Mediating The Giant Case

Successful Strategies For Using Mediation To Settle Complex Insurance Coverage Cases

Patrick Coughlan
Conflict Solutions
www.conflictsolutionsinc.com

Patrick C. Coughlan, Esq. is one of the most successful and experienced mediators in North America. He is one of the few mediators who travels throughout the country mediating significant cases to successful settlement. His style is forceful, resulting in an accurate identification of core issues and a proper focus to achieve a workable settlement. He is sought after by both plaintiff and defense attorneys to settle their cases.

His professional background as an attorney, judge, and owner of several successful businesses gives him a unique perspective and a wealth of practical experience to guide his clients to successful resolution. Pat leads his clients to a clear grasp of the complex and technical issues at hand. His personal attitudes of perseverance, patience, sense of humor, and honesty throughout the process quickly gain the trust of participants in a mediation.

Pat is a member of the Florida, California, Maine, and American Bar Associations, and is certified as a Circuit Court Mediator by the Supreme Court of Florida. He has been selected as a Fellow and Vice President of the International Academy of Mediators and is a member of the American College of Civil Trial Mediators. Pat was a founding Director of the Private Adjudication Center at Duke University which managed major national cases such as Asbestos and Dalkon Shield matters. In 2006, he was designated one of "Lawdragon 500 Leading Judges in America," he was named a 2006 Florida Super Lawyer, and he was voted one of 2006's Best Lawyers in America. (Please see **www.conflictsolutionsinc.com** for a complete resume.)

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I. Introduction:

Why Mediate a Complex Dispute?

It is only recently that really large cases are being regularly mediated. I believe that the complexity of these cases, and the fact that they were often headed to arbitration discouraged mediation. In addition, there are often significant coverage issues involved in these cases that parties previously felt had to be resolved by a court.

Clients and attorneys have discovered that mediation better serves their needs. Experienced attorneys can better manage a complex case through mediation. Frequently I am asked to act as a discovery master for the parties for the purpose of facilitating an early mediation.

Mediation allows participants to custom design a process that will increase the chances of successfully resolving their litigation. A mediator experienced in managing the "huge case," can greatly facilitate the design of a suitable approach. The design of the mediation process should cover discovery, initial presentations, the role of experts, the number of days reasonably required for the process, whether the hearing should take place over consecutive days or if it is desirable to have gaps in the process. (Mediation always takes longer than expected, and space between sessions works best).

In working out a procedure, it may be helpful to have the parties' experts meet after their initial presentations, if for no other purpose than to help them understand that there is another approach or opinion. Managing such a sharing of ideas takes a skilled and experienced mediator.

Mediation offers greater convenience in scheduling than does going to court or even to arbitration. Mediation can be scheduled for a time and place convenient for the participants.

The confidentiality of the mediation process and even the resolution are attractive to clients. Companies do not want their laundry aired in public. Avoiding a legal precedent may also be important. Remember, bad facts often make bad law.

Even in cases with significant coverage disputes, mediation is fast becoming a preferred method of resolving differences. Admittedly, legal interpretations are often obtuse, but in the end, these coverage disputes involve risk management in the same way as do <u>all</u> disputes.

II. IS YOUR CASE RIGHT FOR MEDIATION?

Mediation is the most effective means for parties to manage the risk of litigation It offers participants a confidential and non binding process in which they can explore the possibilities of settlement.

The law books are filled with cases where one party lost and the other party won. No one went to trial expecting to lose. Mediation assists the parties in evaluating the strengths and weaknesses of their position. It also gives attorneys and clients the chance to hear from an impartial person about what he or she thinks about the case.

Mediation is generally not an appropriate means of resolving disputes where legal principles are the paramount issues to be resolved or delay or costs are not impediments to litigation. Mediation works most effectively after the parties have had an opportunity to understand their case and, at least, complete preliminary depositions of key witnesses. Although parties often learn a great deal about their case and their opponent's case during a mediation, mediation should not be used as form of discovery.

Preparation is essential for a successful mediation. A lawyer should prepare for a mediation with the same dedication and enthusiasm as he or she prepares for trial. An in depth understanding of the law and the facts surrounding the litigation are essential to reaching an appropriate settlement.

An attorney should counsel his client about the mediation process and ground rules to determine if the client has a good faith interest in settling the case through negotiation and compromise. It is also important to determine if the parties and their counsel know enough about the case to negotiate intelligently.

III. PICKING THE "RIGHT" MEDIATOR

The most important decision an attorney has to make to assure a successful mediation is selecting the "right" mediator. Attorneys know that a mediator should be impartial, objective, credible, honest, tactful, a good listener, patient, persistent, candid, flexible, and imaginative. However, too few attorneys focus on the mediator's style as an important element in settling a case. Good mediators are expensive (you get what you pay for) and clients should feel that they are getting value during a mediation.

Historically, mediators are trained to be facilitators and message carriers, however, experience has shown that these traits often fail or hinder the settlement of a case. Mediators who are diplomatic, patient, demonstrate a sense of humor, and help the parties evaluate the strengths and weaknesses of their positions in litigation achieve the greatest number of settlements. Most successful mediators have settled hundreds of cases and have a reference list that should be checked by any attorney considering mediation.

The mediation process starts with the selection of the mediator or mediators. Typically, attorneys for one or all the parties will share a list of potential neutrals. They often choose to conduct telephone interviews of each mediator on the list and are interested in: conflicts of

interest, background, work on other large matters, subject matter expertise, personality of the mediator, and their "gut feel" for the mediator's fairness and their own ability to work with the mediator.

Frequently the telephone interview results in a request for a personal meeting with the mediator. This meeting may take the form of a series of interviews with several mediator finalists; or if the initial telephone interview results in the parties' agreement on a single mediator, that meeting will serve to address their remaining questions. It is customary for the mediator to be reimbursed his or her expenses as well as an hourly or per-diem fee.

The personal interview covers everything asked in the telephone interview as well as questions that help the lawyers get to know the mediator. I view this interview as an opportunity to get to know the attorneys involved in the case. I am in the fortunate position of choosing whether or not to work on a matter even if I am the parties' first choice. I also use the interview to lay out my ground rules for mediation as well as my expectations and style.

How one mediates is something that the parties have a right to understand. In order to explain your style, you have to have given a great deal of thought to what it is you do that makes you successful. I find that many mediators cannot explain just what it is that sets them apart from everyone else. Lawyers who handle large cases, have even bigger egos than most attorneys. They earn huge sums of money to provide the best representation money can buy, and they want to have a sense of how you will deal with them and their client.

Even the most difficult lawyer is really looking for a way out. In huge cases, no one can afford to lose. There is simply too much at stake. You must exude the confidence that you can get it done! Lawyers want boundaries in the process, as well as an opportunity for their clients' point of view to be heard, and that starts with the interview.

Remember, if the attorneys could have settled this matter, they would have. They come to the interview looking for someone who can resolve the differences between the parties. Attorneys who are working at this level are experienced, bright, tough, and determined to win . Some may be looking for a mediator who can be intimidated or controlled. Even though you might be dying to be selected as the mediator, the interview is your chance to start taking control.

IV. THE MEDIATOR'S APPROACH TO MEDIATION

Designing the mediation process is crucial to successfully resolving these cases. The mediator must learn about every party's interests and goals. He or she must determine if there are any hidden parties or issues. You have to gain a commitment from everyone to work toward settlement. Most importantly, the mediator must have the decision maker in the room. In this size case you are generally talking about a very senior executive who will NOT want to attend. How you resolve the "person with authority" issues may determine the success of the mediation. I hang tough on this issue. If I cannot get the company president or vice-president to attend in person, then I want the most senior person available AND a representation that I WILL have direct access to the final decision maker.

The pattern of the mediation is also very important. Will the mediation take place over consecutive days or will there be a break between sessions? If there is a break, how do you avoid back peddling? Where will the mediation be held? Why? Will there be a joint opening session; if so, what time constraints will be placed on the parties? Will joint exhibits or individual exhibits be provided to the mediator? How will important issues be marked? Will confidential briefs be permitted? What information will be shared? How far in advance will materials be provided to the mediator and others? Can the mediator request/require additional information? Can the mediator consult with his or her own experts? Under what circumstances? What issues will be dealt with first? Why? Will there be any limits on the number of attendees? Will experts attend?

Again, it is important at this stage for the mediator to exert his/her influence to achieve a process that increases the chances of settlement. Most attorneys will defer to the mediator when it comes to process. As in mediation, tell stories about processes that worked and did not work. Stay in control. You are the experienced professional.

It is often constructive for the mediator to meet with just the parties' attorneys prior to the mediation. Pre-meetings give the mediator the opportunity to assess the case, understand the parties and issues, dig behind the issues, and commence building a relationship of trust with the participants. At the very least, a mediator should talk to each attorney individually, but only after a conference call with all parties in which you explain the reasons for the individual calls.

A sense of humor, diplomacy, patience, good instincts, ability to listen and simplify complicated information, and common sense are the hallmarks of a successful mediator. In establishing a process, remember that it is the parties who must be committed to it. You must sell them that your single goal in working out the design is to increase the chances of resolving the dispute.

At the mediation itself, make your own opening statement. Explain why we are here and what your goal is. Lay out any ground rules, establish civility, and make sure every party understands the pluses of settling and the negatives of not doing so. Reintroduce yourself with a brief history of your credentials. Compliment the lawyers for their fine work up to this point. BE THE OPTIMIST in the room, and expect to settle! Make sure the little details of the day are explained: lunch, restrooms, and how late parties will stay. Warn about the boredom of parts of the process.

I have encouraged the use of co-mediators in really big cases, so far with limited success. I am convinced that co-mediation is much more helpful in complicated multiparty cases, and have convinced parties to use that format from time to time. Two sets of eyes, ears, and expertise is always helpful. Having the ability to exchange ideas and impressions makes the mediator's job less isolated, and even more effective. I rarely find the cost of a second mediator an issue. The limiting factor is that *you* were chosen to rescue the parties from themselves, and they want *only* you.

The single biggest failing of mediators is quitting too soon. This is true in small and large cases. Expect good lawyers to posture during a mediation. Progress comes by simply keeping the lines of communication open. You are expected to be entertainer, teacher, and

cheerleader. You must be the "Energizer Bunny" in the group--encouraging, challenging, and never giving up.

In large cases you will have great lawyers to work with. Take advantage of their knowledge and skill. Put them in a position to be helpful in reaching a settlement. Seek ideas and suggestions when things seem to be slowing down. Try to make them part of the solution.

In seeking solutions to a complicated case, do not let the size of the case overwhelm you. Break the issues into smaller pieces, and attack the more solvable issues first. One of the secrets to success is a series of smaller successes which build trust and confidence in the process and in the mediator.

Always keep in mind that you are overseeing a risk management process. No party will get what it wants from mediation, and each party will probably settle for less than they expected. Your job is to manage those expectations as the process proceeds.

Huge cases often have an 800 pound gorilla at the table who will throw its weight around for some period of time. Remember, if one party could have intimidated the other side into submission, it would have done so before you came on the scene. Let them work through their tfreats without unduly upsetting the other side. You are not obligated to tell the other parties everything that is going on. One of your greatest skills must be your ability to re-frame what you hear into language that does not drive the other party from the process.

Require that the parties bring proposed settlement agreements with them on disks and on computers. Trying to think through all aspects of a settlement after days of mediation is simply asking for trouble. You can even have the parties work on a term sheet and settlement agreement long before a final settlement is reached. PARTIES TO A LARGE CASE WANT SOME FORM OF AGREEMENT SIGNED AT THE END OF A MEDIATION.

Unfortunately, some cases do not settle at the table. Explore whether additional days of mediation would be helpful. If parties are not ready to continue, explore what they each need in order to go forward. Be prepared to follow up periodically. I often have cases come back to me ready to resume deliberations months after an initial mediation. Keep after the parties without being obnoxious.

As a mediator you must be true to the process and to yourself. Catering to a party, attorney, or company because of who they are, or because of the amount of future business they may represent, will destroy your credibility. The mere fact that you were selected to mediate a giant case carries its own credibility.

V. THE LOGISTICS OF MEDIATION

A. Getting Ready For The Mediation

1. Who Should Attend the Mediation?

Parties with decision-making authority should attend the mediation. Successful mediations occur most often when a party or representative with full settlement authority is

present on each side. Although it is unrealistic to expect presidents of Fortune 1000 companies to attend mediations, the corporate representative at the mediation should be far enough up the "food chain" that their recommendations will be taken seriously by the ultimate decision makers.

The single greatest impediment to successful mediation is lack of patience. Sufficient time should be set aside to allow the process to work. Whether the mediation proceeds quickly or slowly is substantially up to the parties involved, but experience shows that patience and determination result in settlements. I often like to tell people that I guarantee that I will settle the case if no one leaves the room. In order to set enough time aside for mediation, it is important for the parties to think, not only about the presentation that they wish to make in front of the mediator and the other party, but also about the presentation that their opponent will make. Large cases with complex facts and legal positions often require two or three days to achieve a settlement. However, I am a great believer that too much time set aside for a mediation is as much a problem as too little time set aside. Prior to the mediation, the parties should discuss by telephone with the mediator their realistic expectations concerning the process and the time needed.

2. What Should Be Filed Before The Mediation Begins

Prior to the mediation, the parties should send a written summary of their claims to the mediation. Copies of these briefs should be exchanged with opposing parties. These briefs offer each side the opportunity to present their position in a narrative, clear, and forthright manner, and it may offer the first opportunity for the opposing client to understand their case and their opponent's case. I encourage people to write these briefs as much for the opposing client as for the mediator. Important sections of exhibits should be highlighted. Files or exhibits that are not indexed and marked can be useless. If there are some confidential matters that the clients wish to disclose only to the mediator, they can be handled in a separate confidential letter or submission.

As a general matter, the more you know about your case and your opponent's case, the more effective you will be in a mediation. The parties should clearly understand their case, understand the problems with their case, and have a clear understanding of their opponent's position.

3. Confidentiality Concerns

All court rules provide for confidentiality of settlement discussions. However, I feel it is important that the mediation contract also contain such a clause. If people come to a mediation who are not parties, I strongly recommend they also sign a confidentiality agreement before the mediation gets underway.

C. At The Mediation

At the outset of the mediation, the parties should briefly present their case, summarizing their positions, the legal points, and the damages being sought in a case. In cases involving large amounts of money, it is essential that the presenter help the other side understand the rationale in reaching the numbers being presented. The audience for this presentation, as with the written briefs, is as much the other side as the mediator.

During presentations, the parties should take the opportunity to talk directly to the opposing client without being aggressive or "in their face." Your goal is not to make friends with the opposing client, but to help him or her understand that you are not an "unreasonable, vindictive, person" and that you are at the mediation because there are important legal and factual issues to resolve. It is helpful to indicate that you have come with an open mind and with the intention of being fair and that you hope both sides will listen to what is being said with an open mind.

After these initial presentations, the parties will be placed in separate rooms where they will have the opportunity to talk confidentially with the mediator in private. Attorneys should be direct, forthright, and honest with the mediator. The more informed the mediator is about low starts and the positions of the parties, the more effective he or she will be in the process of bringing a settlement.

There is tendency today to try to "game" the mediator. Good mediators will see through trickery or efforts to mislead them, and such efforts hurt your credibility and slow down the process.

Make sure to tell the mediator at the conclusion of any caucus any information that you disclosed which you feel should be held confidential. This will protect both you and the mediator from future misunderstandings.

D. Memorializing Your Settlement

If an agreement in principle is reached during the mediation, do not leave until a term sheet is prepared and signed memorializing the major points of the agreement. In addition, the parties should understand who will have responsibility for drafting the final agreements and the timetable for final settlement.

It is crucial to state in the term sheet that it contains "the essential elements of the settlement" so that if there is a subsequent fight about whether or not there was a settlement, the settlement in principle will hold up in court.

If the parties understand the settlement, I strongly recommend that an arbitration clause be placed in the settlement document which says: "In the event there is any dispute over this settlement or the settlement documents, such dispute will be submitted to the mediator for binding arbitration. The Arbitrator may assess fees and costs." I have found that the inclusion of this paragraph speeds up settlements, discourages game playing, and helps to keep the parties on track.