

Backing Away from the Brink: Proactive Preparation & Effective Mediation of Coverage Cases

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INTRODUCTION

A mediation session is often the first time all parties to a coverage dispute have the opportunity to test the validity of their position with other parties and a neutral, third party. Properly preparing your case, your client and the mediator can increase the likelihood of a favorable outcome.

What goes into properly preparing a coverage case for mediation? First and foremost, prepare for mediation as you would prepare for a trial. Know your theme, develop a sound strategy to accomplish your goals, and anticipate opposing arguments.

I. Before You Mediate

The key factors to consider before commencing mediation include deciding what will be mediated (the underlying case, the coverage case, or both), selecting the right mediator, determining who should be involved in the mediation, assessing your preparation, and anticipating your opponent's arguments and strategy.

A. Are You Ready to Mediate?

All of the best intentions will result in wasted time and money if the case is not ripe for mediation. Before deciding on mediation, ask yourself the following:

- What is the status of the underlying litigation?
- Is there a coverage suit pending? If so, who initiated it?
- Have depositions been conducted?
- Have the necessary documents been exchanged?

The parties should agree that the case has evolved to the point where mediation would prove beneficial and then commit to investing the necessary time and resources to preparation.

Proper policyholder preparation includes addressing the following:

- Have all policies been identified and obtained?
- Have all carriers been notified and requested to attend the mediation?
- Have all coverage counsel been identified?
- Has the availability of other coverage been determined?
- Has exhaustion and aggregate information been obtained?
- Has additional insured information been obtained?
- Are there indemnification agreements?
- Has the carrier been provided with requested information?

Likewise, carriers should consider the following to ensure they have properly prepared for mediation:

- Has other coverage available to the insured been identified? If so:
 - What is the position of those carriers?
 - Have they been put on notice?
 - Has there been coordination between the potentially responsible insurers?
- Have indemnity claims the insured may have been addressed?
- Has exhaustion or aggregate information been obtained?
- Has additional insured information been obtained?
- Has the status of the underlying case been determined and has there been a coverage evaluation?

B. What Are You Mediating?

The scope of the mediation will impact your preparation and likely your choice of mediators. You will want to carefully consider the impact of mediating the coverage dispute and the underlying cases together, whether to mediate amongst the defendant(s) and carrier(s) before the mediation, and the benefits of conducting partial mediations of coverage by layer. Other considerations include mediating defense separately from indemnity, and mediating with the defendants only. Of critical importance is a full understanding of the confidentiality of discussions, the discoverability of any agreements that are reached, and the risk of facts being learned during the mediation of an underlying case that can impact coverage.

C. What Parties Should be Included in the Mediation?

Determining who should participate in the mediation can be critical to a successful outcome. It is essential to identify and secure the participation of individuals with the authority to settle. But how much more inclusive should you be? Large, multi-party mediations can be cumbersome and can result in unnecessary delays and filibustering. Consider the following:

- What does the Court order, if any, say?
- Should all of the parties to the underlying case and their counsel attend the mediation of a coverage case? If so, determine the role of defense counsel in advance.
- Should the policyholder have independent counsel?
- Who should be there from the carriers?
- Should additional insured carriers be present?

D. What Should You Look For When Selecting a Mediator?

When choosing a mediator, find someone who is intellectually capable of understanding the complex issues involved in coverage disputes. Look for someone who can speak the

language of the participants. This will help establish the mediator's credibility, which is a key factor in a successful mediation.

You also want to find a mediator who is energetic enough to explore the issues fully. Look for someone who will have the time to spend before, during and after the mediation session. Coverage mediations can be long and frustrating, and you need someone who is tireless.

A mediator who is a mere "number passer" will not be effective. Look for someone who will become involved in discussing and resolving issues and shows a willingness and ability to nudge the process and parties to agreement.

Finally, if the underlying case and coverage case are being mediated together, determine whether working with 2 mediators may be helpful: one for coverage and one for the underlying case.

II. Preparing to Mediate

Once the scope of the mediation has been determined and a mediator selected, your focus should turn to the preparation of the parties involved.

A. Preparing the Mediator

Take the time to educate the mediator on all major issues ahead of time; this means more than the day before. In order to assist the mediator in understanding the key issues, send him or her all relevant charts, law, exhibits, and spreadsheets. Often, a pre-mediation brief can be helpful to orient the mediator, as well as all parties, to the relevant issues.

Communicate with the mediator regarding logistics, interests, suggested approaches, and private/group meetings. Work together to ensure enough time has been scheduled for the mediation to work.

B. Preparing Your Client

Make sure your client is properly prepared for mediation. This includes having a frank discussion outlining your strategy (including roles to be played by counsel and client), addressing all issues and presenting an accurate picture of a favorable outcome. You should also discuss what you expect to be argued by other parties and your responses. Finally, discuss settlement and decision making authority.

Most importantly, help your client understand that it is a process, not just a finite mediation.

C. Preparing Other Parties/Carriers

Meet with those who are willing to mediate and share information and ideas. Form a group or subgroup, if it will be beneficial. Remember, an ambush approach does not work in these cases.

III. The Mediation (Coverage Case/Underlying Case/Both)

Careful consideration should be given to the logistics and an analysis of the issues to be discussed at the mediation. Both will impact the flow and, as a result, the success of the mediation.

A. Getting the Logistics Right

Pay careful attention to the physical space where the mediation will be conducted. Start by determining the number of rooms you will need and then look at the physical layout of each room. Providing access to the internet in each room is essential. You may also want to consider scheduling the mediation in a location near to the underlying dispute in the event the parties and/or mediator want to tour the site.

Know your time limits. Commit in advance regarding plane travel and, if possible, work into late afternoon. Have refreshments available in the room(s) and order lunch in to limit breaks. If the mediation is expected to exceed one day, consider booking space in a hotel that can accommodate the participants.

Take a moment to think about the flow of the mediation. Should the participants prepare opening statements? Would PowerPoint presentations enhance or detract from the proceedings? These considerations and the dissemination of mediation position papers should be discussed and agreed to in advance. Should the position papers be submitted only to the mediator or will all parties commit to an exchange? When should the position papers be submitted – in advance or at the mediation? Consider the extent to which they should advocate, recognize weaknesses and suggest approaches.

Your preparation should include ensuring easy access to core documents (pleadings, dispositive motions, policies and key cases) in order to facilitate the discussion of policy language. Charts depicting coverage periods, including overlapping coverage (especially where there have been mergers, acquisitions) will also help facilitate discussion. Finally, consider whether it would be beneficial to have experts who could explain and educate the participants regarding technical issues in attendance or available by phone.

There are special logistical considerations for large multi-party mediations. First and foremost, make sure there is ample room for the size of the group. It is also critical to seek agreement from all participants that there be no surprises with regard to the parties' positions and that the legal issues be addressed first. In addition, consider if it would be helpful to select group representatives and whether pre-mediation meetings with the mediator or each other would help to facilitate the mediation and prevent the small players from driving the process.

Finally, the mediation may flow better if you are able to divide up the crowd for some purposes. Consider grouping participants for discussion by role in underlying case, by layer, or by "who's a player and who's not". The groups need not be formal and may change or merge throughout the process, but group dynamics are an important factor and can have a profound effect upon the proceedings. Groups can help keep participants focused on the issues and remain committed to the process.

B. Discussing the Issues

After you have identified the issues for mediation, outline a strategy for getting the key issues to the forefront of the discussion. Paramount consideration should be given to choice of law, duty to defend, allocation, liability, reservation of rights, policy limit, funding and remedy issues. Secondly, be sure to consider the effect of carrier differences on negotiations in underlying case and the effect of differences in view on causation issues.

IV. The Agreement

Anticipate a successful mediation and consider bringing a draft agreement or outline of key points with you. You'll find that having your laptop with you will be beneficial if a deal is struck. Make sure to have a list of all the terms you need included in an agreement readily available, and if your jurisdiction has a procedural rule giving enhanced binding effect to written agreements, cite it specifically.

The agreement should resolve all issues possible, including indemnity, duty to defend, extra-contractual allegations, or delay of payment and ensure confidentiality. If the agreement represents a funding approach or an allocation, articulate all variables to prevent further disputes.

Finally, if possible, get an agreement done and signed at the mediation.

* The presenters acknowledge with appreciation the work of Nancy Connito of Saxe Doernberger & Vita in the preparation of this paper.