Should you mediate a policy-limits case?

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Also: Pushing back on mediation confidentiality clauses

By Debra Bogaards

Does it make sense to mediate a policy limits case?

Yes, even though that sounds counter-intuitive or simply put, meshuga! Be upfront and tell defense counsel as well as the mediator at the outset that your client expects the policy limits. The outset means as soon as you agree to mediation, and in your mediation brief.

As you discuss selection of the mediator with defense counsel, tell your defense counsel that you believe strongly that it's a policy limits case. However, you are open to hearing the mediator's evaluation. It is important that you have familiarity with the mediator so she can help you convey to the defense counsel why it's a policy limit case.

The beauty of mediation is that the defense counsel and the claims adjustor are present for four or eight hours. It is unusual to have their sole attention on your case. Moreover, a policy limits demand before mediation will force defense counsel to prepare a report analyzing liability and damages, experts' opinions as well as the risks of going to trial and not beating your demand. Insurance companies are very sensitive to opening up the policy. A CCP § 998 for the policy limits served at least 30 days before mediation is even better.

Tactically, the insurance company will ask defense counsel to make sure the policy limits demand remains open until the day after the mediation. Go ahead and grant the extension. This puts you in the best position to get policy limits at mediation.

In one pre-litigation mediation, plaintiff's counsel made a policy limits demand of the $1 million. We settled the policy limits demand case for $950,000. It was worth shaving off a small amount to settle without any discovery and delay.

In another $1 million policy limits demand at mediation, due to my familiarity with both plaintiff and defense counsel, we were able to settle for the $1 million in less than one hour of mediation. Defense counsel had never heard me characterize a plaintiff as excellent nor ask him why he decided to mediate, rather than pay the policy limits. While it was unusual, this is an example of how the mediator can assist you in the right case of getting policy limits at mediation.

Let's talk about confidentiality clauses

First question: In every big case, the defense insists on confidentiality. It helps other consumers and future plaintiffs when the information is public. How can we ethically push back on these requests when our individual client may not actually care?

This might be a good time to tell the mediator that, during the mediation, she needs to meet in a breakout room with only plaintiff's counsel. The mediator will explain to your client that she needs to speak alone with counsel about some legal issues. In that way, you have an opportunity to discuss your reason for pushing back on confidentiality without engaging your client at that particular moment.

Perhaps the defense will agree to confidentiality only as to your client. Sometimes it works, and being on good terms with defense counsel helps. Ultimately, however, if defense counsel refuses, and your client does not care, then you must proceed with the blanket confidentiality clause.

Second question: No one brings up confidentiality during the mediation. So, when the mediator confirms the settlement and that confirmation makes no mention of any confidentiality provision, what can plaintiff's counsel do when the Settlement and Release Agreement suddenly contains a confidentiality clause and liquidated damages of some ridiculous amount?

A mediator should ask defense counsel to circulate a draft Settlement and Release Agreement before the mediation, or the mediator will ask counsel at the outset in each breakout room to discuss any significant terms, such as confidentiality, that are expected in the closing documents. In employment mediations, or with ride-share companies in personal-injury mediations, we know that confidentiality, non-disparagement and liquidated damages are routine.

Rideshare companies like Lyft and Uber always include a confidentiality clause and a liquidated damages clause ($10,000 or more) as well as attorney's fees if Lyft or Uber sues your client for violating the confidentiality clause. The rideshare agreements usually include a non-disparagement clause requiring your client not to defame, disparage or impugn the company. These seemingly obnoxious terms should not be an afterthought.

It used to be that the defense would pay more in settlement to obtain agreement to these terms. Now, the defense expects these terms to be written into almost every Settlement and Release Agreement. The terms alone can result in complicated further negotiations following the settlement. When this happens, you may want to re-engage your mediator. (Some mediators will assist with these post-settlement negotiations at no charge.)

Sometimes, plaintiff's counsel has been successful in having $5,000 allocated in the Settlement and Release Agreement for the confidentiality provision so the IRS does not tax their client. Also, while certain known defendants demand confidentiality, there is room to negotiate the amount of the liquidated damages clause.

In one interesting mediation, plaintiff's counsel did not sue the ride share company, but instead sued only its driver. Nevertheless, after the settlement for the policy limits at mediation, the ride share company (who was in the background) insisted that its defense attorney insert all its usual confidentiality and liquidated damages clauses. Plaintiff's counsel continued to steadfastly refuse, even if it blew up the settlement. Finally, the defense counsel, whose firm was hoping to land the ride share company as a client, had to waive the confidentiality and liquidated damages clauses because settlement at policy limits was in the best interest of his client.

Submit your questions

Please submit your questions about mediation to debra@bogaardsmediation.law for inclusion in the next issue. This column is intended to be an engaging question and answer to real questions that arise during your mediations. Let's have a robust discussion!

Debra Bogaards is a sought-after mediator in her own practice, Bogaards Mediation. *She has a background with 38 years in insurance defense, mostly for State Farm clients, and an overlapping 20 years as a plaintiff's personal injury and employment lawyer.*

She also will be an adjunct professor with the UC Law Center for Negotiation and Dispute Resolution in the fall of 2023. While most of her mediations are conducted over Zoom, she welcomes in-person mediations at her Jackson Square District offices in San Francisco.


Bogaards