Commercial Insurance Update

Topics Affecting Buyers of Commercial Insurance

MSP C 02/2003 – "Mediation and Why You Need to Know About It" February, 2003

Mediation

and Why You Need to Know About It

Picture this: A dispute arises with your client. The client's lawyer calls your lawyer. Each attempting to gain the advantage, they become inflexible in their stances. Work on the project screeches to a halt. Threatening letters fly back and forth. Finally, a claim and then a counter suit is filed.

Next comes the **discovery process**: document requests, interrogatories and depositions. Then pretrial motions, hearings, and, finally, trial.

What is the cost of such a scenario? You've lost a possible repeat client, drastically decreased productivity, spent considerable time and money dealing with legal issues and had your dirty laundry aired in public. You may or may not have won the litigation battle, but you certainly lost the war.

Since a great majority of civil suits are settled before trial anyway, why not simply work toward settlement of the problem to begin with, rather than expending all that time and money in a drag-out fight? This is exactly why mediation has become so popular.

Benefits of Mediation

Mediation is a confidential, non-binding, conciliatory process by which parties to a dispute agree to sit down and reach an accommodation before they enter into a hostile adversarial relationship. Mediation offers a structured procedure designed to resolve problems in a manner that is acceptable to both parties and moderated by an impartial trier of fact knowledgeable with the industry in question and the specific issues in dispute. This typically creates a fast, flexible forum for resolving problems at greatly reduced costs.

In litigation, you will most likely face a judge or jury unable to fully understand and evaluate the technical issues discussed. For that reason, each side presents "expert witnesses" to explain technical matters in lay terms. Inevitably, the experts disagree, and it will be left for the inexpert jury to decide which witnesses to believe. With mediation, as with arbitration, the individual hearing the dispute can be chosen in part based upon the technical

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knowledge required to assist the parties in reaching an accommodation.

So Why Mediation Rather Than Arbitration?

While successful mediation is voluntary and designed to be conciliatory (win/win) to both sides, arbitration is compulsory and can be adversarial (win/lose). Even when a dispute is resolved quickly, the disputants' business relationship may be destroyed.

Mediation requires agreement by both sides, while arbitration is binding and typically affords no appeal of decisions, absent a clear showing that the arbitrator was biased or acted outside the scope of the arbitration agreement. Mediation needs no appeals process because neither party is bound to settle.

Both litigation and arbitration follow strict procedural rules. Mediation also has rules, but by comparison they are relatively simple and fairly flexible: You present your side of the story; the other party presents its side. Interrogatories and depositions are not used, and in the rare event witnesses are called upon, the process is informal. The goal of mediation is to get agreement on problem resolution and keep the project rolling.

As a result of procedural simplicity and mediator knowledge, mediation can be pursued even while work on the project continues, eliminating costly delays and damages. Additionally, the time savings and lack of need for expert witnesses make the mediation process much less costly than litigation. But your greatest savings may be the saved business relationship between you and your client and your saved reputation as a high-quality, low-risk firm.

How Mediation Works

There are various types and hybrids of mediation, but in concept, the process works as follows: When a problem arises, one party calls for mediation and the other agrees. A qualified mediator familiar with the issues and industry is selected. The

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Don't Fear Mediation

Mediation is still disfavored by some. These doubters feel that mediation often results in innocent parties having to pitch in and pay a portion of the damages — even though they *"did nothing wrong."* Such fears are usually unfounded, as the following claims case shows.

The facts: A mechanical engineer was hired by an architect to help design a car dealership. A lawsuit was filed by the owner against the architect due to problems with a floor drainage system in the area where the dealership changed motor oil and washed cars. At issue was the fact that the drainage system did not meet government standards regarding the potential drainage of motor oil into a sanitary or storm system.

It was clear early on that the civil engineer on the project failed to get the needed approvals and permits for the drainage system. And, because the architect hired the civil, he shared the liability. Yet the civil and the architect both blamed the mechanical engineer for the problem since he designed the drainage system.

The mechanical engineer first refused to participate in any mediation regarding the matter since he was convinced that (1) he was completely innocent and (2) mediation would force him to pay part of the claim.

Eventually, following a little education on the mediation process, the three design firms agreed on a plan of action: the architect would first settle the claim with the owner, and then the three design firms would attend a mediation hearing to determine who was responsible for what portion of the loss.

The results: Based on the mechanical engineer's convincing presentation, both the architect and civil agreed that he had no fault and that they would settle the loss between themselves.

The mechanical engineer paid no damages and received a credit through its insurance company's mediation program that covered 50% of his minor legal expenses.

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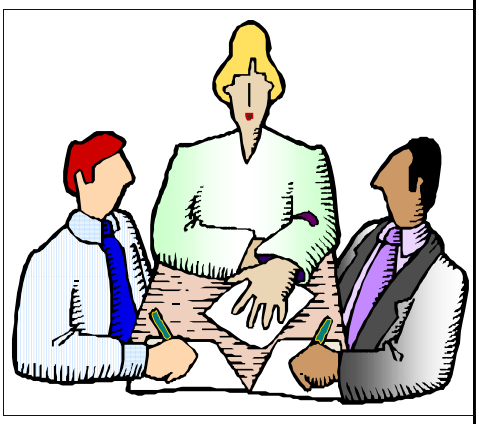
mediator arranges for a joint session with the two parties to discuss the mediation process, how it differs from arbitration and litigation and the rules that apply. Once the preliminary issues are dealt with, each party explains its side of the dispute. This gives the mediator the chance to gather facts and evaluate the relationships and dynamics between the parties, as well as locate areas of agreement and areas of discord.

At the point where joint discussions are no longer productive, the mediator begins private meetings, or caucuses, with each of the parties. Anything said to the mediator in these caucuses is confidential and cannot be disclosed to other parties unless agreed to by the disclosing party. Sometimes, a mediator will request permission to disclose information to the other party when he or she believes it will expedite negotiations. The mediator also may comment as to what a reasonable settlement may include or whether one party's offer is likely to be accepted.



Finally, the mediator seeks to summarize the areas of agreement and narrow the points of contention, pointing out the benefits of compromise and the consequences of no agreement. The mediator acts to concentrate the discussions on the issues at hand and helps avoid new conflicts.

Often the parties negotiate the final settlement in a joint session, allowing the mediator to verify the specifics of the agreement and make certain its terms are clear. If either party fails to accept the agreement, the mediator's proposed resolution is non-binding and the parties are free to seek resolution elsewhere, including turning to litigation.

A Mediation Clause in Your Contract

You and your client do not have to be contractually bound in order to agree to mediate. Either party can suggest mediation at any time. Getting both parties to agree to mediation after a dispute arises, however, can sometimes be difficult due to the emotions involved. At least one party feels wronged and in many cases at least one feels completely faultless and unwilling to give an inch to reach a compromise. That's why mediation is most successful when parties have agreed to it by contract ***before*** a dispute arises.

If your industry uses standard contract forms (The American Institute of Architects, Associated General Contractors, etc.), in all likelihood they already contain a mediation clause. If you use your own custom contracts, you might consider adding such a clause.

By including a mediation clause in your contract with your client, you both have an available means by which to inexpensively settle disputes and emerge from the process with your business relationship intact. Such a clause might read:

Mediation

In an effort to resolve any conflicts that arise during the design and construction of the Project or following the completion of the Project, the Client and the Consultant agree that all disputes between them arising out of or relating to this Agreement or the Project shall be submitted to nonbinding mediation unless the parties mutually agree otherwise.

The Client and the Consultant further agree to include a similar mediation provision in all agreements with independent contractors and consultants retained for the Project and to require all independent contractors and consultants also to include a similar mediation provision in all agreements with their subcontractors, subconsultants, suppliers and fabricators, thereby providing for mediation as the primary method for dispute resolution between the parties to all those agreements.

Choosing the Mediator

We suggest you and your client select the mediation service together when a dispute arises, rather than have a mediator predetermined in the contract. There are several local and national organizations that provide mediation services. Gener-

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ally, they each have they own detailed set of rules and procedures. When you and your client agree on the mediation service, you have agreed to be guided by their rules.

The cost of mediation services vary greatly depending on the type of problem, the number of parties involved, and the amount of time required. Typically, mediators are paid either on an hourly basis or on a percentage of the amount in controversy, much the same as lawyers.

Check with your attorney, insurance specialist or insurance carrier for the names of recommended mediation services in your area. They should be able to recommend a service to you.

An Added Bonus

Some insurers offer a deductible reimbursement program to encourage participation in mediation. Under such a program, policyholders successfully concluding a dispute through formal mediation have a percentage of their deductible returned, up to a preset limit.

Disclaimer: *This article is written from an insurance perspective and is meant to be used for informational purposes only. It is not the intent of this article to provide legal advice, or advice for any specific fact, situation or circumstance. Contact legal counsel for specific advice.*

The Underwriting Ramifications of Your Web Site

By Jeffrey W. Cavignac, CPCU, RPLU

Those of you who have either been reading our newsletters or paying insurance premiums realize that we are in the middle of a hard market. A hard market in the insurance industry is characterized by lack of coverage availability, restrictive policy terms, increased pricing, and intense underwriting.

In this type of environment, underwriters scrutinize each submission they are sent. In addition to loss histories and basic underwriting information, underwriters also require resumes of the principals, financial statements, premium history, and in almost every case they carefully review an applicant's Web site.

Most firms use their Web sites as electronic brochures. They list just about every service the firm might provide, whether or not that service has been provided in the past.

As an example, one of our civil engineering clients performs a small amount of advisory construction management. The *"Construction Management – Advisory"* classification involves consulting to the owner of a construction project on issues pertaining to cost, schedule, constructibility and other construction and design-related activities.

When a Web site visitor clicked on Construction Management, the Web site indicated that the firm provided "complete construction services" (which it actually did ***not*** provide) on a number of different projects, including condominiums! (For those of you who don't know, condominiums are considered to be "guaranteed litigation" by the insurance industry.)

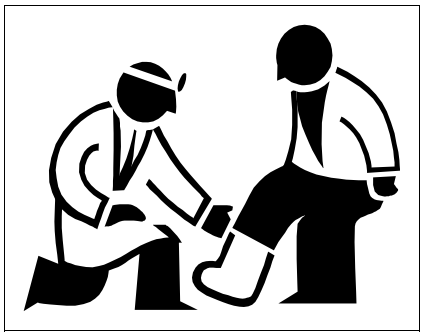
It should be pointed out that the engineering firm had only done Construction Management on one condominium project in the past, and had no plans to do it in the future. Nevertheless, the fact that it was shown on the Web site caused the firm's general liability underwriter (for a preferred insurance company) to non-renew the risk. It cost the engineering firm over $20,000 to buy replacement coverage that wasn't nearly as broad as that provided under the non-renewed policy! The message is clear:

Be careful what you put on your Web site!

It not only can affect how an underwriter perceives your company, but in certain cases it can also elevate your standard of care should you wind up in litigation.

Employee Benefits

In today's business environment it is critical to attract and retain qualified employees. Employee Benefits play an important role in employee compensation and employment packages. Constructed properly, they enable the employer to provide benefits to employees on a tax-free basis and to use the pricing advantage afforded to them by grouping employees for coverage.



In general there are two classifications for employee benefit plans: Pension (retirement) and Welfare (health, dental, disability and life). The Employee Retirement Income Security Act of 1974 ("ERISA") is the Federal law that regulates both employee pension and welfare benefit plans.

ERISA imposes requirements on disclosure of information to participants and the government, as well as on funding, participation, vesting and the accrual of benefits. Both the U.S. Department of Labor and the Internal Revenue Service have been given enforcement responsibilities under ERISA. The Internal Revenue Code also regulates employee benefit plans where special tax benefits are available.

At Cavignac & Associates our goal is to help employers determine the best package of employee benefits to offer to their work force as well as to give guidance relative to their administrative responsibilities and potential liabilities in sponsoring such plans. Annually, we perform a full market search to find the carrier that has a benefit program that meets a specific budget.

With costs increasing at a rate of 15-25% a year it is important to budget for those potential increases, and also to clearly define the employer/employee contribution so the employees understand their role in premium payment. After finding the carrier and benefits for the best price, we assist in making sure that all employees are properly educated.

Educating employees to give them a clear understanding of their benefits package is the key to the success of any benefits program. Satisfaction with the plan increases when employees understand what choices they have, what the costs are and how to best use the benefits and features of the plan. When employees understand and are satisfied with the benefits, less time and effort are needed by employers to solve problems or answer questions, allowing the employer and employees to spend more time working toward the company mission.

Beginning in April we will discuss and outline specific issues that affect employee benefit programs, including the following general topics:

- Medical
- Dental
- Short and Long Term Disability
- Life Insurance
- Vision
- Chiropractic/Acupuncture
- EAP (Employee Assistance Program)
- Flexible Spending Programs
- 401(k)/Pensions / Executive Compensation / Deferred Compensation

Next month, the topic will center on the debate over Defined Contribution.

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