

## The Vanishing Trial and the Emergence of Mediation: Helpful Tips For the Insurance Professional

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In December 2003, the American Bar Association noted that the percentage of civil cases in federal court going to trial had fallen from 11% in 1962 to 1.8% in 2002. In state court, the number of jury trials has declined by more than 25%, with less than 1% being tried over a 25 year period. With these figures in mind, it is important to note that insurers and reinsurers are in many respects the gatekeepers of litigation. They decide which cases will be tried and which will be litigated. In recent times, the insurance and reinsurance industry has shown a desire for the use of alternative dispute resolution. This is evidenced by the development of ARIAS US and the CPR Institute for Dispute Resolution, groups that foster the development of alternative forms of dispute resolution. These alternative forms of dispute resolution are often speedier and less costly than traditional litigation. Clearly, as with litigation as a whole, more insurance and reinsurance claims are being resolved by way of mediation rather than by trial.

We are all aware of what factors contribute to a good result at trial, or what makes one a good or great trial attorney. But the same understanding must now be gained as to mediation, particularly in view of its continued growth. What can insurers do to achieve the best result possible? What makes for a better mediation? What role should underwriters play in the mediation process? Should underwriters attend or otherwise confer directly with counsel? Questions such as these must be asked and answered by the industry. With these questions in mind, set forth below are some tips for participating in a successful mediation.

**1. Mediate Early.** Often, mediation does not take place until after costly and time-consuming discovery in a civil action. If mediation does not take place early, it may be a lost opportunity. Insurers, reinsurers and insureds should consider pre-action mediation. In this regard, consideration should be given to an early and detailed exchange of views on coverage and damages, and an early, overall resolution to avoid litigation costs. Where agreeable, briefs that detail coverage and damages should be exchanged. Information sharing and information gathering is key to the identification of common ground.

**2. Mediator selection.** It is always important to ask for the mediator's qualifications, experience and training. While one party may prefer the appointment of a retired Judge, it may not always be useful to do so. Of course, in order to settle a claim, one party may only need to hear the settlement value of a claim as estimated by a retired Judge. However, retired Judges may not always be trained in the mediation process. Neither do they necessarily have insurance or reinsurance expertise. A mediator with knowledge of the particular industry in question and training in the process may be more helpful in assisting the parties to achieve a resolution. This can be especially true when dealing with a complicated and technical coverage analysis such as a fidelity or D&O Claim, or a reinsurance dispute.

**3. Prepare for the Mediation as Though It is Trial.** It is just as important to prepare for mediation as it is to prepare for trial. Careful review of the facts is key. No stone should be left unturned. The insurer should know jury verdicts in similar cases, court decisions and other objective criteria by which to evaluate damages and settlement possibilities. It is equally important to prepare the insurer/client for the mediation. The insurer should consider what may be the best and worst case alternatives to a negotiated settlement so that a reasonable settlement can be determined.

The client should be advised that the process of mediation is not fact-finding, but a mechanism to assist the parties in finding a joint solution. The mediator is not a Judge, therefore he or she will not find in favor of one side or the other. What the mediator does is listen to both sides and try to find common ground. Further, it is important to set aside sufficient time for the mediation. In the case of a complex coverage case, this means at least one day. This will allow the mediator and the parties to focus their entire attention on resolution of the dispute.

**4. Presentation at Mediation.** The presenting party must have total command of the facts, law and the particular line of business involved. Counsel should be prepared to educate the other side and must display a complete, crystal clear understanding of the applicable insurance principles. This will enhance credibility with the mediator as well as the opposing side. No exaggerations of fact or overstatements should be made, lest credibility be lost during the negotiation process. Do not hesitate to use experts to assist the mediator in understanding the technical issues in a case. This is particularly so if a retired Judge is being used as a mediator. These experts can include accountants or other damages experts, which should clearly set forth in detail the insurer's position on damages. In certain cases, counsel should consider bringing the underwriter to the mediation. The underwriter may be helpful in explaining the insurer's position to the mediator, particularly in a case of non-disclosure during the underwriting process. Finally, confidentiality should be reviewed throughout the mediation in terms of what information disclosed to the mediator can and should be revealed to the other side.

It is useful for a representative of the insurer to be in attendance at the mediation and, in some jurisdictions, such attendance may be required. In instances where a representative does not attend, counsel should be provided with the requisite authority, and the representative should be available by telephone. Where coverage issues are involved, the mediation may be of a nature where those coverage issues as well as the principle settlement are negotiated. The mediation will proceed more smoothly if those coverage issues are discussed and addressed in advance.

**5. Finalization of Settlement.** In the final analysis, the success of a mediation is measured by whether the parties have reached common ground and effectuated their settlement. Where a settlement is agreed, it is incumbent that it be properly and immediately documented. Therefore, it is good practice to prepare a Memorandum of Understanding at the conclusion of a successful mediation, which should be executed by the authorized parties. This means having those parties either present at the mediation or available by facsimile. Only then can one be sure that the effort undertaken to settle will be fully binding, not subject to second-guessing or reevaluation.