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Practical Tips for Mediating Insurance Cases

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Summary

- Pre-mediation conferences are essential in coverage disputes to understand the dynamics between the parties and ensure all necessary parties participate.
- Memorializing the material terms of the settlement before leaving the mediation reduces the risk of future disputes.
- Mediators can assist the parties in evaluating litigation risks by understanding insurance law, providing insights from other jurisdictions, and reframing issues.
- Strategies like “most favored nation” agreements, blind mediation, and “coverage in place” arrangements can encourage settlements among multiple parties.

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Most experienced mediators are comfortable working with a variety of subject matters. After all, the techniques used to assist parties in assuming control of their destinies and assessing risks and alternatives are universal. Quality mediators are able to help parties assess factors that impact litigation risks in all kinds of cases, such as procedural posture, venue, and the judge. Mediators are trained to help reduce tensions and help focus the parties more on their overall interests and less on their litigation positions. Mediators develop trust by demonstrating neutrality, integrity, and empathy. Recognizing that parties want to be heard, good mediators listen while gently encouraging parties to consider their options.

Yet, when mediators are vetted, one of the first questions asked is, “Do you have experience with this subject matter?” And while mediators might argue that a lack of experience in a case’s subject matter should not be disqualifying, the question is understandable. Attorneys practicing in a complex field know that legal arguments can be nuanced and do not want to waste time educating a neophyte. Attorneys might want to use a mediator as a sounding board to test novel theories in a confidential and relatively less risky setting. That is one way they feel heard. A good mediator knows that if an attorney or client believes that the mediator has heard and understands their legal arguments, it will assist the parties in assessing risks and evaluating options.

This article discusses some common issues that arise during insurance coverage mediations and provides practical tips for mediators and attorneys. Every case is different and unique, but the language used to discuss the issues is often the same. For that reason, a mediator well-versed in insurance parlance is quickly able to earn the parties' trust and explore options for effectively resolving their disputes.

Pre-Mediation Calls and Getting Everyone to the Party

Large dollar coverage disputes often involve multiple parties. A seemingly simple and often overlooked issue is determining whether all the necessary parties will attend the mediation. Some long-tail exposures, like asbestos and environmental claims, span decades and implicate numerous insurers and policies. Large dollar first-party cases often involve towers of coverage with multiple carriers that subscribed to different layers.

Numerous parties create logistical issues for judges and mediators. With the advent of virtual hearings and depositions, it is exceedingly rare that all of the parties will meet in person, let alone discuss settlement and mediation. Moreover, because it takes effort to organize potential settlement discussions, lawyers trying to save their client money may sit back and hope others do the legwork to arrange a mediation. Typically, one party will take the laboring oar and initiate discussions about mediation. That party will usually contact the mediator and obtain the consent of the other parties to go forward.

Pre-mediation conferences are important for all mediations but are particularly crucial for coverage actions. During those conferences, the mediator can begin to understand the dynamics between the parties. Even more fundamentally, the mediator can assess whether all the necessary parties will be at the bargaining table. For example, in large construction disputes, it is often helpful for a mediator to suggest reaching out to additional subcontractors and insurers to assist the parties in reaching a comprehensive global deal. It is not uncommon to hear about other potential parties while discussing the case during pre-mediation conferences. If a party refuses to participate, it is important to explore whether the other parties are contemplating additional legal action and how that impacts the releases and other key settlement terms that will be negotiated by the participating parties.

The Settlement Agreement

A primary goal of a settlement is to replace uncertainty of litigation with finality. In a perfect world, not only do the parties reach an agreement at mediation, but they also sign a mediated settlement agreement before they leave. Failing to do so can lead to drafting disputes down the road, particularly where there is a chance one of the parties has second thoughts. As some commentators have noted, context matters when determining whether it is necessary to execute a settlement agreement at the mediation. [1] When I mediate pro bono matters with unrepresented parties through the Central Texas Dispute Resolution Center, we typically do not conclude the mediation until there is a signed settlement agreement. Unrepresented parties are less likely to quickly memorialize an agreement-in-principle, and the longer the parties wait to finalize an agreement, the more likely it never happens.

That is less of a risk in insurance coverage disputes involving skilled and motivated attorneys. Most insurers have a standard, management-approved form of agreement and a strong preference not to deviate from that form. Moreover, even when an insurer sends a representative with settlement authority to a mediation, company procedures often mandate that a different person (who is not at the mediation) actually executes the final agreement.

This does not mean the parties should leave mediation without anything in writing. At a minimum, the mediator should prepare an email memorializing the material terms of the settlement, outline the understanding of how the agreement will be formalized (i.e., which party has agreed to circulate a formal agreement and when), and ask the attorneys to confirm their client's agreement that the key terms have been summarized accurately while the parties are still at the mediation. This is important. Mediation is about the self-determination of the parties. If a mediator memorializes an agreement in a term sheet or email, it should be clear that the parties have an agreement on the material terms.

Practical tip for mediators. Almost every mediation has its ebbs and flows. If the parties are getting bogged down in agreeing on a "number," it sometimes helps to pivot and focus on material terms to a potential settlement agreement. This subconsciously inserts some optimism into the exercise and ensures that the parties fully understand what they are negotiating. If the parties realize that they agree on the general framework of a deal, they might have more incentive to compromise when the mediator circles back to numbers.

Practical tip for attorneys. One of the easiest ways for a mediation to go off the rails is when the parties spend the vast majority of their time haggling over numbers, reach a resolution, and then one party discloses that they have other material demands. When this happens, the other party can feel betrayed and claim that any prior agreements must be renegotiated, potentially scuttling the mediation. If your client highly values a nonmonetary term, such as confidentiality, let the mediator know early in the process so the parties know what they are negotiating.

Repeat Players

The insurance coverage legal community is relatively small. Often attorneys have litigated other cases against the same opposing counsel or each other's respective firms. Most of the time, this is helpful to the negotiation process because the vast majority of coverage lawyers exhibit laudable professionalism. But sometimes familiarity breeds contempt and prior relationships can exacerbate differences.

Practical tip for mediators. The players in one case might look a lot like a prior case, but mediators should avoid making assumptions about how the new case will proceed. Different adjusters at the same insurance company might have different negotiation strategies and philosophies. While it is natural to begin to anticipate where the mediation will go because you have settled multiple other cases with the same parties, remember that each case is different. However, familiarity with the parties can and often does assist the mediator in candidly asking the attorneys and parties what facts might make this case unique or different from prior cases. If you have earned capital from prior cases, use that trust in the next case.

Practice development tip. In complex high-value coverage cases, there is a relatively short list of mediators who are trusted by the parties. Getting on the list takes time and can be frustrating. It is important to remember that insurance coverage cases often have multiple parties. If just one party expresses concern that they have never used a particular mediator (or otherwise objects to a particular mediator), the mediator might not be selected even if several other parties vouch for them. Do not get discouraged. Developing an alternative dispute resolution (ADR) practice takes time. Knowing that up front and having realistic expectations can help grow a successful coverage mediation practice.

Practical tip for attorneys. There is a tendency for some lawyers to let their relationship with opposing counsel impact their mediation preparation. For example, when I hear prior to the mediation, "I have a great relationship with opposing counsel, so I think we should be able to get something done," I get nervous that the attorney might feel it unnecessary to prepare as if they were expecting opposing counsel to be difficult. The problem with this mentality is that the key to attorney preparation is making sure you understand your own client's viewpoint and expectations.

Mediation preparation is not only reviewing the key facts and law, but also understanding your client's risk tolerance and goals. Sometimes clients are more open to settling a winnable case than their attorneys. During pre-mediation calls in one matter, the attorneys told me they thought the case would settle at mediation because the attorneys both valued the case similarly. When we got to mediation, it immediately became clear that one of the clients was not on the same page as the attorney. The mediation illustrated that attorneys should not assume their clients will follow their lead. Attorneys should make sure prior to the mediation that they understand their client's goals. In the end, it is the client's mediation.

The Complexities of Complexity

While some people love it, many people shudder at the prospect of parsing through arcane insurance contractual language. The more complex the issue, the more likely the parties will disagree about valuing the case. A skilled mediator is aware that they will not be the judge or sit on the jury. In other words, technically speaking, the mediator's opinion is worthless. However, a mediator's ability to ask difficult questions and reframe issues to make sure the parties have fully evaluated their risks can be invaluable. That comes from understanding the issues presented in complex coverage cases.

Every case is unique, but a complex case potentially can raise a multitude of issues, including, but certainly not limited to:

- **Choice of law.** Insurance policies rarely contain choice of law provisions, and sometimes courts are forced to determine which state's law applies. These determinations are often dispositive because insurance law is state law, and identical questions have different answers depending on the venue. For example, a recent Texas appellate court noted that some states, like New York, do not recognize common law bad faith claims, making its choice of law determination "significant" to issues of bad faith in a first-party dispute. [2]

- **Scope of the insuring agreement.** A common form of third-party insurance requires there to be an occurrence, often defined to include an "accident." [3]

- **Applicability of exclusions.** Environmental cases often involve the applicability of pollution exclusions, which have changed over time from "sudden and accidental" to "absolute." [4] There are exclusions in both third-party and first-party cases that impact all types of potential claims, from cyber to directors and officers (D&O) to COVID business interruption. The case law and language of exclusions are key to assessing litigation risks.

- **Trigger and allocation.** In third-party claims, the insurance coverage can span decades, with multiple insurers and hundreds of separate policies. Which policies are triggered often can depend on when damage manifested, the time of exposure, or when it occurred "in fact." [5] Once triggered, some states allow an insured to recover "all sums" from each triggered carrier, while others have found the insurer to be responsible for a pro rata share.

- **Duty to defend or indemnify.** Third-party liability cases involve questions concerning whether there is a duty to defend or indemnify. In general, the duty to defend is broader than the duty to indemnify and is assessed by looking at the underlying complaint. Some states are more permissive in allowing extrinsic evidence.

Practical tip for mediators. The parties do not need you to be the smartest person in the room. There is a temptation to demonstrate your understanding of coverage while mediating, especially with prominent coverage lawyers or companies for the first time. However, mediators must be self-aware. If the case does not involve a retrospective premium or a bumbershoot policy, its resolution probably does not need a mediator to discuss their knowledge of those issues. A mediator who sounds like they are trying to be the smartest person in the room is likely not helping the parties. Instead, the mediator's job is to help the parties appreciate that they or their own lawyers are the smartest people in the room. In the end, no matter how much trust the mediator has earned, clients are more likely to hear the voices of the folks with whom they walked into the mediation.

Since insurance law is state law, identical issues can lead to divergent results in different jurisdictions. For that reason, having a mediator who has litigated in numerous jurisdictions can be helpful. The mediator's insights about how other states view the identical issue can help the parties appreciate the risks involved in their case, especially if the issue has yet to be decided in the jurisdiction where the case is pending. For example, my construction defect clients in Illinois benefit from my experience mediating similar cases in Texas because the Texas Supreme Court determined that faulty workmanship could be an occurrence under a commercial general liability (CGL) policy decades before the Illinois Supreme Court did.[6] Thus, Texas has more developed case law concerning business risk exclusions than Illinois because previously Illinois courts did not need to rule on those issues based on the state of the law. Observations drawn from precedent in other states, if made at an appropriate time, can help litigants appreciate their litigation risks.

Evaluating Litigation Risks

Lawyers often overvalue their case. There are many psychological reasons for this. To start, the lawyer can be anchored to a preliminary evaluation that has not been adequately modified to fully consider new facts or developments. Or the lawyer may fear telling their client what they need to hear and instead tell them what they want to hear. Further, confirmation bias can lead to focusing on new facts in discovery that support a side's arguments and minimize those that do not. And even if the lawyer fully appreciates litigation risks, they might not accurately translate the legal risks when calculating the value of the case.[7]

For example, insurers might overestimate the value of multiple defenses. Take a case where the insurer believes it has two independent meritorious arguments: (1) the insured materially breached a condition precedent to coverage by failing to comply with the policy's notice of an occurrence; and (2) the insured "expected and intended" the property damage at issue, voiding coverage. If the insurer believes it has a 50% chance of succeeding on both defenses, it might multiply those probabilities together to conclude it has a 75% chance of prevailing. Mathematically, multiplying the defenses together only makes sense if the two events are completely independent. While late notice and "expected and intended" defenses might theoretically be independent and turn on different facts that might not always be true, consider other factors. Will either the insurer or the insured be relying on the same corporate witness for testimony for both issues? If so, if the finder of fact dislikes that witness, both defenses could be impacted. Even simpler, if the same judge or jury is analyzing both issues, the defenses are less likely to be independent, and multiplying them together potentially overstates the insurer's position.

Mediators should keep in mind that many attorneys became attorneys because they feared the sight of blood or, even worse, mathematical formulas. But evaluating a case involves making predictions about the future. Thus, whether lawyers like it or not, conditional probability is essential to case evaluation. Mediators can help ensure that a case is being properly evaluated by asking good questions. For example, to avoid overconfidence about defenses that are at least potentially related, the mediator may ask whether the same corporate representatives will be testifying about multiple issues.

Practical tip for attorneys. As an initial matter, lawyers do not need to know how to do Bayesian math (or have even heard of it) to be good advocates. But a lawyer who hates math should consider opportunities to work with their client on those types of issues. It may be the case that the client is not averse to math like the lawyer. Insurers and many policyholders, such as construction project managers, are often better suited to apply conditional probability than attorneys. In those cases, lawyers should provide their advice as to the legal parameters of the case and look to their client for a final evaluation of the case's value. At bottom, many attorneys believe they have to provide a "number," but that is not always necessary.

Emotional Intelligence

Because insurance coverage disputes are often between corporate litigants and turn on technical legal arguments, it is easy to assume that the mediation will focus almost exclusively on the law. While this is often true, every case is different. Practitioners should consider whether the insured has pleaded bad faith, and whether the decision-maker at the mediation for the insurer is the person who allegedly acted inappropriately. If that is the case, emotions will likely play a role in resolution since nobody likes to be accused of bad faith. Sometimes policyholders include bad faith counts as an afterthought or bargaining chip and are surprised how it can adversely impact negotiations. Corporate decision-makers are humans, and humans have emotions.

Insureds in first-party cases often make emotional decisions for similar reasons. Litigation positions can harden when an insurer questions the values assigned to a contents claim or "undervalues" the significance of losing a family heirloom.

Practical tip for mediators and attorneys. When emotions are involved, it is often necessary to allow time for parties to discuss their respective positions. Providing adequate time for this phase of the mediation is important. Too often the parties might believe that a half-day mediation is sufficient because the case is not legally complicated. Indeed, one of the most common complaints about mediation is that it can take too long. In hindsight, it is easy to question why the parties did not expedite their negotiations. The answer often has little to do with the law or the quality of discourse at mediation, but rather with the mindset of the decision-makers. So, in preparing for mediation, attorneys should assess whether their client has strong emotions. If so, the mediation might take more time even than the legal issues would otherwise warrant. Practitioners should also start thinking in advance of mediation if a nonmonetary provision (e.g., an apology or donation to a charity) might help resolve the case. Ultimately, attorneys need to understand their client's emotional mindset and should consider raising with the mediator how that could impact negotiations.

Customize Your Mediations

Prior to mediation, the mediator should confer with the parties about important logistical issues. Such issues may include whether to have opening presentations and whether the parties will share their mediation submissions with each other or only the mediator. In my experience, usually neither happens. However, mediators should continue to raise these issues. The choice to have an opening presentation or share the mediation submission should not be a reflection of the attorney's personal and generalized preferences, but rather based on whether it would be helpful in reaching a mutually acceptable resolution in the case at issue.

Further, mediators and practitioners should consider whether to use an artificial intelligence (AI) platform. AI is revolutionizing multiple industries, including the law. Lawyers have an ethical duty to understand and incorporate technology. That includes understanding potential pitfalls. Confidentiality is crucial to mediation. Yet many AI products, such as ChatGPT, will not protect the confidentiality of input data. Some mediators, like myself, have created or subscribed to AI products that will not share any confidential data.

Some mediators use AI to help them brainstorm with the parties about potentially breaking an impasse. Others use it by inputting expert reports and asking for summaries. I once asked AI to review multiple expert reports and provide me with the five items the experts agreed upon and the five upon which they disagreed. To be frank, in this author's experience, most attorneys and parties are not yet ready to incorporate AI into their mediations. That said, as the mediator, I do not want to be the limiting factor if the parties are more open to using AI.

In short, customizing the mediation process to fit the type of dispute makes sense. An American Bar Association (ABA) task force recommends that mediators be flexible and that parties and attorneys appreciate flexibility. [8] Parties and attorneys should attempt to be flexible where possible as well.

Practical tip for attorneys. Before answering based on personal preference, attorneys should remember to discuss logistical questions with their client. If the answers are always the same, attorneys should consider whether there is any type of case or circumstance where they would be willing to deviate from their typical practice. It is perfectly understandable to hold a particular belief (e.g., openings are not helpful), but the real question is whether that is true in the case at hand.

Finally, regardless of whether the parties agree to exchange their mediation submissions, attorneys should consider why they are preparing them in the first place. Pre-mediation submissions should educate the mediator and candidly discuss not only the strengths of the case but also the weaknesses. A pre-mediation submission should not be identical to a summary judgment motion. Parties come across as more reasonable when they acknowledge their weaknesses, while offering arguments to mitigate them. A party's submission that helps the mediator understand the complete picture helps them in the other room.

Insurers as Professional Litigants and Test Cases

The reality is that most cases settle because litigation is expensive. Mediators are well-trained in discussing how cases often are not cost-effective to litigate. Those conversations typically contrast the certainty of litigation costs with the uncertainty of any particular outcome. The typical commercial matter is compromised not because the parties suddenly agree with each other's litigation positions, but because they understand that the costs to "prove" their positions are significant.

Insurers may state at mediation that indemnity dollars and attorney fees are different and that they prefer paying their own attorneys over settling at a number they believe is unreasonable. In my experience, that is not always the case. Money is money, and companies do not simply ignore litigation costs. If an insurer passionately maintains that attorney fees do not matter, it is typically more helpful to pivot to a related concept than debate the point.

The related concept is that insurers are frequent litigants, often on recurring issues. I litigated the meaning of the "pollution exclusion" in many jurisdictions over decades. Many of my clients had strong views that whatever the language used, general liability policies were not intended to cover property damage caused by gradual pollution discharged over decades. They felt that the "sudden and accidental" exclusion meant abrupt explosions were covered, but decades of discharges from a settling pond were not. These cases were litigated across the country, with some states siding with insurers while others favored policyholders.

Mediators should acknowledge that insurers have a vested interest in developing the law in their favor. Even if an insurer stresses that litigating the cost of one particular matter might not be an issue, the insurer should consider whether the specific case presents the most favorable way to frame the issue to the courts. The mediator's questions should be designed not only to make sure the insurer understands, like any other litigant, the expense and risks of litigation, but also to question whether this is the right test case. For example, are there annoying bad facts that could distract the court from the "real question"? If so, the insurer should be more inclined to entertain a reasonable settlement. In some instances, insurers are able to pick and choose their fights. The mediator should discuss with the insurer whether it believes that the case is a good test case. If it is not, then it is a standard case where litigation costs should be considered.

The fact that the insurer might decide to litigate a case based on principle is something that also needs to be discussed in the other room with the policyholder. All things being equal, insureds want to be paid sooner rather than later and avoid the time, expense, and hassle of litigation. If the insured is concerned that the insurer might view the case as a good test case, the insured might be willing to reevaluate its own case evaluation.

Creative Solutions

Many coverage actions involve multiple parties. Different techniques can help lead to an agreement in those kinds of cases. Often the group dynamic can impede progress in negotiations as no defendant wants to "be ahead" of other similarly situated parties. Policyholders might offer "most favored nation" agreements with early settlers that contain a pledge to refund some of the settlement sum if certain conditions are met, including settlements with more favorable terms with other parties. [9] This often incentivizes defendants to settle early because if the insured ultimately is willing to grant further concessions to other parties, the earlier settled insurer will also benefit while simultaneously eliminating litigation costs.

Alternatively, another way to combat defendants' focusing on the contributions of others is to conduct the mediation "in the blind," which forces each defendant to focus on what is in their own best interests. [10] In Texas, construction cases are often conducted in the blind. The parties agree up front that they will never learn the amount each party is willing to contribute toward settlement. The plaintiff makes a demand, and the mediator raises money individually from each defendant. The mediator then provides an offer that is the total of each defendant's contribution. After the plaintiff revises its demand, the defendants are told what the "delta" is between the plaintiff's revised demand and what the defendants had previously raised. Then each defendant, once again, focuses only on its own exposure and decides what, if any, additional amount it is willing to contribute. Hopefully, the gap can be bridged. As a practical matter, the mediator needs to have an IOLTA account because even if the parties settle, they will not learn what other parties paid (the parties agree to the same settlement agreement, but there are confidential exhibits exchanged between the mediator and the parties memorializing each party's respective share).

The scope of release is always a significant part of coverage negotiations. On long-tail claims, a policyholder might be willing to offer a "buyback" in exchange for a larger settlement. Let's take an example of a case in which an insurer issued a 1978 policy with per occurrence limits of $1 million and $2 million in the aggregate, and the insured is demanding $1 million. To date, the insurer has rejected the demand because it believes it has solid defenses. But the insurer also might be concerned about future claims. Even if the insurer paid its full $1 million to settle this claim, it still might have to pay an additional $1 million for other potential claims. Thus, the insurer might be willing to offer more money and obtain a "buyback" in which the parties agree that the policy is exhausted and will not respond to future claims. Sometimes discussing this option leads the parties to refocus on a more limited release, but they can obtain information concerning how the other side values potential future exposure.

Finally, in many third-party actions where the underlying liability has yet to be resolved, the parties might enter into a "coverage in place" arrangement whereby the parties agree to a co-funding arrangement for defense and indemnity. For example, rather than continue to litigate coverage, the carriers might agree to fund, for example, 80% of the defense and 60% of all indemnity obligations, whatever they might be. Coverage in place agreements are more common in environmental matters where the final remedial alternative has yet to be selected. [11]

Strange Bedfellows

Coverage litigation can mean different things. Typically, it describes a dispute between an insured and its insurer over the scope of coverage afforded by an insurance policy. This often involves competing narratives. For example, if the dispute involves whether an exclusion precludes a duty to defend, the policyholder likely will point to an allegation that it argues is potentially outside the application of the exclusion. In the absence of binding precedent, the insured will highlight general standards, stressing that the duty to defend is broader than the duty to indemnify and all doubts should be resolved in its favor. Like two ships passing in the night, the insurer often focuses on how broadly the jurisdiction construes causal language like “arises out of” in the exclusion’s prefatory clause.

Mediators can help parties assess risk by reframing issues. I mediated a case involving a fire at an oil processing facility. The policy contained an exclusion “arising out of” fracking operations. The insurer stressed that as a practical matter most of the oil in the area was a result of fracking. The insured argued that the evidence was unclear and that the insurer had the burden to demonstrate that the particular oil involved in the accident was from a fracking well. The insurer countered that all it needed to do was demonstrate that any oil at the facility was from fracking. While this was a legal dispute over proof, asking questions like “If the only oil at the facility from fracking was a small isolated amount at the other side of the facility, would claims in the entire operation still be barred by the exclusion?” foreshadows issues the court will ultimately need to resolve and helps parties assess their litigation risks. Framing the question in this way helps the insurer understand how a court could possibly see its argument as overly broad, even in a jurisdiction that has interpreted “arising out of” language broadly.

Coverage cases can also be between insurers. In some cases, multiple insurers may facilitate a settlement of an underlying liability action, but one carrier refuses to contribute. These cases, which are called contribution or subrogation actions depending on the jurisdiction, present a different dynamic. Practitioners should remember that cases between insurers still have the potential to create case law favorable to policyholders. A mediator who can highlight how a short-term position could be detrimental to an insurer’s general interests in the long run can help that party focus on the big picture. Often inter-insurer disputes are a result of carriers having disagreements over the handling of multiple matters, with one carrier ultimately deciding “enough is enough” and filing an action because it believes the other carrier had been taking advantage of it.

Sometimes the insured and insurer in a third-party case both see a benefit to stressing coverage defenses in an effort to minimize the settlement value of a case when the underlying liability action has yet to be resolved. In that context, the insured and its insurer might cooperatively agree to emphasize coverage issues in order to drive down the value of the plaintiff’s case. Minimizing the insured’s insurance sometimes can be in both the insurer’s and the insured’s mutual best interests.

Other times, mediation might be a multiparty attempt to globally resolve all disputes. In those cases, the plaintiffs are aware that there are insurance issues, but the mediator is simultaneously attempting to broker a deal to fund the settlement of the underlying case and, depending on how that is funded, avoid coverage litigation. Or parties may settle the underlying case while reserving their right to litigate any remaining coverage questions.

Finally, sophisticated insureds often have high deductibles, self-insured retentions, or fronting policies that can dramatically impact their financial incentives and legal positions. It is important for a mediator to know whether these dynamics exist because they significantly impact negotiations. For example, the parties might dispute “number of occurrences.” During the 9/11 terrorist attacks, two airplanes hit the World Trade Center, causing both buildings to fall. Were there two occurrences—one for each plane? Or was it the result of one occurrence—al Qaeda’s grand plot (that also included the Pentagon)? [12] Typically insureds seek to maximize coverage by arguing for multiple occurrences. However, if the insured is responsible for a per occurrence deductible or self-insured retention, it might prefer for there to have only been a single occurrence. Mediators should not make assumptions without a full appreciation of the coverage profile. Again, learning as much as possible prior to the mediation will assist the parties in determining options for resolving one or multiple disputes.

Conclusion

Insurance coverage disputes can be mediated like any other commercial litigation matters with mediators who are trained in facilitating the right environment to assist parties in assessing their options. Good mediators earn trust through transparency, integrity, and hard work. But in insurance coverage cases, also being familiar with the language of insurance and creative ways these cases can be resolved can be helpful in earning the litigant’s trust and assisting them in resolving the dispute.

Endnotes

1. *See, e.g.*, Sharon Press & Paul M. Lurie, *A Mediator’s Obligation to Memorialize the Agreement*, Disp. Resol. Mag., Fall 2015, at 39.

2. Transform Holdco LLC v. Starr Indem. & Liab. Co., No. 05-23-00339-CV, 2025 WL 1677242 (Tex. App. June 13, 2025) (affirming trial court’s application of New York law because New York had the most significant relationship to a case involving a property claim for damaged merchandise arising from a tornado in Texas where bad faith claims involved alleged misconduct from the insurer’s New York office).

3. Insurers often argue that certain acts are not “accidents” and fail to trigger occurrence-based policies. For example, Cincinnati Specialty Underwriters Insurance Co. argued that allegations that the insured trespassed and intentionally cut down trees failed to allege an occurrence. The U.S. District Court for the Western District of Missouri disagreed, holding that the allegations of intentional conduct but “unintentional damages performed by mistake” constituted an “occurrence.” Cincinnati Specialty Underwriters Ins. Co. v. Persell, No. 4:25-cv-00425, slip op. at 5 (W.D. Mo. May 7, 2026).

4. Some states held that the "sudden and accidental" exclusion barred coverage for gradual pollution claims, but others, like Illinois, held that "sudden" was ambiguous and meant "unexpected or unintended." Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204 (Ill. 1992). Around 1986, insurers removed the "sudden and accidental" exception and incorporated absolute pollution exclusions. Some states limited the absolute exclusion to "traditional environmental pollution." *See, e.g.*, Am. States Ins. Co. v. Koloms, 687 N.E.2d 72 (Ill. 1997) (refusing to apply exclusion to the discharge of carbon monoxide from a malfunctioning furnace). Others strictly enforced it. *See, e.g.*, Maxine Furs, Inc. v. Auto-Owners Ins. Co., 426 F. App'x 687 (11th Cir. 2011) (holding that curry aroma is a pollutant). Finally, "Indiana has gone in a different direction." State Auto. Mut. Ins. Co. v. Flexdar, Inc., 964 N.E.2d 845, 851 (Ind. 2012) (failing to enforce the absolute exclusion even in a traditional environmental claim).

5. *See* Don's Bldg. Supply, Inc. v. One Beacon Ins. Co., 267 S.W.3d 20 (Tex. 2008) (applying injury-in-fact trigger in property damage case); Zurich Ins. Co. v. Raymark Indus., Inc., 514 N.E.2d 150 (Ill. 1987) (applying triple trigger for bodily injury cases).

6. *See* Lamar Homes, Inc. v. Mid-Continent Cas. Co., 242 S.W.3d 1 (Tex. 2007); Acuity v. M/I Homes of Chi., LLC, 234 N.E.3d 97 (Ill. 2023).

7. An entire article could be devoted to how cognitive biases lead to overvaluations of cases. *See* Michaela Keet, Heather Heavin & John Lande, Litigation Interest and Risk Assessment: Helping Your Clients Make Good Litigation Decisions 10 (A.B.A. 2020), https://www.americanbar.org/products/inv/book/392570288/ (discussing how the attorney-client relationship can create a "conspiracy of optimism"); Jennifer K. Robbennolt & Jean R. Sternlight, Psychology for Lawyers: Understanding the Human Factors in Negotiation, Litigation and Decision Making 84 (A.B.A. 2d ed. 2021), https://www.americanbar.org/products/inv/book/408370452/ (discussing attorney overconfidence and their lack of self-awareness concerning it); Leila Schneps & Coralie Colmez, Math on Trial: How Numbers Get Used and Abused in the Courtroom (2013) (discussing various examples of math errors, including the conviction of Sally Clark, a British mother, for murdering her two children based on statistical evidence that failed to recognize that two crib deaths were not independent probabilities; Clark was convicted, lost an appeal, and served three years in jail before her conviction was ultimately quashed after a sharply worded letter from the Royal Statistical Society exposed the statistical errors of the prosecution's key expert).

8. Final Report of the ABA Section of Dispute Resolution Task Force on Improving Mediation Quality, Comment by R. Wayne Thorpe 12–13 (2007), https://www2.mediate.com/ajm/docs/ABA%20-%20Task%20Force%20Final%20Report%20-%20PRINTERS%20COPY.pdf.

9. Kathryn E. Spier, *The Use of "Most-Favored-Nation" Clauses in Settlement of Litigation*, 34 RAND J. Econ. 78 (2003).

10. *See, e.g.*, John Harens, The Effective Resolution of Construction Disputes: If Justice Is Blind, Then Mediators Should Be Double Blind, Schinnerer's 55th Annual Meeting of Invited Attorneys 3 (2016) ("each individual result is never compared to anyone else's position; each individual result is only compared to and always matched to an internal goal" creating a "win-win").

11. Marilyn B. Fagelson et al., Getting to Yes—Negotiating Settlement of Coverage for Long-Tail Claims, American College of Coverage Counsel 2023 Annual Meeting (May 11, 2023) (discussing coverage in place agreements and the difficulties presented in settling with lower layer carriers for less than full limits).

12. *See* World Trade Ctr. Props., L.L.C. v. Hartford Fire Ins. Co., 345 F.3d 154 (2d Cir. 2003).

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