Concerning Coverage

By Jeffrey S. Bolender

Meeting the Challenges of Raising Insurance at Mediation

Mediation is a key opportunity for an insurance carrier to resolve a lawsuit against its policyholder. But where the carrier is defending its policyholder under a reservation of rights, mediation often presents significant challenges. For example, if the carrier wishes to raise coverage issues at mediation, it will often meet stiff resistance from the various mediation participants, including the mediator, because the carrier's position threatens an important source for building a settlement pool.

Despite such challenges, carriers can successfully raise coverage issues at mediation without disrupting the mediation process. Understanding the various steps an insurance carrier can take in preparing for mediation, presenting coverage issues at the mediation, and concluding the mediation will maximize the likelihood that the carrier's position on coverage will receive due consideration.

Preparation for Mediation

Settlement Value

Success at mediation is largely a function of adequate preparation. For an insurer's in-house counsel, ascertaining the lawsuit's settlement value is the most important step in preparing for mediation. This involves quantifying the likelihood that the policyholder will be found liable for the plaintiff's claim and, if found liable, the range of likely damages that may result should the lawsuit proceed to trial. Factors to consider include the quality and extent of evidence obtained during discovery proceedings; the venue and likely jury pool; the reputation of the plaintiff's lawyers; the reputation of the presiding judge; the skill of the insurer-appointed defense counsel; and other intangibles that are unique to the particular lawsuit, litigants, venue, etc.

An insurer's in-house counsel also must consider other costs to ascertain a lawsuit's settlement value. The costs of defending the policyholder through trial, as well as a possible appeal, are always key components in estimating settlement value.

Additionally, if the lawsuit does not settle, in-house counsel may decide to retain coverage counsel to initiate a separate lawsuit to litigate insurance coverage disputes. The fees and expenses related to insurance litigation may exceed the carrier's cost of defending the policyholder. Moreover, a lawsuit by the carrier often prompts a counterclaim by the policyholder, thereby raising the specter of extra-contractual liability and the added expense of "bad faith" related discovery proceedings. These costs should also be considered by in-house counsel in evaluating the settlement value of the lawsuit even if significant disputes exist concerning insurance coverage.

Preserved Rights

Another key step in preparing for mediation is confirming that the carrier possesses the right to contest coverage at mediation. In most states, a carrier cannot deny coverage at the time of settlement unless it has adequately reserved its right to do so. Thus, in agreeing to defend a policyholder, carriers often reserve their rights in writing—commonly referred to as reservation-of-rights letter. This document quotes relevant policy provisions as well as the reasons why coverage may be denied down the road.

Accordingly, in preparing for mediation, a carrier (and its in-house counsel) should confirm that it timely issued an adequate reservation-of-rights letter, and that the policyholder received the letter. Additionally, carriers may wish to consider whether they should supplement their original reservation-of-rights letter in light of subsequent developments, such as evidence revealed during discovery proceedings.

Reimbursement Rights

In some states, such as California, a liability carrier may possess the right to seek reimbursement for payments made in defense and indemnification of the policyholder. Such rights must be adequately reserved by the carrier; therefore, if the carrier seeks to raise such issues during mediation, it is important that the carrier have reserved that right, and that it secures the attendance of the policyholder at mediation.

Under such circumstances, and depending upon the state law at issue, carriers may have the ability during the confidential mediation process to negotiate the release of their reimbursement rights in exchange for a settlement contribution from the policyholder's own funds.

Other Insurance

In many instances, identifying other potential sources of settlement funds, especially other insurance carriers, is the most important step a carrier will take to minimize its overall exposure. In preparing for mediation, each carrier should consider whether other carriers on the risk should pay the entire settlement, or should pay a greater proportionate share.

Under the laws of most states, equitable principles govern the method of allocation as between multiple insurance carriers on

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the same risk. Multiple methods of allocation exist, and determining the most appropriate method is a function of various factors—particularly the competing "other insurance" clauses in the policies of each carrier on the risk.

Consequently, it is often in a carrier's best interest to obtain information about other insurance before the mediation. Ideally, such information would include a copy of each carrier's policy and any reservation-of-rights letters. Based on this information, as well as other pertinent circumstances, the carrier will be prepared to urge at mediation the most advantageous method of allocation (*e.g.*, time on risk, equal shares).

Personal Attendance

Difficult lawsuits rarely settle when key decision-makers do not personally appear at mediation. Ample evidence exists that a litigant, carrier, or other interested party is much more likely to compromise an entrenched position when required to meet the mediator face to face.

But many interested parties will seek to avoid a personal appearance. And unless measures are taken to secure their attendance, it may be impossible to reach a resolution or global settlement. In order to confirm that all key decision-makers attend, carriers may need to enlist the assistance of their appointed defense counsel (or coverage counsel if retained) to confer with the mediator, or pursue other measures to pressure reluctant parties to attend.

Mediation Brief

If permitted by pertinent rules or local customs, submitting a confidential mediation statement outlining coverage issues may benefit the carrier in several respects.

First, a concise, well-written explanation of the coverage issues will educate the mediator before the mediation. Many coverage issues are complex and difficult to understand, especially issues concerning contract interpretation. A mediator often looks unfavorably upon a carrier whose representative (or coverage counsel) attends the mediation and advances an unexpected, complex coverage argument. By explaining the coverage issues beforehand, the mediator will begin the mediation session already knowing the nature of the carrier's position.

Second, a formal written statement concerning coverage issues ideally should demonstrate that the carrier is serious about its position, and that a settlement may be in jeopardy if its position is not given due consideration. It is not uncommon for a carrier, or its coverage counsel, to simply appear at mediation and present coverage arguments orally. Often, however, mediators may not take such arguments seriously, viewing them as a transparent attempt to leverage a lower settlement. In contrast, a written statement—concisely explaining the key facts, policy language, and supporting case law—can convey that settlement will not be achieved, and coverage litigation may ensue, unless the carrier's position is addressed.

Third, a written explanation of coverage is often an essential predicate to orally discussing the issue at mediation. Coverage issues can often be perceived as complex, abstract, and dry. Consequently, carriers bear a heavy burden: presenting complex legal issues to an audience that is looking for settlement funds, not arcane arguments that jeopardize settlement.

Illustrative Material

In some situations, the nature and complexity of the coverage issues may warrant the use of graphics to portray the issue concisely or persuasively. Perhaps the most obvious example is an insurance matrix or chart. Such material can be crafted to provide a quick-glance overview of multiple policies, carriers, limits of insurance, and excess layers of coverage.

Use of graphics may also be warranted where the claim involves multiple years, claimants, defendants, items of loss, or coverage issues. A good example is a lawsuit where multiple residential tenants sue one or more landlords of their multiple unit residences alleging numerous, discrete claims sustained over a period of several years. Such cases often implicate many items of loss, some of which may not be within the scope of insurance coverage.

Employing graphics in this complex situation may assist the mediator in understanding which defendant and carrier must respond to each particular claim; which particular items of loss are within the scope of exclusions; and which carrier and policy period applies as to each particular covered item of loss.

Mediation Presentation

To maximize the persuasiveness of presenting coverage issues at mediation, it is important for the carrier representative to understand the source and scope of the rules of confidentiality; to make early contact with the mediator; and to calibrate the presentation of its coverage arguments based upon the particular roles of the various mediation participants.

Confidentiality

Perhaps the key benefit of mediation is confidentiality, and this is especially true for insurance carriers. Insurance carriers, including their representatives and coverage counsel, should usually confirm at the outset the nature, scope, and duration of all applicable rules of confidentiality and privilege.

Ordinarily, insurance carriers and their coverage counsel must exercise caution in communicating about coverage issues. This is because, if a coverage dispute goes to litigation, a carrier's communications may be discoverable. For example, if the carrier demands or invites the policyholder to contribute it owns funds to the settlement, the policyholder may later argue that the carrier's unprivileged communications reflect an improper attempt to coerce the policyholder. At mediation, however, the carrier enjoys greater freedom to discuss coverage issues with its policyholder, as well as others, without the fear that such communications will subsequently be offered as evidence of "bad faith."

Although most participants understand that mediation proceedings are confidential, they often do not fully understand the actual source, scope, and duration of that confidentiality. State and federal statutes set forth basic evidentiary rules that govern settlement-related communications. In some states, specific rules exist to protect mediation-related communications. Some courts have local rules that mirror or supplement state and federal statutes. In addition, many mediation services employ their own rules of confidentiality in the form of pre-printed confidentiality agreements.

In any event, the carrier should clarify at the outset the applicable privileges, rules,

and confidentiality agreements, if any, under which the mediation is governed.

Early Contact with Mediator

It is usually beneficial for carriers and their in-house or outside counsel to make early contact with the mediator. Mediators typically try to speak with everyone in attendance. But the flow of events, as well as unexpected distractions, may prevent the mediator from meeting with carrier representatives until late in the day. If significant coverage issues exist, the carrier may not have a sufficient time to discuss those issues with the mediator.

Consequently, carriers and their counsel should avoid passively waiting their turn. Carrier representatives may wish to arrive early and greet the mediator while other participants are still arriving. This is an ideal time to briefly pull the mediator aside and request an early meeting. If the carrier has submitted a mediation statement, the mediator will often recognize the carrier representative as a key player, not just another face in the crowd.

Target Audiences

Each participant at mediation—mediator, counsel, litigants, carrier representatives—has a different interest in and perspective of the proceedings. Presenting coverage arguments at mediation, like any communication, should be done in light of the context of the surroundings, as well as the particular sensitivities of the intended audience.

The mediator, for example, must understand the substance and strength of the coverage defenses, as well as the extent to which the carrier is committed to enforcing contractual limitations on coverage. If the mediator does not believe the coverage defense is strong, or thinks that the carrier has neglected to properly preserve its right to contest coverage, the carrier may be viewed as unreasonably impeding settlement. It is usually preferable that the mediator perceive the coverage dispute as a legitimate issue that must be addressed in order to reach a reasonable settlement.

A strong coverage position can dramatically affect how plaintiffs and their attorneys view the settlement value of the liability claims. If they perceive the carrier's coverage position as strong, they may be reluctant to take the lawsuit against the policyholder to trial, because they will not have a guaranteed source of recovery. If they perceive the coverage position as weak, they may be motivated to collude with the policyholder and "set the carrier up."

Moreover, in some states, plaintiffs may not be entitled to know the specifics of the coverage dispute, especially if the nature of the dispute could somehow bolster the plaintiffs' claims (*e.g.*, the policyholder lied in its insurance application). In any event, carriers and their representatives should exercise utmost tact and diplomacy in dealing with plaintiffs and their attorneys. It is desirable to avoid creating the perception that deep divisions exist between the carrier and its policyholder.

Policyholders often react negatively to attempts by their carriers to raise coverage issues at mediation. In most instances, they want the lawsuit to go away without any personal exposure. They may view coverage issues as a distraction from valuable time needed to bridge the gap between the positions of the actual litigants. No one rule applies in all cases. Ideally, the carrier's presentation of coverage arguments will demonstrate to the policyholder (and to the mediator) that the carrier is merely leveraging its reserved coverage rights to achieve a reasonable settlement within policy limits.

In discussing coverage issues with other insurers, the carrier seeking to present coverage arguments must be careful not to be contradictory. Specifically, carriers must often advance arguments about the lack of insurance coverage to the mediator and plaintiffs. In discussing coverage issues with other insurers, however, the carrier may need to advance arguments demonstrating that the claim implicates coverage under those other insurance policies. The risk is that unless the carrier representative or its coverage counsel is careful, he or she may be viewed as advancing contradictory arguments depending on the audience.

In discussing coverage issues with other insurers, a carrier's presentation of coverage arguments should, if possible, focus upon the uncertainty of successfully asserting coverage defenses, as well as the continuing cost of defending the common policyholder. And if the carrier is seeking a particular method of allocation, it should be prepared to discuss those facts demonstrating its preferred method of allocation.

Conclusion

Many times the parties negotiate until the final minutes of mediation at which time there is a significant development, including the final demand or offer that bridges the gap between the parties. Often, however, no time is left to memorialize the agreements reached during the mediation, because the mediation facilities are no longer available or the participants must leave to catch a plane. And where no resolution has been reached, but progress has been made, there is often insufficient time to arrange for subsequent mediation sessions or informal negotiations.

Accordingly, carrier representatives and their coverage counsel should be prepared to conclude the mediation in the proper fashion. If a partial or global settlement has been achieved, the best practice is to get written commitments from everyone before they leave, even if a more detailed settlement document must be subsequently prepared. If the carrier has also resolved a coverage dispute with its policyholder, the carrier or its counsel should be prepared to memorialize that agreement as well.

In some instances, the parties do not achieve a settlement by the end of the day, but they have made progress. In order to keep the momentum going and preserve the progress that has been made, the carrier should be prepared to propose measures to continue the negotiations. This may involve setting up another mediation. If another mediation session cannot be easily arranged, the carrier may wish to propose that the mediator continue to act as a conduit between the parties.

Mediation participants rarely welcome arguments by insurance carriers that the liability claim is not within the scope of coverage. And there will always be instances where the liability claim cannot be settled due to the carrier's position concerning coverage. In many instances, however, the coverage position can be effectively used, within the confidential process of mediation, to achieve a reasonable resolution without unduly disrupting the mediation process.