

## Mediating Insurance Coverage Disputes More Effectively

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### **Introduction**

The last time I wrote an article for DRI, 2017, I had never heard of virtual mediation. It was not part of my training as a mediator. I had never been asked to mediate virtually. When I wrote my article for DRI in 2017, it was all about in person mediation. 5 years later, about 80% of my practice is online and while the in person percentage is slowly increasing, my sense is it will hit a peak pretty soon. Virtual mediation is part of the new normal. My intention in this article is to offer some tips on mediating insurance coverage disputes, whether you are the attorney or the client, while taking into account the fact that most disputes will probably continue to be mediated virtually.

### **Start with the Why**

It is important to have a good idea what kind of session you want as you enter into the process, even before selecting a mediator. Many cases are settled through direct negotiations. Perhaps in this case, direct negotiations were tried in failed. Perhaps the issue is not between opposing counsel but on one side of the v. – between a client and a lawyer. Perhaps this is just a very difficult relationship. Perhaps you think the other side is just not reading the facts, the law and the policy in a way that makes sense. Whatever the reason for the mediation, this reason should be kept in mind at all steps in the mediation process as you engage with each step strategically to try to enhance your chances for success. It will also be important when you consider the proper venue – in person or virtual.

### **Mediator Vetting**

Probably the most under-utilized tool by lawyers and clients is mediator vetting. While it is true that many mediators are former judges, mediator ethics codes are different because of the different role mediators play. This means that you can talk to a prospective mediator before you hire them. You can do this in connection with a case you have in mind or you can do it more generally, in order to enhance your list of mediators for certain kinds of cases. And of course, you can do this by phone, by Zoom or in person. I have experienced quite a few vetting calls, meetings and Zooms. I find them to be very helpful for the mediator and the client/lawyer. These meetings are an opportunity to talk about mediation process, mediator background and mediator styles and technique. For policyholders and insurers, these meetings are also an opportunity to get a better sense of the wide range of mediators in the marketplace. Whether your mediation will be in person or by Zoom, it is important to have a

sense of the mediator's presence. Some mediators haven't quite made the transition to Zoom and it is definitely important to figure that out before agreeing to a Zoom mediation.

### **Pre-mediation Preparation**

We always say preparation is critical, and it is. What is the most effective way to prepare? Early and often. Most policyholders and insurers will have begun their preparation very early and many will have already determined their strategy and goals for a session before embarking on the pre-session process with the mediator, which may include a joint or all sides call or Zoom, pre-session written submissions and ex parte calls or Zooms. What I advocate for is to make sure to connect all of these pre-session steps back to the strategy and goals set out at the beginning and listen for signs that the strategy or goals may need to be tweaked or adapted to new information. The pre-mediation process introduces some new data points that should be considered before the mediation is convened. Let's walk through the pre-mediation aspects that may impact your strategy or goals.

### **Pre-session calls**

Have you ever attended a mediation where the entire morning was taken up dealing with a misunderstanding and you felt like the misunderstanding could better have been cleared up before the session? You are not alone. The key to avoiding this common mediation mishap is to participate fully in the pre-session conference call or calls or Zooms that most mediators hold.

There can be calls with the mediator and all sides of a dispute. There can be ex parte calls. Some mediators do both. It is important to take advantage of whatever such calls the mediator offers.

Here are some tips for making these calls most effective.

1. Understand the purpose. Pre-mediation calls are fundamentally about making sure all sides are coming to the same conversation. The mediator will want to know how this case ended up in mediation, were there prior negotiations and if so will this session continue from there or start fresh. Does each side have sufficient information so that it can do enough analysis to be able to price the case? Were there any pre-conditions placed on the mediation? The parties should work with the mediator to make sure that the starting point for the mediation is clear and agreed to and negotiations can continue forward from there.
2. Consider all relevant participants. It is customary in many geographies and areas of the law for only lawyers to be present on these calls. But this custom isn't perfect for every case. In an insurance coverage dispute, the principals or some in house representative may want to consider being present. When there is an insurance company involved, give some thought to involving the claims handler. This gives the mediator a first chance to hear from and speak to the decision makers and it may be an early advance

opportunity to have clients on both sides interact in some limited way as a sort of preview.

3. Consider separate calls. If the parties really do not get along or there are just too many for a call to be productive, the joint call can be dropped and separate calls may be held exclusively. These can be every bit as valuable as joint calls and can provide the mediator all necessary information.
4. Timing. Unlike pre-mediation submissions, the calls can be held closer in time to the mediation session itself and can be held seriatim and in several phases. There is a lot of flexibility. The main point is not to pass up this chance to begin laying the groundwork for the mediation session.
5. Think backwards from the kind of conversation you want to have at mediation. Ultimately, the mediation submission sets up the dialogue that will take place in session. This is particularly true in mediations where there is no joint session. Give thought to what talking points will be most useful on the day of.
6. Consider doing all of these calls by Zoom. Zoom adds a deeper dimension of communication than a phone call does. It is easier to start getting to know the mediator and develop a rapport once there is some visual familiarity.

Once you work your way through these calls or Zooms, you will know doubt have gathered some additional points to consider in your strategy and goals and it is worth checking back on your evaluation.

### **Pre-session submissions**

Pre-session briefs are the last opportunity to give the other side something in writing that can actually persuade them that they have more risk than they have thought up until now. This is why mediation briefs are not summary judgment briefs and should not be approached as if they are. Pre-session briefs, particularly shared briefs of the kind that most mediators prefer, are not directed at a court or arbitrator. They are primarily directed at the decision-makers on the other side. This is a chance to situate the factual and legal issues in a broader narrative, including even commercial relationships and business impacts, and to write the narrative in a way that the other side will receive it and react to it. The goal is to create a document that the other side will have to take into account and will want to take account as they prepare for the session.

There is often also an opportunity to submit some materials for the mediators eyes only. If there are business considerations involved, this may be a good place to discuss them. Also, the history of prior discussions can be fleshed out, giving the mediator an advance look at some challenges and expectations that might otherwise come up at the session with no forewarning. Talking about such things can give the mediator an opportunity to think about and plan out a better strategy for moving discussions forward.

## **Opening/Joint Sessions**

One way in which Zoom opens up a world of opportunity for the mediation process is with respect to opening sessions. These sessions have often been discarded. Lawyers don't find them helpful. They feel like they have said everything before. But this is often one of the few times to actually connect and communicate with the client on the other side. Given the ease of scheduling and the lack of travel required on Zoom, it is possible to have a couple hours or a half day devoted to opening sessions followed by a brief gap to digest and review your evaluation in light of the opening. Disaggregating the mediation, having components occur over a brief period of time, or have parts occur by Zoom and parts in person, is an interesting way to structure a mediation in certain cases. Remember, the structure of the mediation can be flexible and the parties have a say. Zoom opens up opportunities that used to be too expensive or time consuming but now are quite practical.

## **At the Session – Read the Room, even if it's a Virtual One**

Mediation often brings out the best in lawyers. The process challenges us to raise our game. At mediation, lawyers argue the merits of their cases in different ways than they do in litigation. The best lawyers effectively tailor their arguments to different constituents by reading the room. When done successfully, this can bring adversaries together, narrow the scope of the dispute and result in the parties having a more focused conversation on a limited range of issues, which often produces a settlement.

Think about how litigation develops. The process is inherently incremental and adversarial. Lawyers spend most of their time painstakingly assembling the pieces of a narrative that is designed to appeal to a judge or jury. The narrative gets built around a set of issues that are helpful to us in court and will appeal to a neutral third-party decision-maker.

For most of that process, the only consistent participants are the lawyers for each side. The lawyers will report back to their clients—usually in writing, sometimes by phone—either after specific events or on a schedule for updates. The lawyers will often feel like they are in combat. The clients will rarely feel challenged or confronted. And that incremental build-out of the narrative can harden perspectives and viewpoints, and rarely allows for an outside perspective to creep in and raise doubts. Often, each client will feel like the process is leaving something out—the feeling of being heard.

Mediation is different. The parties have committed time and resources to come together and try to find a negotiated resolution. A very important part of that process is an examination of the merits of the case. But how we articulate the merits is often very different at mediation than it is in litigation. This is because lawyers at mediation have to focus on how their arguments will be received by their negotiating counterparty rather than a third-party decision-maker. The key arguments can be presented together and woven into a concise narrative, instead of being presented incrementally. The challenge is to emphasize the arguments that

resonate in that context with the people who are making real-time decisions about negotiating moves and to present these arguments in a way that will be received by the other side.

In my experience, the best lawyers and clients at mediation are always reading the room, trying to find a way into the other side's narrative so that they can get the other side to hear and understand a different perspective. This mindset is key. The lawyers and clients who are committed to presenting a coherent narrative thoughtfully tailored to the decision-makers on the other side often have the most success.

And this process of reading the room should take place on Zoom as well. Parties should look for opportunities to re-engage during the session directly if the mediator doesn't allow for it. Re-connecting is a great way to change the tone of the session and get things moving if they have gotten stuck.

### **Post-session feedback loop**

Most participants in mediation need a feedback loop. What happened and why did it happen? There should be a formal debriefing process so that everybody has learned from the process, even in the event of settlement. Of course, if the lawyers are in a different location from the client, this too should be done by Zoom.

### **Conclusion**

On balance, the pandemic has opened up opportunities to make the mediation process more helpful in insurance coverage disputes. From mediator vetting to the pre-session process to the session itself and even in de-briefing, Zoom or Teams or other virtual platforms offer chances for the lawyers, clients and mediator to creatively design a process that can work for everybody. The technology is here and is not going away. And the mediation process will continue to evolve as a result of this.