exploring settlement? For a mediator, how do you navigate through such specialized advocacy and find common ground? So, in third-party claims, for example, indemnity agreements are often at play. And the so-called "underlying" lawsuit often has coverage issues that pose a principal impediment to settlement. Those are "coverage disputes" too. The dynamics of each case will dictate some strategies, but successful mediations of these cases have several things in common.

II. What Are "Coverage Disputes?"

Coverage disputes are not just about an insurance policy. Disputes also involve other forms of risk transfer, such as indemnity agreements. And often there are factual questions of where the fault actually lies or how the injury or damage relates to the scope of work for each party. Failure to appreciate the broad scope of what lawyers and judges informally call in short-hand a "coverage dispute" can be the first strike that could doom the mediation on an insurance or risk transfer dispute. Knowing the scope of your coverage or risk transfer case can affect when to mediate and even who the participants should be. Obviously, whether a loss is covered under an insurance policy is a "coverage dispute." And, broadly, it sometimes includes related extra-contractual claims against a carrier. But, it also includes when a third-party may be involved because of an underlying lawsuit—which creates the context in which coverage issues are considered. The key is to remember that the simple phrase "coverage dispute" is part of a broader business concept of risk transfer.

Appreciating the scope of the mediation is also the first step in preparing a client and selecting a mediator. Whether it is the underlying case's plaintiff, an additional insured, another carrier, or a reinsurer, there are often other parties whose interests demand attention. So, the wise party understands not only the scope of the issues as framed by the pleadings, but also the broader context in which the mediation will occur.

III. Are You Ready to Mediate?

Rather than leaping to a mediation, developing an effective strategy preparation requires first

asking *whether* a dispute is ready to be mediated, including the basic question of whether it should be mediated at all!

A. Should You Mediate?

Courts, lawyers, and some local rules often view mediation as a mandatory step in the dispute resolution process—a right of passage before entering the courtroom. But consistent with mediators reminding parties "it's your case, not mine," it's fair to ask whether a mediator is needed to resolve a particular dispute.

There are two contexts in which not mediating could be the right choice. First, for some cases, trial may be the best option as parties demand their "day in court." That may seem cavalier. But judges have been around longer than mediators. In coverage cases in particular, one side or the other may legitimately prefer a judicial resolution for business reasons extending beyond the current dispute. Mediation is an alternative because trial is never off the table. That fact alone drives settlements.

The second reason to consider *not* mediating is antithetical to what mediators do for a living: Mediation is not required to settle. Good mediation planning for a party includes asking whether mediation is the best way to seek a settlement. Direct lawyer-to-lawyer or client-to-client settlement discussions often result in settlement. If they do not, there is nothing lost. In fact, there is a marked increase in the chances of settlement at a mediation where the parties have at least tried to settle the case before seeking the assistance of a mediator and using mediation as a crutch.

B. What Are Your Goals at Mediation?

It is helpful before any mediation to ask why you are mediating. Settlement is the obvious *primary* goal of a mediation, but effective mediation strategy includes identifying and pursuing *secondary* objectives, which enhance the value of mediation, if not assuring the success of later efforts. Having secondary goals may seem defeatist or, some may argue, even bad faith. But prepared parties consider contingencies and learn from every step of a trial's process (including a failed mediation).

One common secondary goal is to set the stage for future settlement discussions by not burning bridges, by softening positions, or by simply giving the parties something to consider after the heat of the mediation day passes. Because complex coverage mediations can stretch into second sessions, good coverage mediators, when they see a settlement slipping away, look for ways to preserve a possible future settlement by setting the correct departure tone or obtaining agreement on next steps.

Other secondary mediation goals include, for lawyers, testing a client's resolve, learning more about your opponent's positions, and getting the assessment of a neutral—especially where the neutral is substantively experienced in coverage. In multi-party cases, seeing how co-carriers or co-parties negotiate and evaluate their positions can also be a useful secondary goal, as one plans joint defense or prosecution strategies.

C. Is It the Right Time to Mediate?

Besides intransigent positions and grossly different evaluations, a leading cause of failed mediations is not picking the right time to mediate. It is noble to explore settlement early. But, for early mediations in particular, a greater premium is placed on preparation and candid exchange of

easily known facts and materials. Among the questions to ask before any mediation, but particularly an early one, are:

- What is the status of any underlying litigation?
- Is there a coverage suit pending?
- Have forum and choice of law issues been resolved?
- Have the parties completed enough discovery?
- Will further discovery really materially change a side's position?
- Have all necessary documents been exchanged?
- Is your client ready to settle? Client readiness to consider settlement (as opposed to client readiness to have a mediator talk sense into "them") is an often overlooked issue.

In short, the parties should agree that the case has at least evolved to the point where mediation is warranted and potentially fruitful. There can be a second mediation of course, but an ill-timed first mediation could cause the parties to balk at trying again.

D. Do You Have the Right Parties for the Mediation?

Having the right people at a mediation is more than having present a client representative with the authority to settle. That's the bare minimum. In fact, whether it is an expert consultant on a key engineering or remediation issue, another person to whom your client has given a role in assessing an entitlement to or obligations regarding coverage, or another carrier, there are frequently others whom a prepared party will know must be also present or available in order to maximize likelihood of success.

Especially in the third-party claim context, coverage and indemnity issues are rarely determined in a vacuum and resolution could also require that other interested stakeholders attend and participate. Consider for example the typical mediation of a coverage dispute concerning the duty to indemnify, including allocation of indemnity obligations where there is an active underlying case. Even if the declaratory judgment action may more commonly be couched only under the duty to defend, how much the underlying plaintiff's case is worth from an indemnity standpoint is never far from the discussion. Increasingly, parties request, or courts order, joint mediations where the underlying plaintiff is invited to the coverage mediation. In those instances, the mediator is effectively mediating two cases—claimant v. insured and insured v. insurers. But where the policyholder is demanding that the carriers settle, and the carriers are arguing about allocation, what better way to determine what is being fought over? Allocating a plaintiff's demand of $10,000—or even $100,000—is, after all, easier than allocating one of $10 million. While the underlying plaintiff is not always aware of the existence or scope of coverage or the substance of coverage issues, sometimes including the underlying plaintiff in the coverage mediation may even make sense because it is that plaintiff's claim that is the subject of the insurance dispute.

One tact experienced coverage mediators can take where there are underlying case plaintiffs is to at least spend the time—perhaps in the days preceding the coverage participants' sessions—to meet with the underlying plaintiffs and their counsel. Or, if not meet with them, make sure they are included in the mediator's pre-session calls. In the right case, even co-mediators can be helpful.

One risk of mediating the underlying case at the same time as the coverage issues is that underlying plaintiffs sometimes waiting most of the mediation day to receive even the first number. One useful thing a mediator can do is to take in a number that surely all defendants and

their carriers can figure out allocation of if it is accepted. Consider this scenario: Plaintiffs' demand is $10 million. Defendants are arguing coverage and cross-indemnity agreements. The mediator asks the policyholders and carriers "if there was only one defendant and no coverage/indemnity issues, what would you all agree is a good response to $10 million?" Inevitably, there is agreement based on liability analysis, say $100K. A mediator could say, "what about me taking in $100K?" "But who would pay that $100K?" they always demand to know of the mediator. "Do you mean to tell me if they accept it, you can't figure that out at that low level?" The mediator replies. So with a promise that the mediator will not personally have to pay it, frequently the first and sometimes the next round can be played that way so that the process does not lose the plaintiffs to too much delay. The underlying case plaintiffs also need to be kept well-apprised of the coverage and other insurance issues, since often carrier funding would be the principal—maybe even only—source of any recovery.

In short, be creative about the parties necessary to a successful mediation—not just in who attends, but in how their role should be used by the parties and the mediator.

IV. Selection of the Mediator

It is easy to blame a failed mediation on a party, or on a lawyer, or on no one—just chalking it up to "sometimes mediations fail." Mediators often escape blame. While a mediator cannot force a settlement, of course, the wrong mediator can be responsible for a failed mediation. And the right mediator can increase the chances that the coverage mediation will be successful. So, a key part of an effective mediating strategy is selecting (jointly with the other parties), the right mediator for that particular case.

Basic mediation skills are transferrable across subject areas, but, as in patent law or other specialty areas, some mediators can be particularly adept at mediating certain types of cases. Similarly, not every coverage lawyer is a good coverage mediator.

The right mediator for your case will be respected by the parties, not just the lawyers. Particularly in complex coverage cases, mediators with coverage experience can bring a "been there, done that" gravitas to their advice. While former judges bring undeniable experience to mediations with their intimate familiarity with juries and having to resolve tough legal questions, that respect and skill is not always transferrable to issues that dominate coverage cases. Similarly, mediators who have mediated thousands of cases have the personal and negotiating skills required for the task, but may not necessarily be the best for the intricacies of a coverage dispute. The lawyers may know and respect the mediator, but clients are the decision-makers. A mediator whose relevant professional experience and advice rings true to the policyholder or carrier will have a better credibility with the client.

The right mediator for your case will also have an adaptable style. There are different styles of mediating, ranging from "facilitative" to "evaluative" (i.e., from "therapist" to "arm-twister"). For coverage cases, the full range is often required. For a particular case, the lawyers are in the best position to know what approach may work most effectively and should not be shy in asking mediator candidates about style and approach. In selecting a mediator, though, be wary of one who emphasizes one style to the possible exclusion of another. In private caucus sessions, a good mediator for a coverage case will listen, of course, but will also engage you and your client on the merits—both to understand your position in order to convey it and to challenge you to consider the possible merits of a contrary view. Whatever style is required at the moment, a mediator who is too

quick to dismiss the merits of claims or defenses and jump too quickly to “number passing,” is missing a key formula for success at a mediation. The right mediator will, if necessary, change approaches in mid-mediation. And lawyers should not be shy about inquiring about style before mediator retention or suggesting mid-mediation a different approach.

The right mediator will also have some substantive knowledge, the amount necessary depending on the particular case when weighed with other factors. He or she can speak the language and is comfortable probing and debating coverage points. That quality is more than simply a requirement for credibility; it is a matter of assuring effective communication. Often in mediations, parties rely on the mediator to accurately convey legal positions and explain it to the other room. A mediator who not only understands your point, but knows what you would say in response to your adversary’s inevitable retort can better help parties assess the risk of not settling.

The right mediator for your case is also engaged in the process. If mediators do share blame for a failed mediation, it is often due to their perceived lack of engagement in the process. A “what-kind-of-case-do-we-have-here-today” kind of approach is a bad sign. The case belongs to the parties and not the mediator, but that does not deprive the mediator of some share of responsibility. Engagement starts early with trying to understand the issues beyond a superficial level before the opening session. Good mediators do not wait until game day to discuss the case with the lawyers, are willing to dig into the documents, privately make suggestions to facilitate settlement, and will not let a close, but failed, mediation go quietly away without some follow-up. Coverage mediations can be long and frustrating, with multiple layers of issues (and parties) and changing dynamics. An engaged mediator will navigate through the issues with the parties, looking for creative solutions. In short, an engaged mediator, while not caring what amount a case settles for, cares deeply whether it settles.

V. Preparing the Mediator

Effective mediation strategy must include deciding how best to prepare the mediator. All good mediators, but especially those faced with potentially complex issues to digest, need to be able to hit the ground running on mediation day. That is particularly true with large multi-party cases, such as allocation cases among carriers or potentially culpable parties. Mediators have their requirements on when they prefer materials and the scope of submissions, but those are only general guidelines and may not fit your case. Good mediators appreciate the uniqueness of cases and count on counsel to provide the mediator with what is necessary to get a full handle on the issues to be mediated. Since only the lawyers know the case the best, the burden to get the mediator up to speed is initially on the lawyers.

There are two principal ways mediators are brought up to speed for coverage mediations: written submissions and discussions with counsel.

A. Pre- Mediation Submissions to the Mediator

For coverage mediations, typical checklists of some mediators, which seek the latest demands or offers, a “brief summary” of positions and the like, do little to convey the issues for a case of any complexity. Counsel, as advocates, should not be limited by such forms. Most mediators—the good ones—want to know what you want them to know and how you think they can best handle the mediation.

Whether jointly with other participants or as part of a unilateral confidential submission, make sure

the mediator has a copy of all relevant documents, including applicable policy excerpts, coverage charts and spreadsheets that will help the mediator understand the parties' issues and relationships. The benefit of jointly submitting key documents is that it provides an easy and common reference for all participants throughout the proceedings. Advocacy, as always, begins with a clear presentation of the facts. Logistical discussion between the parties' counsel before the mediation also has the added benefit of focusing them on the settlement process, through identification of the key documents and issues, and making sure that the right parties will be present and enough time is allotted.

Effective private submissions do more than simply recite the party's summary judgment motion or argue policy provisions. Anticipate and address the other side's points. Confidential submissions are not court briefs. Yet, surprisingly, many lawyers treat them as such, setting out only their side of things—as if the mediator is not receiving an opposing submission or as if there will be an opportunity for a "reply" submission. Why leave it to a mediator's imagination or to mediation day to explain why the other side's response is baseless? An effective confidential submission should also describe the status of any prior or ongoing settlement attempts and provide any suggestions on how the mediator should approach the mediation—everything from the nature of openings, to interpersonal dynamics, to possible structures for a mediated settlement. And, the confidential submissions should not ignore the mundane: logistical needs for presentations, room set-up, and any applicable time restrictions.

The parties should also consider whether, by agreement, to share mediator submissions with all or selected counsel. Particularly for early stage mediations, such can reduce the time spent using the mediator to educate parties about opposing positions. But a confidential supplement is usually advisable as well.

A note about the timing of written submissions: While the date is not carved in stone, reasonably honoring the mediator's preferred time for submissions does allow the mediator ample time to prepare. Consider that in some more complicated cases, it is set by the mediator based, in part, on his or her availability to devote time to it. [For the author, the prize does go to the lawyer who emailed him with a 10-page submission, arriving as he was in a taxi from the airport to the mediation.]

B. Pre-Mediation Discussion or Meeting with the Mediator

Perhaps the most overlooked part of effective preparation of the mediator is oral discussions or even meetings with the mediator in advance of the mediation. It is interesting how lawyers' required avoidance of ex parte contact with judges or arbitrators subconsciously inhibits their pre-mediation contact with the mediator, despite the absence of any parallel ethical constraint. In all but the most straightforward cases, a mediator's calls to the lawyers after receiving their confidential submissions provide an opportunity to ask questions and begin the process. In particularly complex cases, private meetings with counsel can also be helpful, in determining how to structure the mediation or better understand positions of similarly aligned players.

VI. Preparing the Party

Nothing spells doom for mediation more than a client representative who, while polite, passively conveys an attitude of "I'm here. So, mediate me." Preparing the client for mediation has two aspects: preparation on the merits and preparation on the process.

A. Preparing the Party Regarding the Merits

All lawyers evaluate the case for the client prior to mediation, but the extra step of advising the client on mediation strategy goes a long way. There will be times when positions must be compromised or traded, or monetary demands or offers are unrealistically high or low. Keeping the client aware of how your in-session strategy and advocacy is consistent with your evaluation prevents misunderstandings when the client is presented with an opportunity to settle.

It is also helpful to remind clients that mediation is often the first opportunity to hear the advocacy of the other side. So, part of preparing clients is making sure they are aware in advance of what will likely be said by the other side. The prospects for conciliation may be lost if the client has a visceral adverse reaction to the opposing party's presentation. More important for a settlement is to remind clients to listen. Clients rarely—actually, never—have difficulty seeing the strengths of their own position. Assure clients that you are there as their advocate and that often the best role for them is to be a listener and try to evaluate the case, if possible, from the objective view point of the judge or jury who will decide who wins if there is no settlement.

B. Preparing the Party Regarding the Mediation Process

Even the most experienced, trial-savvy clients need reminding that mediation is a *process.* There will be no ruling, opposing parties will not suddenly surrender or grovel with admission of error. Compromise takes time. Mediations should not waste time, but an often over-looked part of mediation is the fact that it is an opportunity for even the most seasoned litigants to vent their unhappiness or frustration with the other side's position. Sometimes parties have to draw and re-draw lines in the sand. Allowing that process to run its course is not wasteful; it is necessary and is managed by a good mediator.

Similarly, educating the client about the mediation process includes making them aware of their relationship with the mediator and reminding them of the so-called "mediation rules." Some attorneys actively discourage their client from speaking substantively during private sessions with the mediator. There are strategic reasons for that decision, but mediators can best do their job if they get a sense of the client decision-maker's mindset, positions, and concerns.

Finally, wise lawyers arrive at the mediation with contingencies to deal with settlement authority issues. Lawyers committed to the process are prepared for the contingency that a call to the "home office" or to "my CEO" may be required at some level of money. It is that common "phone call moment" that occurs in so many mediations. Contingency preparation includes knowledge of where ultimate authority may lay, making sure that person has access to needed information, and simply being ready with the necessary phone number, all to keep settlement momentum alive. And it includes such mundane things as being time-zone savvy when dealing with any ultimate decision maker.

VII. Preparing the Lawyer

Lawyers often balk at being told how to prepare for something as commonplace as mediation. Suffice it to say that, as with trial, success (at least avoidance of failure) comes with preparation. The most successful coverage mediations are where counsel has necessary facts and positions at hand and can present a clear path through a maze of policy endorsements, indemnity agreements and sometimes confusing legal concepts. Mediation preparation is no time for counsel to rely solely on legal briefing and expect to be passively "mediated."

Preparation requires development of a mediation strategy, including anticipated responses to questions from the mediator, how and when to disclose certain work product that could cause the opposing party to make a substantial move and, in cases with multiple issues or parties, where to place the focus of your settlement efforts. Preparation requires all facts to be at hand. Whether mediation is premature is often due to one or more parties lacking seemingly basic information.

In preparation by *policyholder lawyers*:

- Have all policies been identified?
- Is other coverage available to the client, for example, as an additional insured?
- Have all carriers been notified and requested to attend the mediation?
- Are there indemnification agreements?
- Has the carrier counsel provided you with what you need to evaluate the case?
- In third-party coverage cases, are you sufficiently familiar with the facts and legal theories in the underlying case to the extent they affect indemnity exposure, coverage, and allocation among carriers?

In preparation by *carrier lawyers*:

- Has all other coverage potentially available to the insured been identified?
- Have you coordinated coverage issues with carriers on other triggered policies?
- Will the mediation turn into an allocation dispute?
- Are you and the mediator prepared for ways to deal with that? Has underlying exhaustion or aggregate limit information been obtained?
- Are there retention issues that need to be addressed?
- Has the status of an underlying case been updated and a coverage evaluation done?
- Have reserves been properly set to allow a settlement at the end of the day?
- Do you know what conditions may be imposed upon the payment process and how quickly a check can be cut if a settlement is reached?

Finally, particularly in multi-party coverage mediations, sharing strategies with lawyers for similarly situated parties is always helpful. A group or subgroup can better present positions and share its ideas with the mediator. The mediator can be helpful in identifying such groups and logistically dealing with them. An auditorium of isolated parties makes for a long, frustrating day.

VIII. Conduct of the Mediation

No two mediations are alike. And lawyers have their own styles. However, successful coverage mediations have certain things in common at each phase of the mediation day.

A. Opening Comments by the Mediator

Experienced lawyers and parties often tune out the mediator’s opening comments, except to find out what might be for lunch. But such openings are important. Some parties prefer skipping right to private caucuses without even a joint greeting by the mediator. [It is a different question as to whether there are opening statements by the lawyers.] The opening words from the mediator, if properly geared toward the sophistication of the parties and not too long, will give you a sense of what lies ahead and the mediator’s style. The best mediators convey confidence and encourage the parties to listen to the views of the other side. And, it is an opportunity for the mediator to identify key open issues and, perhaps, his or her proposed plan for addressing them. If done right, it is a

tone setting exercise uniquely developed for each case.

B. Opening Statements by Lawyers

The existence and content of opening statements at mediations generally vary by region. But even in parts of the country where they are common increasingly one lawyer (or all) will tell the mediator that no opening is really necessary "because we understand each other's positions." In some cases, that could be a mistake. A party's position on that should be carefully considered as part of a mediation strategy—as should, of course, the content of any lawyer opening. Openings do not have to be long, but the opportunity to address the opposing party should not be squandered. They allow a client to hear directly what the opposing counsel's arguments may sound like before a judge or jury and they allow the other side's representatives to hear your arguments unfiltered. From a mediator's perspective in early-stage mediations, how can the mediator tell parties to weigh what the other side's position is if they never got to hear it directly? On the other hand, opening statements that drag on too long or are delivered in a closing-argument style can be counterproductive. Finally, based upon what the mediator learns in pre-mediation submissions and discussions, the mediator sometimes has ideas for each party as to the focus of an opening. The final decision on the existence, content and approach of lawyer openings should be left to the mediator based on his or her preparation and pre-mediation consultations with all parties.

C. Joint Sessions

Immediately after any opening session, there is an exchange of pleasantries and the parties typically retreat to private caucuses, often never to see each other again. Good mediators try not to allow the opening session to end on an adversarial note. Successful mediations often follow the opening statements with some minimal "together time" to answer the mediator's questions, share thoughts on how the mediation should progress, and/or offer some other basis for re-establishing the compromise nature of the mediation. This is the important soft stuff of mediations.

Similarly, particularly in larger cases, mediators sometimes find it useful to get the parties back together again during the day to address common issues that have arisen during the day. For example, in a case dominated by carrier allocation issues, questions or concerns about the nature or status of an underlying case might be addressed by policyholder counsel. And sometimes meetings of certain sets of counsel without clients, as suggested by the mediator throughout the session, can be helpful.

D. Private Caucuses

Private caucuses are supposed to be candid discussions about evaluating a claim, but they often do not begin that way. Often, counsel runs the show with the client sitting quietly. Good mediators will engage the client representative throughout the day to get to know the decision-maker and to make the client feel more part of the process. A successful mediation strategy will include the client in the dialogue with the mediator. An engaged client is more likely to take the necessary steps toward settlement. When the mediator is not in the room, time should not be squandered. Those down times are sometimes the longest time you will have alone with the client apart from deposition or trial preparation, both of which are oriented toward advocacy. It is a unique opportunity to continue candid discussions between lawyer and client about the risks or opportunities presented by the case.

E. Private Communications Away From Client

Some clients view with suspicion private conversations their lawyer has with just the mediator or with opposing counsel. Those clients properly prepared for mediation should not be. Such sessions should not be frequent or lengthy, but can advance settlement when properly used or suggested by the mediator. For example, where there are differing case evaluations within a caucus room they can be helpful to the mediator in developing an approach within the room.

F. Effective Time Management

Time management is an important part of any mediation strategy. Effective mediations require focus, for which time is an enemy. All mediations begin with energy, but risk losing focus. For the mediator, his or her involvement with each room must be sufficient to maintain that room's focu (a sometimes daunting task in multi-party cases). Mediators need to remind parties that time spent away from a party's caucus room has value. For counsel, focus comes from assuring that positions remain in the forefront. In coverage cases, no less than in other types of litigation, themes matter.

Efficiency also requires easily managing of information. As questions arise during mediation, efficient access to pleadings, exhibits, and key legal authorities is important, including the ability to have online access to information. Logistical issues with Wi-Fi and cloud access necessary to get critical information can waste time. A good mediation also has some momentum that a mediator is trying to manage.

Finally, especially in coverage mediations, many key participants are usually visiting from a city other than where the mediation is being held. A good mediator and effective counsel are aware of flight schedules (even if not openly shared). And a good mediator will not allow early flight claims to create unnecessary leverage. Increasingly, many parties or counsel claim that they have to leave mid-afternoon "to catch the last flight home." [Such claims are suspicious, of course, where the mediation is held in a major airline's hub city.] But there are ways to deal with it. First, where many participants are from out-of-town, the mediator should make private inquiry early in the day. Second, if participants are spending one night out of the office, consider whether the mediation should start at say 1 p.m., with the participants spending that single night during the middle of the mediation. Again, it is a matter of preparation and planning.

G. Special Considerations for Large, Multi-Party Coverage Cases

All parties deserve attention, but some parties can unwittingly delay, disrupt, or derail the process. A large risk to the success of multi-party mediations is posed by players who have the least at stake, or who will contribute the least toward a resolution, but who nonetheless seem to be driving the process. An effective mediator and effectively prepared parties will not let the loudest voices or the smallest player stand in the way of progress. Handling the situation has to be artful, keeping in mind the mediator's only goal is a settlement, even if it is regretfully a partial one. Counsel should be prepared to work with the mediator to encourage other parties to keep their eye on settlement and deal with those who will not.

In large multi-party cases, coordination by parties in similar positions is important to keep up momentum. Mediations can materially advance if sub-groups of the parties find agreement even on the manner in which to proceed with the mediation. And aligned groups can better keep individual parties focused on the issues.

IX. The Mediated Settlement Agreement

Mediation success is judged principally by one thing: a settlement. So an effective mediation strategy must include how to deal with a settlement agreement. All mediators have form documents to reflect the principal terms of settlements, but they are often not suited to all issues that may be resolved in coverage mediations. And some mediators have a simple case-specific form with the case style on a thumb drive. Counsel to be prepared from the beginning with key language, contained on a laptop or on a thumb drive for easy use. When a settlement appears imminent, smart counsel begins putting key terms in writing or setting them out for the mediator to confirm with the other parties. If there are unusual provisions to be required beyond a release, payment, confidentiality or timing of payment, it is also best to advise the mediator of such earlier in the mediation day when it first appears a settlement may happen.

A question facing all lawyers at a mediated settlement is how much detail to put into the mediation agreement and how much to leave for the inevitable later formal agreement. The key is to make sure that all material issues are addressed, including such mundane things as who will be drafting the formal agreement. For coverage mediations, key points may include addressing indemnity, the duty to defend, extra-contractual allegations, and confidentiality. If the mediated settlement agreement contains a funding approach, articulation of the variables can prevent further disputes. In some cases, if there is time, drafting a final agreement on the spot can prove beneficial and efficient. After all, necessary parties are usually present to approve and sign the final papers.

Finally, take the time to work out the terms of the written agreement entered at the end of the mediation. With planes to catch and in the relief (or, conceivably, euphoria) of reaching consensus, it is easy to lose focus on the importance of the documentation. Relying solely on the future formal agreement to iron out language can be problematic if opposing counsel has a different view of what the short-hand references of the mediation-day agreement mean.

XI. After the Unsuccessful Mediation

If the mediation day was unsuccessful in reaching a settlement, effective counsel and mediators will consider at least three things. First, if not tried earlier, is a mediator’s proposal still feasible? In the right case at the right time, a mediator’s proposal can break an impasse. Second, is there a possibility of a settlement in the future? Before the parties leave, it is often worth the mediator exploring with counsel and the client representatives whether an additional mediation session or additional informal communications should be had. In multi-party coverage cases, in particular, it is not unusual for a second session to be necessary with additional parties present or after judicial resolution of some open issues. Third, what lessons were learned during the mediation? Mediation post-mortems are often rare, as counsel thrust forward with litigation, but they can be valuable. Wise counsel, while it is fresh on the mind, takes the time to consider what the mediation session taught for future use in pursuing settlement again or for trial.

XII. Conclusion

No party “wins” a mediation. Winning is never the goal and should never be the part of a realistic and effective mediation strategy. But with preparation and recognition of some uniqueness in mediating insurance and indemnity issues, the parties can forge a compromise that they “can live with.” And for the mediator . . . well, it settled and the terms are not important.

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