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Fundamentals of Mediating Insurance Coverage and Bad Faith Claims

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There is a time and place for everything—including a time to mediate an insurance coverage or bad faith claim. In order to achieve the best outcome, counsel for policyholders and insurance carriers need to effectively prepare, timely schedule and persuasively advocate their positions.

Who will you choose to mediate the dispute?

Although several factors might influence your selection of a mediator, the first option might be to let the other side choose. Presumably, they are proposing a mediator that they trust—whether because of past experience or others' recommendations. Either way, their proposed mediator begins the process with credibility in the other room.

But regardless of the selection process, you should always investigate and consider the importance of any proposed mediator's (1) experience with the subject matter, (2) experience in resolving litigation or pre-litigation disputes and (3) reputation for persistence.

Counsel and their clients tend to identify subject matter expertise as the most important criteria when selecting a mediator. For insurance coverage and/or bad faith claims, that certainly includes coverage experience generally, whether from the policyholder's or insurance carrier's perspective, and could include the type of coverage (e.g., first-party versus third-party claims) and whether the policy is commercial, consumer or personal; and it may even be policy specific (e.g., general liability, directors and officers, errors and omissions, employment practices). In a complex case involving multiple insurance carriers, look for a mediator with experience in similar situations. Although a mediator's professional bio should provide most of the information you need, conduct due diligence on the mediator. You can even call the mediator if you have any questions about whether your case is one with which they have direct or related experience.

"For everything there is a season, and a time for every matter under heaven."

Perhaps more importantly, you should insist upon a mediator who has experience resolving disputes, regardless of subject matter, and a reputation for persistence. As you conduct your due diligence, ask other advocates whether they came prepared, understood the case, listened to the litigants, communicated material information, asked perceptive questions and equitably guided the process to a close—whether during an initial mediation session, while following up with the parties when a settlement is not reached or when scheduling another mediation session.

What information do you need to resolve the dispute?

Coverage issues begin with the policy itself. There is no substitute for methodically reading the policy. The declarations page confirms the kinds of coverage that were sold, the limits of that coverage and the policy period. The insuring agreement will tell you what the insurer has promised (e.g., indemnity, defense). The definitions will necessarily clarify what is covered (e.g., claim, loss). Exclusions may eliminate coverage, and endorsements may replace policy provisions.

Of course, certain aspects of any insurance claim are affected by the policyholder's notice to the insurer of a claim or loss. Policy language generally mandates notice, and state law addresses the consequences of a failure to promptly provide notice (or, in the case of an excess insurer, when a claim seems reasonably likely to implicate the excess coverage).

Beyond notice, some of the most important information in resolving a coverage claim is the evidence of loss. Under a first-party policy, the evidence might document the damage or destruction of property, or the revenue and profit losses associated with an interruption in business operations. Under a third-party policy, the evidence might document the facts concerning a customer's injury, an employee's termination or the policyholder's use of a trademark that a third party claims to own. Both the policyholder and the insurance carrier have incentives to investigate a claim, which includes collection and preservation of evidence of loss.

When is the right time to mediate?

Mediation should take place only when both sides have sufficient information to meaningfully assess risk and to understand the range of outcomes at trial. Depending on the case, and in light of the information that will be exchanged during the mediation process, that could occur before a single motion is made or interrogatory propounded. Or it may require that certain depositions or statements under oath be completed. And regardless of when the mediation is scheduled, an experienced mediator can help the parties assess risk, litigation outcome and settlement value.

Schedule pre-session activities

Whether suggested by the mediator or at the parties' request, participating in a pre-session video meeting or teleconference with the mediator can be effective, allowing you to confirm logistics, including the mediator's expectations; communicate information about the claims or defenses, which can both clarify parties' positions and begin to frame the mediation; and propose a process, or variations to a process, to increase efficiency (such as exchanged briefs, an in-person mediation, an initial joint session).

In addition to engaging the mediator before briefs are submitted, you should consider whether to conduct a risk assessment or exposure analysis. And on the insurance carrier side, you should obtain settlement authority consistent with your assessment.

If you learn new information from the policyholder's mediation brief, you should consider whether you have the authority to resolve the case.

Persuasively advocate the claims and defenses

Once you have written a good brief and supported it with evidence, the most persuasive thing you can do is to share it with the other side. Although there might be rare exceptions, consider your audience. Are you trying to educate and persuade the mediator? Yes, to some degree, but the other side may be the more important audience. Simply, if you are the policyholder alleging coverage and/or bad faith but refuse to share your analysis, it is likely to spawn a counterproductive reaction in the other room. Instead, a well-reasoned analysis, rooted in policy language and supported by evidence, will allow the insurance carrier and its counsel to consider in advance the merit of your claims. (Of course, exchanged briefs do not preclude parties from submitting information ex parte, appropriately designated for the mediator's eyes only.)

Further, consider the dynamic that takes place where parties choose not to share their briefs. If the mediation takes place after important fact discovery or motion practice has taken place (or still is pending), the parties may start the mediation with a clear understanding of the other side's position. But where you mediate earlier in the case, an unwillingness to exchange briefs requires the mediator to spend a good portion of a mediation session explaining the other side's advocacy. Imagine how your client might feel if their first exposure to the neutral mediator is the mediator's explanation of the other side's position.

So, what does a persuasive brief look like? First, if you've selected an experienced mediator, you do not need to write a treatise on principles of policy interpretation, reasonable expectations, or narrow constructions and burdens of proof. A mediator familiar with coverage issues knows the standards. *E.g., MacKinnon v. Truck Ins. Exchange*, 31 Cal.4th 635. 647-649 (2003); *Truck Ins. Exchange v. Kaiser Cement & Gypsum Corp.*, 16 Cal.5th 67, 84 (2024). Instead, include a discussion of legal standards, together with an analysis of published opinions, only where they might be dispositive in the context of the dispute.

Second, be clear. If the policy provides coverage, quote and explain how the language of insuring agreement, the policy's defined terms and its other provisions lead to a conclusion of coverage. If you have a bad faith claim, spell out the claims adjuster's communications or conduct and how they run afoul of the implied covenant of good faith and fair dealing. And whether the policyholder seeks coverage or extra-contractual, bad faith damages, detail the losses for which you expect compensation and support them with evidence.

Third, provide relevant exhibits. For instance, if photographs are available, as they say, a picture is worth a thousand words. If communications have importance, don't characterize or summarize them; attach the email chain(s). And if there is a dispute about whether someone is an insured, provide the document(s) that establishes them as such.

Fourth, and finally, tell your client's story. Giving the mediator a modified summary judgment motion is far less impactful than a thoughtful "trial" brief that highlights the facts and the way they support your theme(s) of the case. Whether you will tell the fact finder about a promise made and broken, an inattentive or sloppy claims adjuster or the importance of contracts that mean what they say, give the mediator something to work with when discussing how a fact finder might respond to the case if does not settle.

Philip E. Cook, Esq., is a JAMS neutral with decades of experience as a trial lawyer and mediator. With over 30 years of experience handling insurance coverage matters, he brings deep insight into the complexities of coverage disputes. In 2015, he founded Cook Mediation to focus on resolving litigated disputes. Since 2004, he has served as a court-appointed settlement officer, mediator, and early neutral evaluator for various courts, including the California Court of Appeal, the Los Angeles County Superior Court, and the U.S. District Court for the Central District of California.