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Mediation Notes

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# Don't Ask This Question in Mediation: "There's Coverage for That?"

It is not uncommon for the guest list to be one short at mediation. There are a host of situations where a non-party is necessary to resolution. Insurance carriers are the most obvious example, but it could be a lienor, a subrogree, a party having an interest in real property, a family member, a former business partner or a trustee, to name a few.

Insurance coverage goes undetected more than you think, and as a result, the missing invitee is the claims representative. Sometimes there is a carrier present, but another one is missing. Areas where we find claims not reported include libel and slander (covered under D&O, CGL and some homeowners policies); copyright and trademark infringement (CGL or IP coverage); invasion of privacy (D&O, GL); employment disputes (EPLI, maybe GL or D&O); or in construction litigation where the date of loss "trigger" or occurrence is hard to pinpoint. Cases involving a counterclaim may trigger coverage, but the counterclaim is sometimes not reported to the insurer and proceeds as an unreported claim. Counterclaims can pose a real challenge as it is understandable in some way that the plaintiff might not think to call the insurance company because they initiated the lawsuit. Most of this is borne of ignorance. Neither the client nor the lawyer understand that the claims might be covered and do not think to report the claim. In my world you sometimes hear an attorney ask, "There's coverage for that?" Examples of under-reported claims

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include copyright or trademark infringement actions covered under general liability policies or fraud claims covered under a D&O policy.

When a party and their counsel fail to investigate coverage, we have a sticky problem. Can the mediator who "knows" coverage educate them? Yes and no. Most mediators would agree that a mediator can suggest they "investigate" coverage, but a mediator should not interpret the policy. Ethically we can point them to where the policy might be, but we will not read it for them.

The problem is pretender legal expense. Virtually every liability policy specifies the carrier is not obligated to pay for defense costs incurred prior to the carrier receiving notice of the claim. This happens more than you would think. Defendants are effectively paying out-of-pocket for a defense that might have been paid by the carrier. I have taken over cases where prior counsel spent thousands, even hundreds of thousands of dollars in legal expense before giving notice to the insurance carrier. So attorney malpractice comes into play immediately. Do not assume the client has no coverage or rely on the client's statement that his agent said it wasn't covered.

If you are not familiar with insurance coverage, talk to lawyers who know coverage and make sure you do not leave some policy undetected. Failing to report claims is a serious problem for the client and lawyer. Do not mediate the claim until you have made a diligent search for available insurance coverage. If you discover in the middle of mediation that the client may have coverage of which you were unaware, suspending the mediation may be the only prudent course of action.

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