

*ABA Section of Litigation 2014 Insurance Coverage Litigation Committee CLE Seminar,
March 5-8, 2014: Mediation Boot Camp 101: Preparing Your Coverage Case for Resolution*

Mediation Boot Camp 101: Preparing Your Coverage Case for Resolution

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Preparing Your Coverage Case for Resolution**

I. INTRODUCTION

Mediation has likely existed in some capacity since the beginning of time. During the past three decades, concurrent with the rise of private mediation firms and an overburdened judicial system, mediation has gained in popularity and become an increasingly important tool for evaluating and resolving legal disputes between opposing parties.

Generally speaking, in many jurisdictions, the evidentiary and procedural rules that govern mediation, and the overall strategy that an attorney should follow when preparing for and participating in mediation is consistent regardless of the underlying subject matter. However, in cases involving insurance coverage disputes, and in cases where an indemnity payment from one or more insurers is needed to fund the settlement of an underlying lawsuit, the process of preparing for and participating in mediation is more elaborate.

Unlike typical litigation cases, where the parties to the lawsuit are usually the only decision makers needed to facilitate a mediation, cases involving insurance coverage issues may require multiple sets of decision makers including the parties to the lawsuit, and their respective primary, excess, umbrella, and additional insurers.

Frequently, insurance coverage attorneys for both the policyholder(s) and the insurer(s) work directly with the attorneys representing the parties named in the underlying lawsuit to prepare for and facilitate mediation. These same insurance coverage attorneys may also file separate lawsuits to resolve or influence the settlement negotiations for the underlying litigation.

California has some of the most developed statutory rules and case law governing mediation in the United States, and provides an excellent framework for examining effective mediation strategies for cases involving insurance coverage issues. This paper will provide an overview of the California mediation rules, and will also provide some helpful tips regarding how to prepare for and facilitate mediation for cases involving insurance coverage issues.

II. OVERVIEW OF CALIFORNIA MEDIATION RULES

Before discussing mediation strategy, it is important to understand the basic rules governing mediation in California. Most of these rules are set forth in California Evidence Code sections 1115 through 1128. Included below is a brief discussion of these rules.

A. What Qualifies As A Mediation In California?

1. Mediation Defined

As an initial matter, it is important to understand what qualifies as a mediation in California. Cal. Evid. Code section 1115(a) defines mediation as a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement. Cal. Evid. Code section 1115(a). By comparison, in *Foxgate Homeowners' Ass'n, Inc. v. Bramalea Calif., Inc.*, (2001) 26 Cal. 4th 1, the California Supreme

Court concluded that mediation is the next step beyond direct negotiations and is an alternative to “unnecessarily costly, time-consuming, and complex” court proceedings. *Foxgate Homeowners' Ass'n, Inc.* at 14.

Upon reviewing the comments to section 1115, it becomes clear that what qualifies as a mediation is determined by “the nature of a proceeding, not its label,” and that a proceeding might qualify as a mediation for purposes of the confidentiality protections “even though it is denominated differently.” See Rebecca Callahan, *Mediation Confidentiality: For California Litigants, Why Should Mediation Confidentiality be a Function of the Court in Which the Litigation is Pending?*, 12 Pepperdine Disp. Res. L.J. 63 (2012).

2. Distinguishing A Mediation From A Mandatory Settlement Conference

It is critical that an attorney understand the difference between a mediation and a mandatory settlement conference. Although courts and practitioners sometimes use these terms interchangeably, these are very different alternative dispute resolution (“ADR”) procedures with vastly different confidentiality rules. Evidence Code section 1117(b)(2) provides that the confidentiality protections afforded to communications in mediation do not apply to communications during a mandatory settlement conference convened pursuant to rule 3.1380 of the California Rules of Court. *Id.*

The first step in distinguishing a mediation from a mandatory settlement conference is determining whether or not a court has ordered the ADR process. The analysis will change depending on who initiated the ADR process.

Second, if a court has not ordered the ADR process, and instead, the process is the result of an agreement between the parties, the parties are not participating in a mandatory settlement conference. Only a court can order the parties to participate in a mandatory settlement conference, it cannot be self-imposed.

Third, if a court has ordered the ADR process, you must carefully review the court order to determine whether or not the court has simply ordered the parties to participate in mediation or whether the court has specifically ordered the parties to participate in a mandatory settlement conference convened pursuant to rule 3.1380 of the California Rules of Court.

Finally, it almost goes without saying that if the court has ordered the parties to participate in a mandatory settlement conference convened pursuant to rule 3.1380 of the California Rules of Court, the parties are participating in a mandatory settlement conference and not a mediation. Conversely, if the court has ordered the parties to participate in mediation, the question of whether or not the parties are actually participating in mediation depends on whether a neutral is involved, as discussed below.

3. Distinguishing Mediation From Ordinary Settlement Negotiations

In many cases, the ADR process is initiated by the parties themselves and is not the result of a court order. Under these circumstances, it is important to distinguish a mediation from ordinary settlement negotiations. As noted above, Cal. Evid. Code section 1115(a) defines mediation as a

process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement. Cal. Evid. Code section 1115(a). Therefore, a neutral person or persons acting as a mediator is required for mediation. Mere settlement negotiations between the parties without a neutral person involved acting as a mediator do not qualify as mediation.

B. Who Qualifies As A Mediator In California?

As noted above, you cannot have a mediation in California without a mediator. The California Evidence Code defines a mediator as a neutral person who conducts a mediation. "Mediator" includes any person designated by a mediator either to assist in the mediation or to communicate with the participants in preparation for a mediation. *See* Cal. Evid. Code section 1115(b). Simply put, a mediator is the neutral person who conducts the mediation and the members of their staff who assist with the mediation and/or communication with the participants in preparation for a mediation.

Typically, mediators fall into one of two categories; retired judges or attorneys who never served as judges but work as professional mediators. In rare circumstances, non-lawyers with expertise in a specialized area also serve as mediators. *See* Cal. Prac. Guide Alt. Disp. Res. Ch. 3-B § 3:75.

As explained further below, you have many options to consider when selecting the appropriate mediator for your dispute. Unless the mediator is appointed by the court, all of the parties to the dispute must agree on the selection of the mediator. When making this decision, a party should consider the mediator's reputation, level of experience, and potential for bias for or against the party.

C. What Is A Mediation Consultation?

A mediation consultation is defined in the California Evidence Code as a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator. Cal. Evid. Code section 1115(c). Essentially, a mediation consultation includes any communications that a party has with a mediator or a member of the mediator's staff for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator.

D. What Role Does Confidentiality Play In Mediation?

1. The Importance Of Confidentiality To Mediation

Confidentiality is one of the most important features of mediation. It allows parties to negotiate freely with the understanding that their communications during mediation will remain confidential. California Courts have long held that the success of mediation depends on a candid and informal exchange among the parties and the mediator. *See* Cal. Prac. Guide Alt. Disp. Res. Ch. 3-B § 3:94; *see also* *Rojas v. Sup.Ct. (Coffin)*, (2004) 33 Cal. 4th 407, 415; *Simmons v. Ghaderi*, (2008) 44 Cal. 4th 570, 578.

2. The Key California Mediation Confidentiality Statutes

As noted above, the key statutes governing California mediation are set forth in California Evidence Code sections 1115 through 1128. The California statutes specifically relevant to confidentiality are set forth in sections 1119 through 1128. These sections are so important that we have provided the text of these statutes below.

a. Cal. Evid. Code § 1119 – Written Or Oral Communications During Mediation Process; Admissibility

Except as otherwise provided in this chapter:

(a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

b. Cal. Evid. Code § 1120 – Evidence Otherwise Admissible

(a) Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.

(b) This chapter does not limit any of the following:

(1) The admissibility of an agreement to mediate a dispute.

(2) The effect of an agreement not to take a default or an agreement to extend the time within which to act or refrain from acting in a pending civil action.

(3) Disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute.

c. Cal. Evid. Code § 1121 – Mediator's Reports And Findings

Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with Section 1118.

**d. Cal. Evid. Code § 1122 – Communications Or Writings;
Conditions To Admissibility**

(a) A communication or a writing, as defined in Section 250, that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if either of the following conditions is satisfied:

(1) All persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally in accordance with Section 1118, to disclosure of the communication, document, or writing.

(2) The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, or orally in accordance with Section 1118, to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.

(b) For purposes of subdivision (a), if the neutral person who conducts a mediation expressly agrees to disclosure, that agreement also binds any other person described in subdivision (b) of Section 1115.

**e. Cal. Evid. Code § 1123 – Written Settlement Agreements;
Conditions To Admissibility**

A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if the agreement is

signed by the settling parties and any of the following conditions are satisfied:

- (a) The agreement provides that it is admissible or subject to disclosure, or words to that effect.
- (b) The agreement provides that it is enforceable or binding or words to that effect.
- (c) All parties to the agreement expressly agree in writing, or orally in accordance with Section 1118, to its disclosure.
- (d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

f. Cal. Evid. Code § 1124 – Oral Agreements; Conditions To Admissibility

An oral agreement made in the course of, or pursuant to, a mediation is not made inadmissible, or protected from disclosure, by the provisions of this chapter if any of the following conditions are satisfied:

- (a) The agreement is in accordance with Section 1118.
- (b) The agreement is in accordance with subdivisions (a), (b), and (d) of Section 1118, and all parties to the agreement expressly agree, in writing or orally in accordance with Section 1118, to disclosure of the agreement.
- (c) The agreement is in accordance with subdivisions (a), (b), and (d) of Section 1118, and the agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

g. Cal. Evid. Code § 1125 – End Of Mediation; Satisfaction Of Conditions

(a) For purposes of confidentiality under this chapter, a mediation ends when any one of the following conditions is satisfied:

- (1) The parties execute a written settlement agreement that fully resolves the dispute.
- (2) An oral agreement that fully resolves the dispute is reached in accordance with Section 1118.

(3) The mediator provides the mediation participants with a writing signed by the mediator that states that the mediation is terminated, or words to that effect, which shall be consistent with Section 1121.

(4) A party provides the mediator and the other mediation participants with a writing stating that the mediation is terminated, or words to that effect, which shall be consistent with Section 1121. In a mediation involving more than two parties, the mediation may continue as to the remaining parties or be terminated in accordance with this section.

(5) For 10 calendar days, there is no communication between the mediator and any of the parties to the mediation relating to the dispute. The mediator and the parties may shorten or extend this time by agreement.

(b) For purposes of confidentiality under this chapter, if a mediation partially resolves a dispute, mediation ends when either of the following conditions is satisfied:

(1) The parties execute a written settlement agreement that partially resolves the dispute.

(2) An oral agreement that partially resolves the dispute is reached in accordance with Section 1118.

(c) This section does not preclude a party from ending a mediation without reaching an agreement. This section does not otherwise affect the extent to which a party may terminate a mediation.

h. Cal. Evid. Code § 1126 – Protections Before And After Mediation Ends

Anything said, any admission made, or any writing that is inadmissible, protected from disclosure, and confidential under this chapter before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends.

i. Cal. Evid. Code § 1127 – Attorney's Fees And Costs

If a person subpoenas or otherwise seeks to compel a mediator to testify or produce a writing, as defined in Section 250, and the court or other adjudicative body determines that the testimony or writing is inadmissible under this chapter, or protected from

disclosure under this chapter, the court or adjudicative body making the determination shall award reasonable attorney's fees and costs to the mediator against the person seeking the testimony or writing.

j. Cal. Evid. Code § 1128 – Subsequent Trials; References To Mediation

Any reference to a mediation during any subsequent trial is an irregularity in the proceedings of the trial for the purposes of Section 657 of the Code of Civil Procedure. Any reference to a mediation during any other subsequent noncriminal proceeding is grounds for vacating or modifying the decision in that proceeding, in whole or in part, and granting a new or further hearing on all or part of the issues, if the reference materially affected the substantial rights of the party requesting relief.

3. Confidentiality Protection Under California Law

The statutes listed above provide broad confidentiality protection for participants in mediation in California. The California Supreme Court has said that this statutory scheme “unqualifiedly bars disclosure of specified communications and writings associated with a mediation absent an express statutory exception.” *See* Cal. Prac. Guide Alt. Disp. Res. Ch. 3-B § 3:97; *see also* *Rojas v. Sup.Ct. (Coffin)*, (2004) 33 Cal. 4th 407, 416; (emphasis added; internal quotes omitted); *Cassel v. Sup.Ct. (Wasserman, Comden, Casselman & Pearson, L.L.P.)*, (2011) 51 Cal. 4th 113, 117–118, 119.

Additionally, the California Supreme Court and Courts of Appeal have broadly construed the mediation statutes to effectuate the legislative policy of confidentiality. *See* Cal. Prac. Guide Alt. Disp. Res. Ch. 3-B § 3:97.1; *see also* *Simmons v. Ghaderi*, (2008) 44 Cal. 4th 570, 580; *Wimsatt v. Sup.Ct. (Kausch)*, (2007) 152 Cal. 4th 137, 142, 152–156.

Furthermore, the California Supreme Court has stated that “Except in cases of express waiver or where due process is implicated, . . . mediation confidentiality is to be strictly enforced.” When a “due process right is not implicated or where no express waiver of confidentiality exists, judicially crafted exceptions to mediation confidentiality are not appropriate.” *See* Cal. Prac. Guide Alt. Disp. Res. Ch. 3-B § 3:97.1; *see also* *Simmons v. Ghaderi, supra*, 44 Cal. 4th at 582,—“Except in rare circumstances, (these mediation confidentiality provisions) must be strictly applied and do not permit judicially crafted exceptions or limitations, even where competing public policies may be affected” (parentheses added); *See* Cal. Prac. Guide Alt. Disp. Res. Ch. 3-B § 3:97.1; *see also* *Provost v. Regents of Univ. of Calif.*, (2011) 201 Cal. 4th 1289, 1302–1304

4. Using Confidentiality Agreements In Mediation

In addition to the broad mediation confidentiality protection provided in California Evidence Code sections 1115 through 1128, an additional way that participants in mediation can protect the confidentiality of their communications is by using a confidentiality agreement. It is

common practice in California for all parties to a mediation, including their counsel, participating insurance representatives, and the mediator to execute a confidentiality agreement at the beginning of a mediation. *See* Cal. Prac. Guide Alt. Disp. Res. Ch. 3-B § 3:95.

Substantively, a confidentiality agreement used in mediation should provide that:

- All offers, promises, conduct and statements, whether oral or written, by any of the parties or their representatives are confidential if made *in connection with or in the course of* a mediation, or in initiating a mediation or retaining a mediator; *See* Cal. Prac. Guide Alt. Disp. Res. Ch. 3-B § 3:96.
- Such information shall be considered both a “communication within the mediation process” within the meaning of Cal. Evid. Code § 1119, and a “settlement negotiation” within the meaning of Cal. Evid. Code § 1152, and *shall not be admissible or discoverable for any purpose in any arbitration, litigation or other proceeding* between or among the parties; *Id.*
- The mediator is disqualified as a litigation witness for any party to the mediation, and any oral or written opinion expressed by the mediator regarding the subject matter of the dispute is inadmissible for all purposes; *Id.*
- Evidence otherwise admissible or subject to discovery outside of mediation shall *not* become protected by its use in the mediation (*see* Cal. Evid. Code § 1120(a)). *Id.*

See Cal. Prac. Guide Alt. Disp. Res. Ch. 3-B § 3:96.

Please note that you should never sign or allow your client to sign a confidentiality agreement that expands the scope of confidentiality beyond that provided by the California Evidence Code or that seeks to carve out an exception for the enforcement of a settlement agreement. *See* Cal. Prac. Guide Alt. Disp. Res. Ch. 3-B § 3:96.1. If you do, you and/or your client risk being required to disclose confidential mediation communications in an enforcement action. *Id.*

A mediation confidentiality agreement should only restate the controlling principles of confidentiality law as set forth in Cal. Evid. Code section 1115 et seq. *See Estate of Thottam* (2008) 165 Cal. 4th 1331, 1339—party required to testify about otherwise confidential communications because confidentiality agreement required disclosure of mediation confidences “necessary to enforce any agreements resulting from the Meeting.” *See* Cal. Prac. Guide Alt. Disp. Res. Ch. 3-B § 3:96.1.

III. Key Considerations For Effectively Mediating A Case With Insurance Coverage Issues.

As noted above, cases involving insurance coverage issues require special consideration when preparing for mediation. Included below are some important considerations that an attorney should make when preparing a case involving coverage issues for mediation.

A. Notify All Insurers With A Potential Coverage Obligation

One of the first things that an attorney should do when they get involved in a case where one or more insurance carriers has an obligation to defend or indemnify an insured involved in the litigation is to identify and notify all insurers with a potential coverage obligation. Many insurance policies have notice requirements that may be breached if an insured fails to provide timely notice to the insurer. Make sure to provide timely notice to all insurers of their potential coverage obligation as soon as possible.

B. Keep A Chart That Identifies Each Insurer's Time On Risk, Available Policy Limits, And Coverage Position

In complex cases where there are multiple insurers with different times on risk within different layers of coverage, it is helpful to prepare a chart that identifies each insurer's time on risk, available policy limits, coverage position, and the layer of coverage (i.e. primary, excess, etc.). Without a coverage chart, it can be difficult to keep track of all of the applicable insurance policies. Coverage charts are also a useful exhibit to have at a mediation involving multiple insurers. While there are many software options available for preparing coverage charts, Microsoft Visio is one of the most user-friendly programs for creating complex insurance coverage charts.

C. Provide Regular Status Updates To The Insured And The Insurers

Regardless of whether an attorney is representing a policyholder or an insurance company, it is very important to make sure that all insurers—from whom funds may be required to fund a settlement at mediation—receive regular status updates regarding the progress of the underlying litigation and the insurance coverage negotiations. In order for an insurance company to provide settlement authority for mediation, they need sufficient information about the value of the case and their exposure under their policy. Additionally, it takes time for all of the necessary persons within an insurance organization to provide approval for settlement authority. The more information that an insurance company has to evaluate a claim, the better.

D. Prepare An Exposure Analysis

When an attorney is trying to secure a certain level of settlement authority from an insurance company, it is helpful to provide the insurance company with an exposure analysis. An exposure analysis will provide an insurance company with information regarding its time on risk, allocation, indemnity exposure, exposure from other insurers, and potential defense costs. This information will help an insurance company evaluate its coverage position and determine the level of authority that it is willing to provide.

E. Request Settlement Authority Prior To Mediation

To the extent that insurance money is needed to fund a settlement or to make an offer or counteroffer during mediation, it is important to secure settlement authority from all participating insurers prior to the mediation. Additionally, in cases where there are multiple insurers, it is important to make sure that all of the participating insurers agree to a funding allocation prior to

mediation. It will be impossible to have a productive mediation unless all participating insurers have provided sufficient settlement authority and have agreed to a funding allocation prior to the mediation.

F. Make Sure That All Of The Decision Makers Are Available In Person Or By Telephone

In addition to obtaining authority prior to mediation, it is important that all of the decision makers are available in person or by telephone. As noted above, in standard litigation cases, the decision makers would be limited to the parties named in the underlying litigation. However, cases involving insurance coverage issues may require multiple sets of decision makers including the parties to the lawsuit, and their respective primary, excess, umbrella, and additional insurers. It is essential that all of these decision makers participate in person or by telephone during the mediation. Otherwise, a settlement opportunity may be missed because a decision maker is not available to provide final approval or additional settlement authority to resolve a dispute.

G. Prepare A Mediation Notebook That Includes Copies Of Important Documents And Evidence

It is important that you do not show up for a mediation empty handed. Frequently, during mediation, you will argue with opposing parties regarding the strengths and weaknesses of your case. You may also debate the significance of key pieces of evidence and insurance coverage obligations. The best way to prepare for mediation is to prepare a mediation notebook (or several mediation notebooks) containing all of the key documents that you may need to support your position during the mediation. It is recommended that you include copies of your mediation brief, significant pleadings, insurance policies, key cases, and important evidence in your mediation notebook.

H. Develop A Settlement Strategy Within The Limits Of Your Settlement Authority

In addition to the foregoing, it is important to develop a settlement strategy within the limits of your settlement authority. Mediation involves a substantial amount of gamesmanship and psychology. To be successful at mediation, you need to understand the case from your opponent's perspective. All of the participants in a mediation need to feel like they won some type of concession in order for the process to be successful. There needs to be some give and take on both sides.

You should never begin a mediation by giving the opposing party your best offer or counteroffer. Your first offer or counteroffer should be reasonable enough to let the opposing party know that you are serious without giving them everything you have. Thereafter, if both parties are rational and reasonable, negotiations in mediation should resemble a tennis match and each party should change their settlement position incrementally until they reach a happy medium.

Of course, not all settlement negotiations during mediation will play out this way, and not all cases will settle during mediation. Sometimes, a case is simply not ripe for mediation or one or

more parties is not willing to cooperate or negotiate in good faith. In any event, it is very helpful to develop a settlement strategy within the limits of your settlement authority prior to mediation.

IV. Evaluating Whether Your Case Is Ripe For Mediation

In addition to the above-noted steps required to prepare for mediation, it is also important for you to evaluate whether or not your case is ripe for mediation. Included below are some additional factors you should consider when evaluating your case for meditation.

A. Is Your Case Right?

Various factors can indicate whether mediation makes sense for your case. Mediation frequently benefits cases with multiple parties, unrealistic or overly emotional parties, difficult opposing counsel, large dollar amounts and complicated issues—essentially, any case that you’ve tried to resolve informally with opposing counsel, and failed. In coverage cases, the parties may also seek out mediation for the additional protection of confidentiality provisions to limit use of discussions in ongoing or subsequent disputes between the same carrier and policyholder. Depending on your client’s goals, mediation may also be used as an investigation tool, to gain a better understanding of what issues and dollar amounts are really at stake and to provide direction in litigation strategy. A court may also order a case to mediation, or participation in other dispute resolution processes, although typically courts will not do so without the parties’ consent.

B. Is The Timing Right?

To position your case for resolution at mediation, the key is to do everything that can be done before and during mediation to place the parties and decision makers at a point where they would rather compromise their claims (and give more, or take less, than they “know” is right) than spend more money and risk an adverse outcome at trial.

Sometimes it makes sense to mediate early in the litigation process, before either side spends much on discovery, motions or trial preparation. These may be cases involving lower dollar amounts, or where legal, not factual issues predominate, and where emotional issues are not a controlling factor—perhaps where business, not personal interests, are at stake.

On the other hand, counsel and the parties will need to have been given the opportunity and information necessary to be comfortable with their evaluations of the strengths and weaknesses of a case. In the context of insurance or business clients, this includes realistic dollar amounts and facts sufficient to support reporting and settlement authority requests, as well as time to prepare necessary reports and obtain approvals for potential outcomes. Individual parties or those not familiar with litigation may need to have time to understand the process, including the potential emotional costs of litigation and trial. Fact discovery on key issues, such as policy terms and the claims at issue in any underlying action may be essential. For example, in a typical dispute over liability insurance coverage, the parties will want to have the policies, all significant correspondence—including tender and reservation of rights letters, underlying pleadings, discovery, defense reports, settlement demands exchanged or agreements reached, as well as amounts of defense and indemnity costs incurred and paid by either the policyholder or carrier.

Serving discovery, noticing key depositions and teeing up dispositive motions may serve dual purposes of pushing your opponent to mediate, or of clarifying or narrowing the issues remaining in the litigation.

Before going forward, consider whether you've discussed potential outcomes with your client, counsel and others on your "team." Do you have information demonstrating the proper authority to resolve, and have you been able to account for factors that might impact the appropriate settlement range, including the budgeted costs for continuing to litigate? Conversely, have you provided (or will you be able to provide in advance of mediation) the opposing party with the facts and relevant law that will help them assess the case and show up with a similar expectations on the dollar amounts and non-monetary relief required to resolve the matter? To the extent confidential information is an issue, have you proposed (or agreed to) a protective order that will govern the exchange of key information? And, if necessary, have you obtained any permissions necessary from your client to disclose pertinent information?

V. Selecting The Best Mediator For Your Case

As noted above, unless the court appoints the mediator, all of the parties in the lawsuit will need to collectively agree on the selection of the mediator. Typically, each party will submit the names of several mediators for the other side to consider. Using a process of elimination, the parties should eventually find someone that they all can live with.

There are many factors that you should consider when selecting a mediator, and it is important to thoroughly research a potential mediator before making a selection. If the proposed mediator is not someone with whom you are personally familiar, you should conduct research regarding the proposed mediator online and also ask other attorneys about their experiences with that person.

You will also need to decide if you want a retired judge or an attorney working as a professional mediator. Frequently, in complex high exposure cases, insurers will insist on using a retired judge for mediation. Retired judges are often—but not always—more influential when discussing the viability of a party's settlement position.

In a pure insurance coverage litigation or in a case involving complex insurance coverage issues, you may want to select a mediator that has experience with insurance coverage issues—and ideally with the types of policies and underlying claims at issue in your action. Some mediators with insurance coverage experience may specialize in a particular area of insurance coverage litigation, such as environmental or construction defect, and may not be the best choice for unrelated coverage disputes, such as those under professional liability or media and technology policies. If a mediator without significant insurance coverage experience is selected, briefing the insurance coverage issues in an easily understandable manner, may be key to having the mediator give your settlement position the appropriate weight in resolving the case.

VI. Preparing the Mediator

Typically, mediators request briefs from the parties in advance of the mediation. Briefs can be an excellent way of getting the mediator to understand your position. As with any legal

advocacy piece, mediation briefs benefit from clear writing based on solid law and facts. Timely submission is important, particularly where the mediator personally set a submission deadline.

Your case and strategy will further dictate the contents of your brief. For example, your brief could provide a comprehensive background and arguments regarding all issues in the case or only address targeted issues—perhaps the strongest or ripest for resolution. Or, as noted above, if the selected mediator is unfamiliar with coverage issues, it may make sense to include additional detail or background on insurance coverage law and general principles.

In short, what you brief and who your audience is will vary case by case. Sometimes the coverage issues require detailed analysis of policy language and case law, while at other mediations they are more blunt—e.g., who is obligated to pay and what are their limits. The nature of the mediation (for example, whether the mediation is primarily driven by underlying liability claims or, alternatively, solely consists of a coverage dispute) usually plays a big part in an attorney's decision on what sort of mediation statement to prepare.

If the coverage issues in your cases are simplistic, and you are working with a mediator with coverage experience, thorough briefing of the insurance coverage issues may not be necessary. However, if the coverage issues are less common or more nuanced, thorough briefing may be appropriate to demonstrate to both the neutral and your adversary why your arguments are better, why your client should get what they want through settlement negotiations, and why your client will likely prevail in court should mediation fail. Regardless of whether you are dealing with sophisticated or garden-variety coverage issues, remember that the best briefing presents the issues and arguments in simple terms that someone who is not an attorney or an insurance professional would understand and find convincing.

Another strategy decision is whether to share your brief with the other party (or parties). Sharing briefs provides the opportunity for the other side to review and fully absorb your position. Sharing briefs also facilitates the opposing parties' reporting requirements, and increases the likelihood that others will attend the mediation with adequate settlement authority and a realistic understanding of your position. In more complex litigation, sometimes a group decision is made only to exchange briefs between certain parties—such as the insurer defendants, or only with cross-defendants in relation to a specific claim. Furthermore, a policyholder may choose to share their mediation statement, or a side letter, with the mediator only, depending on the circumstances of the dispute and the attorney's personal approach. Often, though, the deciding factor is whether the main dispute is the one underlying the coverage claims or the coverage claims themselves. Where the primary dispute being mediated is an underlying liability claim, it may be undesirable to draw all parties' attention to the coverage issues in play. In such situations, a side letter for the mediator's eyes only can help tee up the coverage issues that will drive the extent to which insurance funds are available to settle the underlying dispute.

Insurers may also choose to keep their briefs confidential to limit further disputes regarding claim handling and settlement of an underlying action. This is particularly relevant where an insurer is invited to the underlying mediation for a claim it is defending under a reservation of rights, or for which it has denied coverage. The carrier may prepare and submit a brief solely to the mediator to emphasize its coverage defenses and what it believes to be the limits of its obligation to contribute to settlement, it may wish to keep the contents of its brief private from its

policyholder and from the underlying plaintiff, leaving it to the mediator to educate both as to what is reasonable to expect from the carrier in this position. Where multiple insurance carriers are involved, each may also choose to submit private statements regarding insurer obligations to fund settlement and any allocation issues. Carriers may also choose to submit confidential statements where multiple insureds are involved in the same litigation to avoid appearing preferential or to preserve confidentiality of the issues pertinent to each insured in the coverage, or any underlying, action.

VII. Pre-Mediation Communications

Typically, mediation is selected where the parties do not believe they can resolve their dispute without the assistance of a neutral party. That does not mean that discussions among counsel should not continue on appropriate issues.

In some circumstances, to facilitate frank settlement discussions, the parties will want to reach an agreement to stipulate to the confidentiality of any discussions outside of the context of formal mediation and to waive rights granted under state law that permits use of in settlement discussions to support the parties' claims. In California, this typically includes an agreement to waive *White v. Western Title Insurance Co.*, 40 Cal. 3d 870 (1985). A White Waiver may be beneficial where an insurer is attempting to resolve a coverage dispute, and does not want its settlement offers to be deemed either a concession of coverage or used as evidence of bad faith in a subsequent lawsuit. The parties may wish to enter into a stipulation that remains in effect prior to and throughout the mediation process.

In a coverage action involving multiple layers of insurance coverage or cross or sub-claims (i.e. mass-tort, construction defect, and environmental claims) the parties generally benefit from understanding where others on the same side stand, and may wish to meet and confer to formulate a joint strategy. If coverage issues are intertwined with an ongoing underlying action, the carrier may also want to meet with defense counsel to discuss resolution strategy and with the policyholder's coverage counsel to address what the policyholder is expecting from the carrier in this regard.

VIII. Communications With The Mediator During The Mediation

Strategic discussions with the mediator are key to ensuring your mediation is effective. In most cases, those discussions should have begun before the day of mediation. In addition to briefing the issues to bring your mediator up to speed, if you have not worked with your mediator before, consider calling them to introduce yourself. Most mediators will appreciate an introduction and hearing your thoughts on the dispute and what you expect from the mediation.

You should carefully consider what you say and do not say to your mediator at the mediation. Be strategic about what you authorize the mediator to disclose to the other side, as well as what you reveal to the mediator themselves. Perhaps the most obvious example is how much money your client is willing to pay or receive to resolve the dispute. But other issues arise that require the coverage attorney to make a judgment call, sometimes on the spot. Though every case is different, it is important to remember that the mediator's primary purpose is to lead the parties to

resolution. What you say to the mediator should provide them with the tools to accomplish that, while protecting your client's interests and goals.

Role playing can be important in mediations. For example, if the mediator comes to you with a proposed term that is unacceptable, consider how you react. Do you calmly and respectfully reject it and propose an alternative term? Or would it be better to project that you are offended by the proposal, stand firm, and reject it without proposing an alternative? Depending on the circumstances, one of those approaches could be more effective in leading you and your client to your goals at mediation. Also, playing off of the other attorneys and decision-makers on your side—whether it be a “good cop, bad cop” dynamic or some other arrangement—can also be a good way to communicate with your mediator. Internal tension, whether genuine or feigned, in your group can persuade the mediator to put additional pressure on the other side to make concessions.

If your client has a breaking point and discussions are approaching that or encroaching on an issue your client considers sacrosanct, let the mediator know. There are times when walking out of a mediation is the right move. But avoid doing that in haste. If the negotiations are focused on something your client feels is non-negotiable, let the mediator know. And if you do threaten to walk out, be prepared to make good on that threat.

At the end of the day, the mediator is your ally in that they are also interested in resolving your matter. But they are also the other side's ally for the same reason. Be sure that your communications with the mediator strike the right balance to maximize opportunities for achieving your client's goals.

IX. Documenting Settlements At Mediation

Memorializing all of the material terms of a settlement reached at mediation in a signed document is important to bind the parties, even though in most cases that document will be superseded by a more formal settlement agreement. It is key so that parties do not backtrack on what they have agreed to, as well as to facilitate halting any underlying litigation efforts. For example, memorializing and signing the settlement at the mediation could include or pave the way for stipulating to continuances of approaching discovery deadlines and/or filing a notice of settlement with the court. By comparison, at a mandatory settlement conference, it would be very important for the parties to place all of the material terms of the settlement on the courts' record with the assistance of a judge and a court reporter.

X. Documenting Settlements After Mediation

Once your settlement has been memorialized at mediation, the next step—in most cases—is to replace that informal document with a more comprehensive settlement agreement. This might flesh out broad-brush terms and/or add new terms to the settlement that were skipped or overlooked at mediation. Usually, the post-mediation settlement agreement will be the parties' final settlement agreement, and, as such, requires thoughtful crafting. If your client has priorities beyond the core settlement terms, such as confidentiality or governing law, make sure those terms are included in the final settlement agreement.

XI. Conclusion

We are hopeful that the foregoing information will help you prepare your coverage case for resolution.

About The Authors

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