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Maximizing success in media liability mediations

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Lawsuits have been a prominent part of our media landscape in recent years —-- from Miramax's 2021 IP lawsuit against Quentin Tarantino (relating to his non-fungible token (NFT) with content from the handwritten version of "Pulp Fiction's" script)[1] to Dominion's defamation lawsuit against Fox News (relating to talk shows allegedly promulgating the false "election fraud" narrative).[2]

Often, media liability claims are settled. Both *Miramax v. Tarantino* and *Dominion v. Fox* ended in settlement. It was less than a year before the *Miramax v. Tarantino* parties issued a joint statement saying that they "look forward to future collaborations, including possible NFT projects."[3] Especially in the entertainment world, where parties may be "repeat players" who work together on multiple projects, settlement may come especially early. The *Dominion v. Fox* case, on the other hand, took longer to settle and lots of dirty laundry was aired along the way.[4]

You need not abandon your advocacy skills completely. However, assuming your client wants to settle, your negotiation skills should be at the fore.

When claims like these arise, defendants typically turn to their media liability insurance (potentially a stand-alone policy or part of cyber insurance coverage), which is specifically tailored to respond to such claims. Media liability insurers and their insureds typically work hand-in-hand in connection with defense and, ultimately, resolution of the underlying claims.

Furthermore, given the limited number of insurers writing media liability coverage, both insurer and insured often have an interest in preserving the relationship. Thus, insurance coverage disputes arising out of these cases are also fairly likely to settle.

So, what can the parties do to maximize the potential for success in media liability mediations?

Consider early mediation. Ideally, the parties will consider mediation before a lawsuit has been filed. As alluded to above, media liability parties and insurers inhabit a small world. Avoiding the acrimony of litigation can preserve good working relationships and ongoing business. It can also avert the public attention that inevitably arises from high-profile lawsuits.

Assess whether full-blown discovery is needed. A sufficient information exchange is essential to the success of early mediation. Thus, whether the parties can trust each other to exchange key documents and information must be considered when assessing the potential for early mediation.

Choose a mediator who is a good fit. Media liability insurance is, in some ways, similar to other errors and omissions coverage. However, it also has unique and special features designed for publishers and providers of media and entertainment content. A mediator who has experience with media liability claims and insurance may be especially helpful.

Consider the mediator's style and character. Are they likely to mesh well with the personalities involved? We live in a polarized world, and it is easier than ever for parties to become entrenched in their positions. Does the case involve a client or lawyer who is reticent to hear anything but positive evaluations of their case? The mediator may need to be especially adept at delivering a fresh perspective without alienating the recipient.

In this same vein, consider whether the matter calls for an especially empathic listener. This may be especially important if the mediation must resolve both the underlying dispute and significant coverage issues. Many underlying media liability cases involve significant personal feelings that are as important as (or even more important than) the economics. Emotions can run exceptionally high, for example, when a celebrity believes their carefully curated image has been misappropriated or misused in a manner that casts them in a false or negative light. If the mediator is not adroit at navigating the emotions in such a mediation, no matter how much expertise the mediator has, resolving the matter will be challenging.

Put on your negotiator hat when preparing for the mediation. The skills required to mediate a case successfully are different from those required to succeed in an adversarial court proceeding. You need not abandon your advocacy skills completely. However, assuming your client wants to settle, your negotiation skills should be at the fore.

Prepare the client for the mediation. Continuing to litigate is often the best alternative to settling. Before the mediation, take a dispassionate look at what is reasonably likely to happen if the case proceeds in litigation. What will the likely costs be of various motions and, if it gets there, trial? And, potentially, appeal? What is the best-case scenario for your client? How likely is that scenario? Make the same assessment of your client's worst-case scenario.

Ideally, both lawyer and client will have this balanced analysis in mind before and during the mediation session.

Spend enough pre-session time with your client to develop clear and reasonable objectives for the mediation. Explain that mediation almost certainly will not result in the best-case scenario at trial for your client — or the other side. Share the potential advantages of resolving the case early, without a clear winner or loser.

In addition to saving the (often massive) cost of litigation, these advantages include the ability to craft a result that both parties agree to (rather than ceding determination of the outcome of their dispute to a third party), being freed to focus on important business/profession/life goals (instead of spending time and energy preparing for and participating in discovery and court proceedings) and obtaining finality regarding the result of their dispute (as opposed to continuing with the uncertain result of litigation down the road). Putting the case to bed may also be preferable to having to list the litigation as a potential liability in shareholder reports or carrying the matter as an open claim.

Prepare the client for the dance of mediation — that is, the reciprocal movements that may need to be taken, step by step, to reach settlement. Resolution of a complex case with multiple issues, large dollar amounts and high emotions may not happen in a few hours (or even in a single session). The slow pace of the process can try anyone's patience. However, the incremental nature of negotiations allows each side to digest new information so they can adjust their thinking about the case.

Draft a compelling (but not over the top) mediation brief and exchange it with the other side well before the session. This is the perfect outlet for adversarial advocacy skills in a mediation. Alert the mediator to the key legal issues in the case. And educate the other side about your client's key arguments and how convincing those arguments may be in court.

Generally, the benefit of "saving" the best arguments to "surprise" the other side later is overrated in comparison to the opportunity to educate the other side in advance of the mediation, with time to consider fully the arguments they will be up against in continued litigation. Matters that a party genuinely wishes to keep confidential should be submitted to the mediator in a separate "For the Mediator's Eyes Only" communication.

Share the policy with the mediator. Media liability policies are less standardized than many other types of insurance. The mediator should know the precise policy language at issue and understand each side's perspective on why the matter does or does not fall within coverage.

Optimize pre-session mediation calls. As in most mediations, pre-session calls are a must in media liability insurance mediations. If key concerns and issues can be addressed and discussed during the pre-session call, the stage will be set for a more productive session. You can also build trust and rapport with the mediator.

Allow the mediator to ask any questions that may have arisen while reviewing the briefs. Also, be sure the mediator has grasped essential information needed to facilitate settlement during the session. Unlike the lawyers and parties, the mediator has not been living with this case for months or years. Even if it seems obvious, don't assume the mediator knows what you know.

Inform the mediator about key facts and circumstances that could impact the mediation's success, including ego issues or other potential barriers to settlement. If you believe the client will be more likely to accept a balanced perspective from the mediator, let the mediator know this as well. Additionally, let the mediator know of any preferences regarding the structure of the session. If there are any heightened privacy or security concerns because of your client's celebrity, alert both the mediator and the case manager before the day of the session so steps may be taken to ensure appropriate discretion.

Stay creative and flexible during the session. Even if you have mapped the process in detail while preparing for the mediation, expect the unexpected on the session day. Lawyers, parties and the mediator all need to keep an open mind as the process unfolds. Changed circumstances may call for altering the architecture of the session.

Spend enough pre-session time with your client to develop clear and reasonable objectives for the mediation. Explain that mediation almost certainly will not result in the best-case scenario at trial for your client — or the other side.

For example, a joint session that was inadvisable at the beginning of the day may make sense as the session proceeds. The mediator should seek the parties' input when their assessment of what is needed changes. However, changes will seem less jarring if everyone understands going in that the session plan is not set in stone.

As alluded to earlier, a healthy dose of patience will likely be called for in a media liability mediation. As noted above, the pace may seem glacial. Additionally, the mediator's absence may seem like neglect. However, although mediators try to give each party equal time, sometimes one side or the other may need a bit more attention — perhaps to vent or to discuss offers/demands and counters.

If there are any questions or concerns about the mediator's process, raise them with the mediator as candidly and quickly as possible. Similarly, if the mediator seems to be unaware of a substantive consideration, discuss this with the mediator right away. Open lines of communication allow the mediator to adjust course as needed during the mediation session.

Last, but certainly not least, if settlement is reached, do not leave without memorializing it in a term sheet. This document need not contain all the boilerplate language of a full settlement agreement.

However, it should contain at least a brief statement of monetary and other key terms such as waivers of liability and, if desired, confidentiality. The term sheet will obviously be subject to more formal documentation.

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Enhance the possibility of post-session settlement. Even with everyone's best efforts at the mediation session, sometimes a case is not yet ready for settlement. In these circumstances, the mediator's follow-up can make a difference. Keep the mediator informed as the case progresses and further opportunities to settle arise.

Remain open to the possibility of scheduling another session if the landscape of the case shifts significantly. For example, a party or insurer whose number seems set in stone may adjust its position after a court ruling or altered business circumstances. A merger may lead to a new management team that has different priorities and wants to get the case resolved expeditiously. Remain open to the potential that a settlement that once seemed out of reach may later be possible.

To recap, you can maximize the potential for success in your media liability mediation. Invest the pre-session time necessary to prepare yourself, your client and the mediator for the session. Remain patient, flexible and creative as the session day progresses. If the case does not resolve, continue to look for settlement opportunities post-session and share them with the mediator.

Notes

[1] https://bit.ly/3OJaF29

[2] https://bit.ly/43e0F5b

[3] Jack Queen, "Tarantino, Miramax settle copyright suit over 'Pulp Fiction' NFTs," Reuters, Sept. 9, 2022.

[4] https://bit.ly/3oyVfmz

About the author

Cassandra S. Franklin is a **JAMS** mediator and arbitrator with experience on both the carrier and policyholder sides of complex insurance coverage disputes. She has dealt with a range of insurance issues in diverse lines of business, including the special insurance products applicable to media and entertainment publications, productions and events. She has also written and spoken extensively on both insurance coverage and ADR. She is based in Los Angeles and can be reached at Cfranklin@jamsadr.com.

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