

# The case for mediating reinsurance disputes, even absent an immediate settlement.

**Peter A. Scarpato**, President of Conflict Resolved, LLC, sets forth the many benefits of mediating reinsurance disputes whether or not the parties settle.

**A**s arbitration and litigation costs escalate, more parties opt either by contract or ad hoc agreement to mediate reinsurance disputes. Despite this trend, many lawyers and clients still debunk mediation as unnecessary, expensive and unproductive – complaints based mostly upon the non-binding nature of the process and prior “bad” experiences, defined as “going back and forth all day without producing a settlement.” In fact, in the hands of an experienced, patient mediator, parties can and do benefit in many ways – even absent an immediate settlement – from mediating their dispute.

In its classic form, mediation enlists an impartial, trusted third party to help parties understand, respect and react to the objective, subjective and psychological factors creating conflict between them, promoting their ability to perceive and communicate positions leading to an inexpensive, voluntary resolution of the dispute on their own terms. In this process, success is measured on various levels, in carefully-timed, meaningful steps – step one: actively listening to and understanding the other side’s arguments; step two: believably communicating your appreciation and respect for such views to the other side (without relinquishing your views); step three: suspending judgment and creating an environment where parties can comfortably and critically evaluate the strengths and weaknesses of their positions and creatively explore options to resolve their differences; step four: selecting, exchanging and reacting to the terms and bases of each other’s reasonable, fair proposals by working together and separately in private caucuses with the mediator; step five: eliminating divergent and increasing common terms in such proposals, leading to an agreement in principle and/or written settlement of the dispute.

Since this process often lasts one or two days, its benefits are

obvious, even if parties fail to reach step five: without the aggravation, time and expense of lengthy discovery, pleadings, motions practice and legal and consulting fees, parties can work with a mediator experienced in the complexities and subtleties of reinsurance to (a) gain an informed, enlightened perspective on their and their opponent’s case, (b) acquire insights into the strengths and weaknesses of their substantive positions and the

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goals and interests of the other side, (c) test each other’s desire to settle and measure the qualitative and quantitative gaps between their “bottom lines” and (d) set the stage to comfortably resume settlement discussions later if and when discovery enhances or erodes their respective positions. Statistically, parties who mediate, even unsuccessfully, have a greater chance of settling their cases earlier, more knowledgeably and less expensively than those who do not.

For reinsurance, this mediation process allows parties to maintain relationships, reduce hostilities, avoid unpredictable panel or court decisions, assert more control over the terms of their settlements and lower litigation costs. In a world dominated by increasing numbers of arbitrated disputes, mediation is certainly a viable, beneficial option.