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The Legal and Cultural Roots of Mediation in the United States

By: Judith A. Saul*

Mediation is well-established in the United States. This paper will explore its roots and how it came to be widely used by both the courts and communities. It will then describe research into mediators' activities and the resulting critique. It will describe the new models of mediation that emerged and the recent willingness of the field to acknowledge its own diversity. A closer look at one of those new models, transformative mediation, will clarify the differences offered by these new models. Finally, the paper will take a brief look at one possible future of the mediation field.

Mediation Emerges in Response to Labor and Social Unrest

The formal use of mediation in the US is linked to the labor unrest that occurred during the 1800s and early 1900s. Workers' unions demanded higher wages and better working conditions. The companies resisted. The resulting unrest disrupted business. Strikes by workers were sometimes met with violence. One result was the development of collective bargaining, with mediation as the primary process used. Probably the first "professional" mediators were the "Commissioners of Conciliation" appointed by the Secretary of Labor in 1913. In 1935, the U.S. Congress passed the National Labor Relations Act, instituting collective bargaining in labor-management conflicts. The Federal Mediation and Conciliation Service was formed in 1946, providing a staff of full-time mediators ready to facilitate negotiations between unions and management. The mediation done in collective bargaining was between groups, with appointed or elected representatives negotiating on behalf of workers and management. The process itself was intervener-directed and solution-focused.

The next major development in the history of mediation was tied to the civil unrest of the 1960s. During this period, cities throughout the country experienced tension over race and discrimination, particularly as it related to education and housing. Detroit, Los Angeles and Boston were among those cities where the police response to demonstrations led to further conflict and, in some cases, to riots.

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In response to this wide-spread civil unrest, some community activists and labor mediators thought of applying the methods used in collective bargaining to restore calm by bringing groups together to talk. The public and private sectors provided support and created new organizations to respond to this need. In 1964, the US Department of Justice created the Community Relation Service to provide these services. National foundations, especially the Ford Foundation, and the American Arbitration Association, already an established ADR (alternative dispute resolution) provider started the National Center for Dispute Settlement in Washington, DC and the Center for Dispute Settlement in Rochester, NY. Meanwhile a prominent labor mediator began the Institute of Mediation & Conflict Resolution in New York City. Mediation was still being used primarily between groups, but here it was used as an alternative to the streets.

Court-Based and Community Mediation Programs Develop

Around the same time, courts found themselves dealing with a large number of minor criminal cases that seemed ill-suited to legal intervention. These cases were between relatives, acquaintances and neighbors. They often involved harassment, minor assaults or payment disputes. The increased mobility and urbanization that marked this period meant that many people couldn't turn to family members or other traditional resources to resolve these conflicts. So people turned to the courts with situations that were not easily resolved by judicial intervention.. These disputes tended to involve strong emotion and situations where it was difficult to determine the truth. Even when the courts dealt with these cases, a verdict of guilty or innocent rarely resolved the situation. In fact, many situations were on-going, leading to continued conflict and return appearances in court.

In response, the courts experimented with alternative ways to handle these cases. In 1969, the city prosecutor in Columbus, Ohio developed a program that offered mediation as an alternative to a judicial hearing, creating the first court-based mediation program. The mediation was provided initially by law professors and then by law school students. The program succeeded in diverting many of these cases from the courts and in allowing people to deal with the disputes between them in ways that seemed most appropriate to them. As this program proved successful, other courts began developing mediation programs. The already established centers in Washington DC, New York City and Rochester began taking such cases from the courts as well.

In 1977, in response to interest in these court-based mediation programs, the Department of Justice started three Neighborhood Justice Centers in Atlanta, Kansas City and Los Angeles. These built on the idea of a "multi-door courthouse," where situations would be evaluated and sent to the most appropriate forum rather than simply being sent to a prosecutor or judge. These programs were evaluated in detail and proved successful. Though only the one in Atlanta continued past the original grant, they served as models for community mediation programs.

In the late 1970s and early 1980s, mediation programs grew rapidly. The community mediation field benefited initially from federal funding through the Law Enforcement Assistance Initiative. State and local governments also made funding available. Foundations were joined by private organizations like the American Bar Association and the American Arbitration Association in supporting community mediation programs. Over 200 programs were begun between the mid-1970s and the mid-1990s. Some courts established programs during this period, but the major growth was in the community mediation field.

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The cases handled by all mediation programs expanded beyond the original misdemeanor cases to include small claims cases, custody and visitation cases, juvenile delinquency and status offense cases, and victim-offender cases. Private practitioners emerged during this period as significant providers, especially in divorce cases, though this area of growth is outside the scope of this paper.

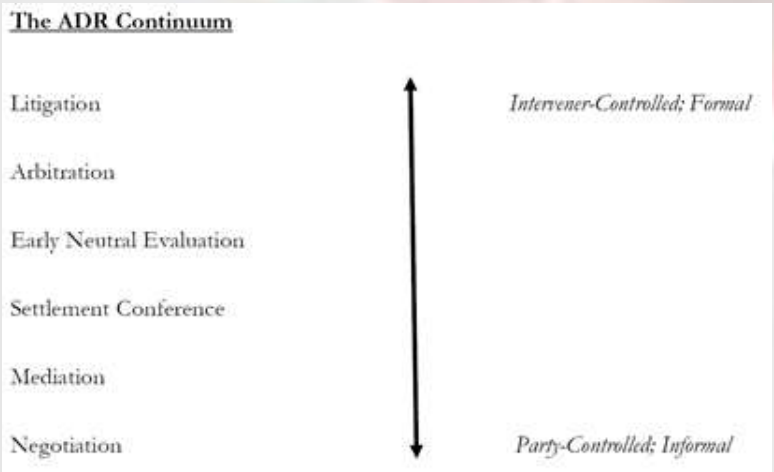
Community-based centers differentiated themselves from court-based programs in several significant ways. They expanded their areas of practice to include cases that would never go to court, like roommate disputes and conflicts in schools between students. They also supported collaborative community relationships by offering facilitation of intergroup conflicts in neighborhoods. Unlike court-based programs, community centers were committed to the availability of mediation at any stage of a conflict. They were also committed to building capacity in local communities so they recruited and trained community members to be their volunteer mediators. By training volunteers and educating community members as well as by offering mediation and facilitation in response to a wide range of situations, the community mediation centers sought positive systemic change in their communities.

As community mediation programs expanded, accepting the kinds of court cases described above, the higher courts took notice. With increasing backlogs, they saw alternative dispute resolution methods as a possible remedy. In 1988, Florida passed a law authorizing civil court judges, at their discretion, to order any case on their dockets to mediation. In 1990, the US Congress passed the Civil Justice Reform Act, requiring every federal district court to develop a case management plan. It recommended the use of ADR processes as one possible remedy to the backlogs. This spurred the development of pilots of court-ordered and court-referred mediation programs, as well as programs that used other ADR processes. By the end of the 1990s, over half of the 94 federal court districts offered or required mediation. It gradually became the primary ADR model used by the courts, outpacing the previous front-runner, arbitration. Mediation made sense to the courts since it produced settlements. And since most courts created rosters of mediators, they defined the qualifications of their mediators. Many courts required that mediators be lawyers or other professionals with content expertise. They usually required mediation training as well, though sometimes for only a minimal number of hours.

Research Critiques the Mediation Process

At this point in its development, mediation was well established in court-based and community programs as an alternative to traditional court processes. The differences between the two kinds of programs were most evident in the level of cases handled and in who the programs used as mediators. Though community centers had the explicit goal of handling many kinds of disputes from many different sources, the reality was that in these programs, as in court-based programs, most cases came from the justice system. Though in one sense the mediation field was doing well, some mediation practitioners & scholars were discouraged by what was happening.

To understand this disappointment, it will be useful to take a step back and consider the mediation process and what it offered. Mediation is generally considered to be the first place on the continuum of alternative dispute resolution processes where a third party in involved. But it is still a process that leaves decision-making in the hands of the parties.



It offers a less formal process than those "higher" on the continuum, allowing direct engagement between the parties.

As described above, mediation was developed to provide an alternative, first to the unrest in communities and then to the clogged case processing system of the courts. Though almost all mediation was affected by the shadow of the law, it promised new ways to deal with conflict that had party self-determination at its core. As part of that promise, both court-based and community programs articulated a specific set of benefits.

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By using cooperative problem-solving and supporting a non-adversarial approach, they promised creative solutions and win-win agreements.

By moving family conflicts like divorce, custody and visitation from courts to mediation, programs promised enhanced communication and better ways to deal with strong emotions. By providing easy access to mediation, either through referral or parties' own choice, they promised faster, easier access to resolutions. Community mediation centers claimed additional benefits. By training volunteers, they sought to build capacity for people to handle their own disputes. By accepting conflicts not involved with courts, community centers sought to strengthen neighborhoods.

But this rhetoric was not consistent with the practice of mediation. And this was true of community programs as well as court-connected programs. Research done in the 1980s noted this gap between the rhetoric and the reality. The reality this research demonstrated was that mediation did not realize its articulated goals because the process employed by mediators was not sufficiently different from the process used by interveners higher on the dispute resolution process continuum. Mediators were oriented toward settling cases and, in the process, they often strayed from the idea of party self determination.

This gap was especially stark as researchers looked at what mediators actually did, not just what they promised. And the gap was present across programs, for volunteer mediators and attorney mediators, though to a different degree. Researchers found that mediators' practice generally involved controlling the "process" of mediation. Most mediators used a stage model, guiding parties through a series of steps that structured how parties talked to each other. While this, in and of itself, had the effect of controlling content, most mediators were more overt in limiting what parties talked about. By being selective rather than inclusive to what they responded, mediators shaped the conversation in a direction that, in their opinion, increased the chances of solving the problem. They tended to prioritize concrete topics over emotional content. They contained conflict through the use of ground rules and caucuses. Since mediators were actively involved as problem-solvers, they had to understand the situation so they asked lots of questions, made suggestions and used their position to influence or persuade the parties. Other mediators, practicing what is now called evaluative mediation, went even farther. In many court-based programs, mediators were expected to have content expertise so that they could evaluate the strength of each side's arguments and predict likely court outcomes. Thus mediators subtly or not-so-subtly offered advice as a way to ensure that any agreement reached met either their own sense of what was right or fair or the court's standards.

The practice of mediation developed in this way because mediators were focused on problem solving or transactional bargains. With programs dependent on the courts for cases, their interest in pleasing the courts outweighed their commitment to party control. The practices described above made sense because their goal was to solve the problem and/or resolve the case. Research revealed not only increased mediator directiveness but sometimes activities that bordered on coercion of the parties. Because of the process' informality, there were little or no legal protections for parties.

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Though mediation always struggled with differentiating itself from the courts, it was in danger of losing its way as an alternative. The attempts made over the decades to demonstrate mediation as a fundamentally different process were not being realized. Instead, party control and party choice were diminished. Communication between parties was restricted. Emotions were contained. Mutual problem-solving was replaced by mediator-led problem-solving. Mediators overtly or subtly evaluated the "facts" of the case. Creativity was stifled as mediators sought to ensure that courts would approve of any agreement reached during the process. While mediators maintained that they were facilitating a process that was very different than other ADR processes, experience and research did not support that claim. Instead, mediation had shifted its focus to the production of agreements at the expense of its own "first principle," party self-determination. As a result, parties failed to see mediation as fundamentally different and rarely sought out mediation on their own initiative. Researchers and social justice advocates critiqued process as being dangerous for women, racial minorities and others who were apt to be less aware of their rights and in less powerful positions.

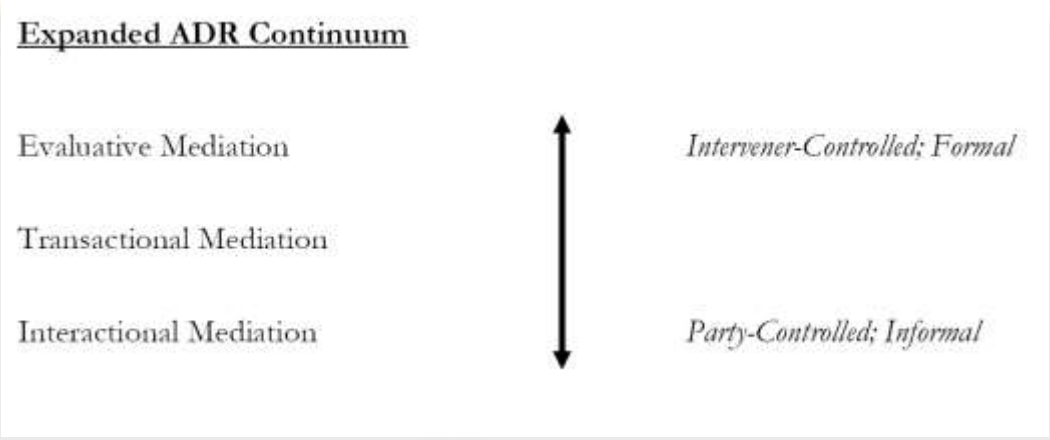
The Mediation Field Responds to the Critique

So mediation was at a crossroads in the early 1990s. On the one hand, it was well-established, used widely by the courts either through court-based programs or by referral to community mediation centers. But on the other hand, it was in danger of losing its uniqueness. The largest growth was occurring in the most directive end of the process, with attorney mediators beginning to overwhelm mediators without professional degrees. And as mediators became more directive, what was actually happening in the mediation room didn't feel all that different to the parties.

The response of the field to this critique varied. Some, especially courts that were disposing of large numbers of cases through mediation and the attorney-mediators who served them, were satisfied. Others considered the critique and began to develop new forms of practice in an attempt to re-establish the uniqueness of mediation. What emerged at this time were communication-focused practices. These stood in contrast to the settlement-focused practices that were most prevalent. Those developing these new forms of practice also worked to break the hegemony of the mediation field, asserting that these were not just different techniques or styles but new models of practice.

These communication-based mediation models defined new goals in an attempt to return to what was unique and valuable in mediation. They reasserted the value of party self-determination. They focused not on transaction but on interaction. The major new models were transformative mediation, narrative mediation, insight mediation and understanding-based mediation. Though there are significant differences between them, their shared focus on interaction yielded a set of common ideas. One is that for mediation to be a unique process that yields sustainable agreements, a mediator needs to focus on something other than, or at least something in addition to, settlement. Instead, they posited interactional change as key. And these models agreed that this interactional change could not be generated by top-down, mediator-driven interventions.

This development led to an expansion of the ADR continuum referenced earlier. Mediation processes could now be differentiated based on the degree to which parties are in control versus the degree to which the mediator is in control.



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Some Thoughts

"Peace is not absence of conflict, it is the ability to handle conflict by peaceful means."

Ronald Reagan

"The harder the conflict, the more glorious the triumph."

Thomas Paine

"Conflict cannot survive without your participation."

Wayne Dyer

"Man must evolve for all human conflict a method which rejects revenge, aggression and retaliation. The foundation of such a method is love."

Martin Luther King, Jr.

"Washing one's hands of the conflict between the powerful and the powerless means to side with the powerful, not to be neutral."

Paulo Freire

"Whenever you're in conflict with someone, there is one factor that can make the difference between damaging your relationship and deepening it. That factor is attitude."

William James

"Change means movement. Movement means friction. Only in the frictionless vacuum of a nonexistent abstract world can movement or change occur without that abrasive friction of conflict."

Saul Alinsky

"If you want to bring an end to long-standing conflict, you have to be prepared to compromise."

Aung San Suu Kyi

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A Closer Look at One Response - Transformative Mediation

Taking a closer look at one model that focuses on interaction, transformative mediation, will help to make this important development more concrete. Transformative mediation brings rhetoric and reality together. It aims at conflict transformation not conflict resolution. It takes seriously the notion that parties should be the ones in control, not only of content but also of process. Transformative practice is based on a different understanding of conflict. Most transactional mediators, whether facilitative, problem-solving or evaluative, understand conflict as a clash of power, rights or interests. Transformative mediators, in contrast, understand conflict as a crisis in human interaction. Thus the mediator's focus is on interaction.

It is important to define clearly the difference between resolving conflict and transforming it. Resolution is about reaching an agreement, hopefully a good one, whether by "good" one means just, fair or win-win. Transformation is about something else. It's about a change in the quality of the interaction between the parties. This change in interaction comes about as a result of a shift in each person's sense of their ability to deal with the situation they face and their ability to consider the perspective of the other. It is important to emphasize that what is talked about here is transforming conflict interaction - not people. Both resolution and transformation can happen and often do. Parties in transformative mediation sessions reach agreements at about the same rate as those involved in other mediation processes. And parties in problem-solving or even evaluative mediation may leave the mediation with the ability to communicate more effectively. But while parties may accomplish both, research indicates that mediators must choose. It is not possible to focus on these two different ends since each requires different practices.

Transformative mediation has a different definition of the mediation process: "mediation is a process where a third party works with parties in conflict to help them change the quality of their conflict interaction from negative and destructive to positive and constructive, as they discuss and explore various topics and possibilities for resolution." The goals of a transformative mediator are to support party decision-making and inter-party perspective-taking. They reflect the reorientation of the mediator from transaction to interaction, from conflict resolution to conflict transformation.

A hallmark of transformative mediation is a clear connection between purpose and practice. Transformative mediators have a clear sense of what they are trying to accomplish with each intervention. They make no distinction between process and content because from a communication perspective, the two are not separate. Choices about process affect content so parties are the ones to decide how to have their conversation. Transformative mediators attend to the moment-to-moment interaction between the parties, not the problem and its potential solution. They follow rather than lead, never using manipulation or pressure. They avoid leading because doing so assumes that the mediator, not the parties, knows what is best in a given situation.

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Other ADR processes focus on resolution without attending to conflict transformation. This is one reason people seek alternatives to court. Getting an agreement may solve a problem. A court verdict may settle a case. But the conflict between the parties may not end, leaving people caught in negative, destructive interaction. Resolution without conflict transformation is also a problem for the courts since agreements reached that leave parties in conflict are less likely to be implemented and/or to be sustainable. Though resolution may be courts' focus, research indicates that what parties care most about is conflict transformation. The process of conflict transformation allows parties to reconnect with the best in themselves and then to re-establish positive connection with others. Interaction shifts to become more positive and constructive. Agreements that result from such improved interaction are often more sustainable. But more importantly, future interactions tend to be more positive and less conflictual.

Even this brief overview makes clear that transformative mediation, like other interaction-focused models of mediation, presents a clear choice. The process is very different than the process parties experience in court. It is also different than models of mediation that focus on transaction, on getting an agreement. Because any parties involved in conflict are interactional, it is appropriate for all kinds of disputes, not just those where parties have on-going relationship.

Mediation's Future

It is useful now to go back to mediation's roots and on to its branches. Mediation developed as an alternative way to respond to conflicts. At first, the field considered mediation as monolithic, generally asserting that there was a single, universally-used mediation process. This hid the real differences in the way that mediation was practiced. Over the past decade, the mediation field has gotten clearer about its own diversity and has become pluralistic. Different mediation models are acknowledged and co-exist. It is important to continue to clearly define models so that the differences between them are better understood. Mediator qualifications, training and standards of practice need to be tailored to fit different models. There also need to be different ways to evaluate success.

Mediation rests on the principle of self-determination, honoring the right of parties to make choices for themselves. Choice is good for the mediation field as well. The field will do well to consider the possibility that diversity is key to its success. By clarifying the differences between mediation models, the field offers clear choices to parties involved in conflict, to courts referring cases and to those interested in being trained as mediators.

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* Judy Saul has over two decades of experience in mediation, facilitation, training and non-profit management. She founded the Community Dispute Resolution Center, Inc. (CDRC) in 1983 and served as its Executive Director for over 25 years. Under her leadership, CDRC became a nationally-recognized leader in the community mediation field. In 2009, Ms. Saul received the Lawrence Cooke Peace Innovator Award from the New York State Dispute Resolution Association. Ms. Saul is a Certified Transformative Mediator, and Fellow and Board member of the Institute for the Study of Conflict Transformation. Through the Institute, she has published articles on mediator coaching and assessment, training design and multi-party practice. She is certified as a trainer by the New York State Unified Court System and is an adjunct faculty member at Hofstra University School of Law. She has trained nationally for the Institute and the United States Postal Service's REDRESS Program as well as internationally in Australia, England, Germany, Indonesia, Kenya, New Zealand and Norway.

It's Never Just About Money

By: Elliott Platt*

Mediation is becoming more accepted than ever, and for good reason. Done well, it can be an important process for resolving cases.

We've long had settlement conferences in the courts. Those conferences are successful in many cases. A settlement conference can help counsel evaluate their positions and reach compromises that end cases.

But not always; the time and resources available in judicial settlements are limited. Especially in the state courts, parties are not directly involved in the conferences. Judges are rarely able to help the parties identify their interests, needs and goals. Thorny issues and entrenched positions may need more – more time and effort to help parties reach resolution. Mediation can be that "more."

As attorneys consider whether to mediate, it's helpful to know what to expect in a good mediation. The mediator seeks to identify and accommodate the parties' interests. Unlike many settlement conferences, it is essential that the decision-makers on both sides are directly involved.

Lawsuits are framed in terms of money. Very often, the only legal remedy for a wrong is an award of money. The plaintiff wants some, the more the better; the defendant resists, issue joined.

But there is always a range of interests and concerns on both sides. "It's never just about money," said Linda Singer of the Center for Dispute Settlement. She has promoted the concept of mediation for decades, written extensively about it, and trained legions of new and not-so-new mediators.

She's right. Think about any major case and look a little deeper than the prayer for relief and the affirmative defenses. In an employment discrimination case, for example, the plaintiff may feel disrespected and betrayed by a company to which he gave his full loyalty and effort. The manager who is accused of discrimination may be appalled to be labeled a racist or a sexist (or both). In a malpractice case, the plaintiff was not only injured, but the trust she placed in her doctor (or lawyer, or accountant) was breached. The professional she is suing feels wrongly accused and is concerned about his professional reputation. For both sides, filing the complaint is a declaration of war. The battle is on, and the enemy must be vanquished for reasons separate from the money claimed.

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Even in commercial litigation, there are individuals who made the decisions that gave rise to the dispute. They may believe their professionalism and even their future employment may be at stake. Everyone who represents a big company knows that the corporation must be personalized and humanized. So, instead of telling the jury, "My client, Megabucks, Inc., did what was just good business," we argue, "The folks down at the warehouse had some hard decisions to make." That's not just good argument; it's true. Real, feeling people made decisions that are now being challenged.

In many cases, warring companies may need each other in the future. Maybe a software developer did not produce what was ordered this time (and maybe it did), but it may still be the best alternative for the disgruntled customer's next project. So resolving today's dispute may involve some agreement about tomorrow.

At some level, parties are open to the concept of a settlement when they agree to mediate. Still, the parties may differ dramatically on the outcome they anticipate. Mediation seeks to get the parties beyond the merits of their dispute, to focus on their underlying interests, and to help them reach an agreement that, perhaps through a series of compromises, meets their interests. As advocates, we advise our clients of the risks of litigation. A mediator can help parties focus on those risks by helping them think about the alternatives to a negotiated settlement and how to get to that settlement.

The most determined litigants bring unbridled passion to the beginning of a case. That passion can be reinforced by their investments of time, money and emotion as the case progresses through motions and discovery. A good mediator can help the parties realize that there is no guarantee that those investments will be re-paid and that reaching a settlement can be the prudent thing to do. The process requires a sustained effort by everyone involved. It helps the parties focus on their future, seeking an acceptable way to put the nasty dispute behind them and avoid the additional time, expense and uncertainty of litigation.

As Professors James A. Stark and Douglas N. Frenkel recently wrote, "The methods mediators use . . . are almost limitless in their variety. Mediators persuade by asking questions and by making statements. They persuade by trying to thaw damaged relationships and cool down heated emotions. They persuade by trying to engage the disputants in cooperative brainstorming activities. They persuade by 'conditioning' the parties through flattery and humor or by using 'just between us' type statements in private caucus."[1]

Mediators may approach their task in different ways and they may adjust their approach based on their perceptions of each case. They seek to identify the barriers that stand in the way, and the interests and relationships that can serve as the basis for constructive conversation. But always the goal is the same: to help the parties come to their own resolution.

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[1] Stark & Frenkel, *Changing Minds: The Work of Mediators and Empirical Studies of Persuasion*, 28 Ohio St. J. on Disp. Res. 263, 268 (2013).

Elliot Platt graduated from the University of Pennsylvania Law School in 1966. After a year as a VISTA Volunteer, he became employed at Community Legal Services, Inc. in Philadelphia, Pennsylvania. He worked at CLS for fifteen years, representing people who could not afford to pay counsel. Since then, for more than 32 years, he has been in private practice, most of that time, and currently, as a sole practitioner. He has litigated in many areas of law on behalf of a broad range of clients.

Goethe, the San and the Art of Listening – Transforming Dispute Resolution

By: Jacques Joubert*

The Bushmen or San are the closest relatives of the people that first walked the earth. A few months ago I experienced a powerful demonstration of listening by their leaders in Southern Africa.

A documentary filmmaker is involved in a dispute with a former radio personality. In short the radio personality claims copyright over the video recording of an expedition of the well-known Kruiper family in the Kgalagadi Transfrontier Park. According to the filmmaker, the author of the video recording copyright belonged to the traditional leader of the Khomani San, the late Dawid Kruiper. He says the funds allocated by SA National Lotteries for the making of the video was never earmarked to benefit the former radio personality by giving her copyright. Dawid Kruiper, he says had given him a non-exclusive license to make a film from the video recording to tell the world the story of the Kruiper family.

A court hearing their dispute will have to decide who is telling the truth. The risk of such a credibility finding is usually a good enough reason to have a dispute mediated. The former radio personality has however turned down a request by the filmmaker and members of the Kruiper family to mediate the dispute. Instead she has pulled out all legal and non-legal stops to prevent a beautiful and deeply respectful film from being screened to the world. In doing so the filmmaker believes she is silencing the voice of the San in South Africa.

The filmmaker showed the film to the leaders of the Bushmen and before commenting on the film, they asked him to tell them his side of the dispute. It was then that I experienced a demonstration of listening that I had never experienced before. They gave him the floor and without staring him down they listened intently to every word he had to say, without once interrupting him or making any comments or attempts to guide his narrative. They suspended their judgment and just listened and listened, allowing moments of silence to encourage the filmmaker to open his heart to them. They had created a safe space for him to tell his story behind the dispute. After the filmmaker finished they referred to a scene in his film in which the legendary Bushman tracker Buks Kruiper refers to him as his "brother." To be called a brother by Buks, they said was an honor and it meant that they too regarded the filmmaker as their brother. Alan Nelson, a senior advocate and mediator trains aspirant mediators for UCT to listen to the parties with "their whole bodies and their whole souls." He would have found the San's demonstration of listening equally compelling.

Commercial mediators are trained in a paradigm in which the mediator generally plays and is expected to play a central role to advance a settlement. To this end the mediator uses confidential and private sessions with the parties to explore possible concessions and proposals that may satisfy their underlying interests. And only when satisfied that one or both of the parties are willing to make helpful concessions or proposals, does the mediator obtain permission to convey a concession or proposal to the other party. It is in the exercise of this discretion that commercial mediation can be so effective. It explains why a commercial mediator should generally have knowledge and experience of the field in which the dispute arose. A mediator with experience of medical negligence claims is hardly going to ask permission to take across a demand that the mediator knows will offend the other party.

The commercial mediation paradigm may however have a limitation in that it does not encourage dialogue between the parties themselves. The mediator is at the apex of the process, thus limiting the potential for mediation to transform the way in which the parties may in future resolve other disputes. The popularity of the commercial mediation paradigm however suggests that it is here to stay, but should it be the only show in town?

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Johann Wolfgang Goethe wrote: "What is more illuminating than light?" He answered:"Dialog!" For this reason Mediation in Motion (MiM) and UCT Law@Work is developing a model of mediation where the mediator will not only effectively make use of private sessions, but will also actively look for opportunities to facilitate dialogue at joint sessions between them. In this model mediators prepare the parties during private sessions to have a constructive dialogue, really listening to each other's concerns during joint sessions. And if the dialogue breaks down, nothing prevents the mediator from reverting back to private sessions.

MiM's mission is to transform the way in which people resolve disputes, and we believe commercial mediators should be open to opportunities to encourage real dialogue between the parties. This is especially important when the parties share a common interest to continue with their relationship. Listening, really listening, is of course an integral part of dialogue and Goethe may also have been inspired by the Bushmen leaders' demonstration of listening.

A few months ago Woza Mediation facilitated (not mediated) a dialogue between a group of people who were in favour of legalising the trade in Rhino horn and a group who were vehemently against any trade. For the first hour they debated the pros and cons, the strengths and weaknesses of each other's positions. It became a heated conversation and they constantly interrupted each other. I asked them what the chances are that they would be able to persuade each other of their respective positions. They looked at me with surprise but quickly realised that debating the issue would get them nowhere. Within minutes they realised that their respective positions were a means and not an end. They suspended their judgement about who was right and started talking about ways to work together to preserve the Rhino.

Mediators, who have developed their own mediation practices, will know how difficult, time consuming and costly it is to set up mediation. MiM will by the end of June launch a web-based mediation platform that will use an automated process to connect mediators with their clients. This innovative platform will make it easier, less time consuming and far less costly to set up mediation.

It promises to be a game-changer for mediation in South Africa and beyond . . . .

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The foregoing originally appeared on Mr. Joubert's mediation blog and is reprinted here with permission.
http://www.jacques-joubert.co.za/blog/goethe-the-san-and-the-art-of-listening-more-lessons-for-mediators

It's About Pre-Suit Mediation!

Live from the PMI a Highlights Reel

By: Larry Langer*

In a sterling presentation at the 2015 Professional Mediation Institute, Christine Harter and Rodney Romano explained why pre-suit mediation has become a prominent part of their mediation practices. There are two principal advantages: minimal litigation expenses and privacy. As Christine noted, "pre-suit mediations absolutely work, especially in medical malpractice cases because it helps avoid the press." Numerous defendants including major retailers, medical and dental professionals, and restaurant chains are anxious to avoid the potential adverse publicity resulting from a public lawsuit. In addition, Christine suggested that carriers are frequently motivated to use pre-suit mediation to expeditiously close low policy limit cases or with *pro se* insureds before there is attorney involvement. Christine cautioned mediators to be careful in dealing with *pro se* parties. Carefully document acknowledgements of mediator neutrality and the limits of mediation. She urged mediators to make sure *pro se* parties fully read and understand the consequences of any agreement. Drawing upon his experience in serving on the Dispute Resolution Center (DRC) Grievance Committee, Rodney warned that the primary complaint behind most grievances stems from allegations that the mediator coerced the party into a settlement.

Privacy is a paramount concern in those pre-suit cases that Rodney's firm labels as "black box mediations." Such cases may involve a high profile party such as a celebrity or public figure. Or the dispute may involve heinous acts which the party seeks to cloak in secrecy. In arranging the logistics of such mediations, every effort is made to conceal the existence of the mediation even from the firm's employees generally by conducting the mediation off-site.

Christine and Rodney readily admit some cases are unsuited for pre-suit mediation. For example if liability is in dispute, pre-suit mediation may not be productive. In the absence of sufficient discovery, one party may not be able to fully assess exposure. Mediations that devolved into discovery disputes seldom succeed. Rodney explained how a lack of trust between the parties can hinder resolution. For that reason Christine urged the parties to "lay their cards on the table… help me to help you." For Rodney it is a favorable omen if the adjuster trusts the plaintiff attorney. This has led him to inquire, "Have you had cases before?" Christine observed that pre-suit mediation may not be worthwhile if it involves only one out of five plaintiffs in a multi-party lawsuit.

Rodney pointed out that some large corporations retain separate counsel for pre-suit mediation and litigation. This maximizes the incentive to resolve the case at pre-suit mediation. Rodney, who runs an extremely successful mediation practice, derives great personal satisfaction from his work, commenting that mediation "is a laboratory for the neuroscience of decision making."

Rodney offered numerous practical tips. Before the mediation formally begins in a litigated case, he often telephones the attorneys for the parties to determine the level of contentiousness. He will also check the number of pleadings entered on the official court docket. Too many pleadings indicate to him that the parties are fighting over everything. If the case does not settle at the mediation, he tries to maintain communication with the parties even reaching to consult on weekends. He has provided his cell phone number to the parties when he feels that is appropriate. This allows him to be available at propitious moments in order to capitalize on mood swings that suddenly favor settlement.

Larry Langer was initially Florida Bar Board Certified in Workers' Compensation August 1, 1988, and Florida Supreme Court certified in Circuit Civil Mediation April 21, 2000. He is a member of the PMI Board and a frequent contributor to this newsletter. His full biography is on page 23.

HOW TO MAKE THE MOST OF YOUR STATE MEDIATION

By: Greg Johnsen [*]

INTRODUCTION

I have often heard that you can only expect to get back what you put into an endeavor. This is true with many things in life, and it is certainly true in mediation. Simply put, the more effort a party or litigant puts into mediation, the better chance of a successful result. During my tenure as a state mediator I have seen varying degrees of preparation and effort as it relates to mediation. I have noticed that the attorneys and parties who are consistently prepared for mediation are the ones who are getting the desired results from mediation. Others who are not so diligent have inconsistent results.

State mediations are ordered and by definition are not voluntary.[1] All claims filed in petitions for benefits must be mediated before adjudication of the claims raised in those petitions by the Judge of Compensation Claims.[2] State mediation is a service provided at no cost to the attorneys, employers, carriers, and claimants as part of the Florida workers' compensation system. Many litigants take advantage of the state mediation process to either settle claims or to resolve a myriad of issues, thus avoiding or minimizing continued litigation. A number of private mediators also offer their services for a fee, and do an excellent job settling cases and resolving issues. Most would agree that mediation, as a form of alternative dispute resolution, offers the best opportunity to resolve a case without further litigation. How then do we maximize our chances for a successful mediation?

Before I continue, I feel it is important to define what constitutes a successful mediation. Certainly most of us would agree that a mediation where the case settles or where all the issues are resolved would count as a successful mediation. What about a case where only a one or two issues resolve, or where the outcome is an impasse? Could those mediations be deemed "successful mediations?" I submit that a successful mediation is not defined by the outcome, but rather where a meaningful discussion of the case or the issues of the case has taken place. Even if the case is not resolved at the time of the mediation, a meaningful discussion of the issues and claims may lead to a resolution at some point prior to trial.

PREPARATION

Most parties and their attorneys come to mediation with varying degrees of preparation. Coming prepared to mediation is the most essential requirement to a successful mediation. I have mediated many cases a day or two prior to final hearing. In those mediations the attorneys are so well prepared the opening statements lay out all their arguments that they plan on presenting to the judge of compensation claims. The attorneys and parties are so well prepared that in some ways the mediation feels like a dress rehearsal for trial. In my experience, these mediations usually result in a settlement of the case or a resolution of the issues. Without a doubt, the pressure of an upcoming final hearing plays a role in getting the case resolved. Also, there has usually been some dialog among the respective attorneys in preparation for the final hearing. These factors play a role in resolving the case. More significantly, however, the parties at that point have all available information to make an informed decision.

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On a number of occasions, I have come out to our lobby here at the Miami district office to gather the participants for the mediation, and find that the attorneys and parties are seated on opposite sides of the room. This happens more often than not. There has been no dialog or discussion of the issues or of any potential settlement interest. On some occasions the attorneys have never even met. Other times the attorney sent to cover the mediation is not the lead attorney, and may have limited knowledge of the file or ability to make agreements. Keeping these obstacles in mind, the following are my humble suggestions on how to prepare for mediation, thereby increasing the chances for success.

When representing an injured worker, or claimant, at mediation, it is probably not a good idea to meet the claimant at the mediation for the first time. The claimant may be making a life altering decision at mediation, especially if settlement is coupled with a voluntary resignation from employment with the claimant's current employer. The claimant might be reluctant to rely on the advice of an attorney she just met in the mediation office for the first time. Building a relationship with a client takes time, and can rarely be done in the 10 to 15 minutes of discussion prior to the commencement of the mediation. Additionally, it is important for the attorney to speak to their client before the mediation to determine if there is any settlement interest. The sooner a demand can be provided to the employer/carrier, the more likely the employer/carrier will have settlement authority available for the mediation. Many times the employer/carrier hears the settlement demand for the first time at mediation. Sometimes the employer/carrier already has authority to settle the claim, or can obtain authority at the mediation. Other times that is not the case, and an opportunity to settle the case has been lost. Many employer/carriers prepare for settlement, and obtain settlement authority prior to mediation, not knowing whether or not the claimant is interested in settlement. It never hurts to prepare for the unexpected.

If settlement is not contemplated then what other issues should the claimant's attorney address with the claimant prior to mediation? Is the injured worker satisfied with her doctors and medical care? Are there any outstanding medical bills that the claimant is being harassed about? Has the claimant been receiving her indemnity checks timely? Was that mileage reimbursement request paid? I am always amazed when these questions are brought to light at mediation for the first time. The injured worker usually has answers to these questions. Conferencing with the claimant prior to mediation will help expedite resolution of these issues at the mediation conference.

From the vantage point of the employer/carrier the main focus should be on obtaining the requisite documents and records prior to mediation. If one of the pending issues pertains to average weekly wage are there payroll records, or at the very least a 13 week wage statement, to address the issue? Do I have up-to-date payout ledgers to prove any indemnity payments made as well as payment of medical bills? Does my file contain up-to-date medical records including any IME or EMA reports?[3] Is my adjuster aware of the mediation, and does she have sufficient settlement authority? Having a pre-mediation conference with the claims adjuster on the file prior to mediation is just as critical as the claimant's attorney talking to the injured worker before mediation.

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How to Make the Most, from page 15.

Every so often I will call an adjuster for opening statements to start a mediation only to find that the adjuster is unavailable. On other occasions the adjuster answered her phone and received an unpleasant surprise by not being aware that a mediation conference was taking place on her case. What is the likelihood of that mediation being successful? Most attorneys who represent employer/carriers will prepare a settlement evaluation prior to the mediation. Some do not unless they receive a settlement demand from claimant's counsel. To those attorneys I normally say "Why do you need opposing counsel's opinion of the settlement value of the case in order to prepare your own evaluation?" Having a settlement evaluation on file allows the adjuster to obtain settlement authority prior to the mediation. Anything can happen at the mediation conference. The claimant might decide to settle her case after hearing the employer/carrier's position.

There are events that happen on a file which are out of everyone's control that can affect preparation for mediation. The claimant does not appear for deposition or does not comply with discovery requests. The doctor's office will not cooperate in providing a deposition date or necessary medical reports. The employer does not know a 13 week wage statement from a take-out menu for lunch. Additionally, both sides should be aware of any potential child support arrearage. All workers' compensation child support information requests are now handled though the Office of Judges of Compensation Claims (OJCC).[4] These requests are rapidly processed by our district staff allowing for quick access to the information. Nothing is worse than having settled a case and then finding out the next day that the claimant owes a substantial sum of money in child support. The use of maximum effort to obtain as much information as possible prior to the mediation conference increases the chances of a successful mediation.

GOALS

Now that I have all this information, and have maximized my preparation, what am I going to do with it all? The second part to a successful mediation is to have a game plan. Is the goal to settle the case? Is the goal to resolve the issues and keep the case open? Is the goal to accomplish nothing? The initiative lies with the claimant and claimant's counsel as the initiators of the claim. Settlement is always voluntary. No mediator or judge of compensation claims can force a claimant to settle her claim. In many ways the employer/carrier is forced to react to what the claimant does with the claim. This does not mean that the employer/carrier cannot have goals for the mediation conference. I have seen many a mediation where the claimant states she does not wish to settle her case. The employer/carrier starts making settlement offers to the claimant and the mediation results in a settlement. In one mediation I conducted, the attorney for the employer/carrier brought settlement checks to the mediation. The checks were made out to the claimant and his attorney for the full settlement authority on the file. The claimant, who was not initially interested in settlement, decided to accept the settlement offer after seeing the checks made out in his name. The employer/carrier's goal at that mediation was to settle the claim, and they accomplished that goal.

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Some Thoughts

"I think sometimes people really require the satisfaction of closure."

Diablo Cody

"I don't believe you ever get closure on anything. Things leave a permanent mark on you."

Allison Anders

"Coming together is a beginning; keeping together is progress; working together is success."

Henry Ford

"Changes call for innovation, and innovation leads to progress."

Li Keqiang

"You don't make progress by standing on the sidelines, whimpering and complaining. You make progress by implementing ideas."

Shirley Chisholm

"Honest disagreement is often a good sign of progress."

Mahatma Gandhi

"Progress is a nice word. But change is its motivator. And change has its enemies."

Robert Kennedy

"We all want progress, but if you're on the wrong road, progress means doing an about-turn and walking back to the right road; in that case, the man who turns back soonest is the most progressive."

C. S. Lewis

How to Make the Most, from Page 16.

Many times at mediation, settlement may be premature. The claimant may be receiving active medical care, or there may be a pending surgery on the horizon. In these cases the main focus of the mediation will be issue resolution. State mediations cannot be used exclusively to mediate attorney's fees.[5] Therefore, issue resolution will focus on whether certain claimed benefits are due and owing to the injured worker. Litigants preparing for a mediation which will predominantly focus on the issues at hand should set a goal for each issue. Is the issue resolved? Do I want to go forward on that issue? Do I want to compromise on that issue? Do I want to withdraw that issue? All of these are valid questions when engaged in issue resolution. The majority of state mediations focus on issue resolution. State mediations are court ordered and many times the case may not be ripe for settlement at the time of the mediation. If only 1 or 2 issues are resolved at the mediation, those resolved issues might pave the way for the remaining issues or the entire case to be resolved at a later date. A common example is resolving an issue pertaining to a recommended diagnostic test. The MRI or nerve conduction study agreed to at mediation might provide additional information about the injuries or other claims. Obtaining the diagnostic test may lead to authorization of other benefits or overall settlement. From an indemnity perspective, resolving an average weekly wage issue gives the parties a strong foundation from which to resolve all future indemnity issues such as temporary partial disability and impairment benefits. Having a plan on how to address each issue combined with proper preparation increases every party's chance of having a successful mediation.

AFTERMATH

Despite best efforts and diligent preparation, some cases do not resolve at mediation. The claims will be set for trial, or if previously set for trial, will continue on towards trial. Just because the mediation ended in an impasse does not mean settlement or resolution of the issues is out of reach. Many cases settle within a few days after mediation. Sometimes the claimant has a change of heart and wishes to accept the settlement offer. Other times a little additional settlement authority will resolve the case. The same could be said for mediations focused primarily on the claimed issues. The parties may have learned new information at the mediation or have a better idea of what discovery is pertinent to addressing those issues. At a bare minimum, each party will learn the other side's position and can then perform the requisite discovery to determine the merits of that position. Mediation is not the last stop for resolving claims. Many cases undergo multiple mediations before resolution.

Most people are under the mistaken impression that state mediations are only one-half hour long. This is an incorrect assumption. Mediations at our district offices last as long as reasonably necessary. State mediators, along with our private mediator brethren, perform a public service every day. Allow us to help you resolve your case.

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[1] Pursuant to Rule 60Q-6.110(2)(d), F.A.C., the OJCC now offers voluntary mediation services based upon the availability of the selected mediator.

[2] Florida Statute section 440.192(9).

[3] Independent medical examiner and expert medical advisor respectively.

[4] As of September 1, 2013 the OJCC began processing all requests for child support with access to the databases of the Florida Department of Revenue and all Florida county data bases.

[5] Florida Statute section 440.25(1).

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* Gregory J. Johnsen graduated *Magna Cum Laude* from Barry University with a Bachelor of Arts in 1990 and *Cum Laude* from the University of Miami School of Law in 1993. After becoming a member of The Florida Bar in 1993, he tried several jury and non-jury trials in civil litigation matters and drafted a brief to the Supreme Court of the United States. He then moved into workers' compensation where he has worked since 1994, handling both the trial and appellate levels, including oral arguments before the First District Court of Appeal. In 2006, Greg became a State Mediator and has mediated over 5,000 workers' compensation claims including complex causation and death claims. Annually Greg is one of the highest rated mediators in the Division of Administrative Hearings (DOAH). In 2015, Greg transferred from the Miami Division to the Ft. Lauderdale Division of DOAH.

Preparing for Mediation:
Medicare Checklist for WC Claims

By: Mark Popolizio*

It is no secret that Medicare Secondary Payer (MSP) compliance continues to complicate workers' compensation (WC) claims practice. Unfortunately, far too often Medicare issues (especially the Medicare Set-Aside, or "MSA") end up sounding the death knell for settlement, thereby forcing WC claims payers to keep claims open and incur additional costs.

The key to combating the MSP challenge is good old-fashioned "preparation." Quite simply, addressing potential MSP issues before mediation or settlement discussions is very often the difference between settling a case and clearing a permanent spot for it on the claims shelf.

To help better address MSP issues as part of the settlement process, the author presents the following general Medicare checklist:

1. Be proactive. Take control.
MSP compliance (especially the WC MSA) has simply grown too complex for eleventh hour or *ad hoc* approaches. You need to start thinking about potential Medicare issues early, and they need to be revisited throughout the course of the claim.

2. Do you know your company's or client's protocols?
Make sure you have a firm understanding of any applicable protocols. Adjusters should check to see if their company or insureds (if applicable) have any specific MSP protocols that must be followed. Likewise, defense counsel should check with their clients to make sure they are aware of any protocols.
Typical protocol items involve the following: Who will check the claimant's Medicare and Social Security disability status? Who will be responsible for obtaining and negotiating conditional payment claims? Who will be responsible for reimbursing Medicare? When is a WC MSA applicable? Should specific settlement language be used?

3. Do you know the claimant's Medicare and Social Security Disability (SSD) status?
Determining the claimant's Medicare and SSD status is a critical step in assessing whether MSP issues need to be addressed. Check to see if this has been done. If it has been done and came back negative, look to see how recent that inquiry was, as you may need to do an updated status check.

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In terms of obtaining this information, there are a few options: The Section 111 Query Process system, which can be used only by Responsible Reporting Entities (RREs), provides Medicare status information. RREs can use the system once a month to check a claimant's Medicare status, and a response is generally provided within 14 days of the submitted inquiry.

One thing to keep in mind is that the Query Process provides Medicare status information only; it does not provide SSD information. Thus, if the Query results come back negative (for example, claimant is not on Medicare), it will likely still be necessary to check the claimant's SSD status separately. This may be particularly pertinent with respect to determining whether a WC MSA may be applicable.

Another option is to submit a written request for Medicare and SSD status information directly to the Social Security Administration (SSA). The claimant's authorization is needed to process this request. Response times vary greatly among the various SSA offices nationally.

This information could also be requested directly from the claimant as part of standard discovery practice (for example, interrogatories, production requests, depositions, etc.), as may be permitted per jurisdiction. However, for a variety of reasons, best practices may favor procuring this information from more official sources as noted above.

4. Have you checked for Medicare conditional payments?

If the claimant is a Medicare beneficiary, then it is necessary to determine whether Medicare is asserting a conditional payment claim. If so, has Medicare's claim been examined for accuracy? Have steps been taken to remove inappropriate claims and/or to argue for other reductions?

Assuming this has been done, check how recent the information is, as it may be necessary to obtain an updated conditional figure from Medicare (and it may then be necessary to go back and challenge/reduce any new amounts).

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5. Is a WC MSA applicable?

Determine whether the case meets the Center for Medicare Services' (CMS') WC MSA review thresholds (assuming the parties have decided to participate in the CMS' review system). Make sure you have a firm understanding of the thresholds, including how CMS defines the terms "total settlement amount" and "reasonable expectation of Medicare enrollment" to determine whether a settlement falls within the thresholds.

If the settlement meets the review thresholds and will be submitted to CMS for review, have you taken steps to reduce the WC MSA allocation amount before the proposal is sent to CMS? For example, can prescription costs somehow be reduced? Is there an outstanding recommendation for surgery (or some other costly medical procedure) that may no longer be medically necessary? Do you know the claimant's non-industrial health history so that a rated age can be obtained to help reduce the claimant's life expectancy for WC MSA calculation purposes?

Another important issue involves whether the settlement will be finalized before CMS completes its review of the WC MSA proposal. If so, which party will be responsible for any discrepancy between the agreed and approved amounts? Alternatively, will the parties wait for CMS' response before finalizing settlement? If so, will the settlement be "contingent" upon CMS approving the proposed WC MSA allocation amount?

Here are other issues to address: How will the MSA be funded? Will any type of administration assistance be provided to the claimant? If so, who will be responsible for securing this? Will some form of reversionary interest be considered?

If the case does not meet CMS' WC MSA thresholds, determine whether a future allocation may still be applicable or prudent. This will largely come down to an interpretation of CMS' policy statements regarding non-threshold cases. On this point, adjusters should see if their companies or clients have any specific protocols or policy positions regarding non-threshold cases. Likewise, defense counsel should check with their clients regarding this issue.

6. Prepare clear and understandable settlement language.

It is important that all pertinent MSP issues be memorialized as part of the settlement agreement. These provisions should be clear and understandable in terms of the MSP issues addressed, how particular issues will be addressed, and the corresponding obligations of the parties.

While an in-depth analysis into each of the issues and related considerations is beyond the scope of this article, some general items include information regarding the WCMSA (for example, amount, funding, administration, etc.) and who will be responsible for reimbursing any Medicare conditional payments. Consult any applicable protocols and your legal counsel regarding what settlement provisions may be applicable in your particular case.

7. Be Proactive

Being proactive and taking charge is absolutely critical when it comes to dealing with Medicare Secondary Payer issues. Addressing potential Medicare issues *before* mediation or settlement discussions is the key to setting claims.

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* **Mark Popolizio** is vice president of MSP Compliance and Policy for ISO Claims Partners. Mark is a nationally recognized thought leader in MSP compliance. He has authored numerous articles on MSP issues and is a regularly featured presenter at national seminars and other industry events. Prior to dedicating his professional focus to MSP compliance in 2006, Mark practiced workers compensation and liability insurance defense for ten years, representing carriers, employers, third-party administrators and self-insureds. He is a member of the Florida and Connecticut Bar. Mark is based out of Miami, Florida, and can be reached at mpopolizio@iso.com or 786-459-9117.

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Why Are Attorneys Afraid of Conflict in Mediation?

By: Jeffrey Grubman*

The mediation process has evolved significantly over the past few decades. Mediation was initially viewed skeptically by trial attorneys who viewed themselves as warriors who preferred to try cases rather than settle them. Those same trial lawyers believed that if settlement was appropriate, they certainly did not require the assistance of a third party to effect the settlement. They would pick up the phone and call their opposing counsel and either work things out on their own or try the case.

As courts around the country become overburdened, mediation became a popular forum to resolve disputes. Many courts throughout the country require cases to be mediated before the case can go to trial. Consequently, attorneys have been forced to participate in mediation. Because trial attorneys were not accustomed to the mediation process, the process initially looked somewhat like a court hearing or a trial. For example, in the early days of mediation, opening statements in mediation looked and sounded very much like an opening statement at trial. Trial lawyers in the early days of mediation, and some trial lawyers still today, had a difficult time finding the balance between advocating their client's position while proceeding in a conciliatory manner with settlement being the goal of the mediation.

Largely due to attorneys' discomfort with finding that balance, it became commonplace in many parts of the country for attorneys not to make opening statements in mediation. A well prepared and delivered opening statement goes a long way towards achieving a favorable settlement for one's client.

The custom of not making opening statements in certain parts of the country and in certain substantive case-types has now led to not even having a joint session during some mediations. Except in the rare situation where there is the potential for violence, this is a mistake. The parties and their counsel should at least be willing to sit in the same room with one another for some period of time while the mediator explains the process and lays the groundwork for a productive day.

When there is a joint session, many attorneys instruct their clients not to say anything. These attorneys apparently believe either that their clients will say things that could hurt their case or the client or the adversary will say things that could upset the other person and thereby make it harder to settle the case. The confidentiality that blankets the entire mediation process should ameliorate an attorney's concern about his or her client saying something that could hurt the case. The fact that a litigant may say something that will upset the other party is not enough of a reason not to allow parties to speak. First, the fact that the parties are engaged in litigation is evidence enough that the parties are not happy with one another. Nobody should be surprised or devastated when one of the parties says something the other party does not like.

More importantly, many people want their voices heard not just by the mediator, but by the party with whom they are litigating. This is particularly true in situations where the parties had a pre-existing relationship, such as partners or competitors in a business. I have found joint sessions extremely helpful either with or without the attorneys present where the parties are encouraged to speak directly to their opponents. I can think of countless mediations where the parties met in caucus and negotiated through the mediator for hours followed by a meeting in which the parties spoke directly to one another and in which the case settled during that meeting or shortly thereafter. Nevertheless, many attorneys feel uncomfortable with the conflict that sometimes arises from these direct communications. Hopefully, the next time an attorney reading this article gets that uneasy feeling when the mediator suggests that the parties speak directly to each other, he or she will give it a try rather than viscerally reject the idea.

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* *Jeffrey Grubman is a mediator and arbitrator with JAMS. He is based out of the Miami office but mediates cases nationally. His practice focuses on securities and financial services, commercial/business, employment, and entertainment and intellectual property. He can be reached at jgrubman@jamsadr.com. The information contained in this article does not constitute legal advice and are his opinions and not the opinions of JAMS.*

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PMI Welcomes New Board Members!

Andy Bucher
Boca Raton, Florida

Jeffrey Grubman
Miami, Florida

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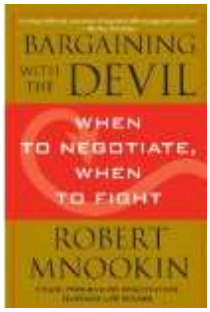
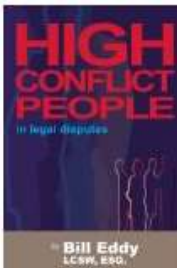
Some Books

Comprehensive and current, **Negotiation: Processes for Problem Solving** covers the theory, skills, ethical issues, and legal and policy analyses relevant to all key areas of negotiation practice.



One of the country's most eminent practitioners of the art and science of negotiation offers practical advice for the most challenging conflicts—when you are facing an adversary you don't trust, who may harm you, or who you may even feel is evil.



An easy-to-read and practical guide for legal professionals, or anyone disputing with a high-conflict personality. Using compelling case examples and drawing from thirty years' experience in three professions, Bill Eddy explains the dynamics and strange logic of four types of personality disorders that appear to be increasing in legal disputes.

Cultural Diversity

Live from the PMI - a Highlights Reel

By: Larry Langer*

AnnaMarie Kim Miller, Silvia Hoeg, and Eric Hires presented a lively discussion on Cultural Diversity: Identifying and Managing Implicit and Explicit Bias in Mediation. AnnaMarie explained that the difference between implicit and explicit bias refers to the bias that we can readily identify (explicit) and the bias we may not recognize within ourselves (implicit). Eric noted that while everyone may have some degree of bias, to fulfill the role of a professional mediator we must zealously preserve our neutrality.

In order to test our biases, AnnaMarie displayed photographs of an Asian woman, a heavily tattooed street tough, Snoop Dog in a hoodie, and a controversial politician. She asked audience members to identify areas of potential prejudice and how a mediator might deploy cultural sensitivity to overcome an initial negative reaction. Eric emphasized active listening as one tool to help develop the rapport necessary to bridge a cultural gap.

Eric added some levity to the program by donning Jamaican attire together with an island accent. In skit form he portrayed how such a Jamaican might present a cultural challenge to a mediator. Enthusiastic audience participants freely related anecdotes on how cultural diversity had impacted their mediations. A Spanish speaking mediator pointed out the importance of having a male authority figure assist a Hispanic female with decision making. Another audience member revealed that the inadvertent use of a Yiddish term disrupted a mediation because one of the parties refused to work with a Jewish mediator.

Eric cautioned that mediators should be careful not to inject personal opinions, beliefs, or attitudes that might be construed as offensive. He also acknowledged that he has been hired for mediations because he is black and therefore might better able to relate to a black litigant. He recommended patience so that the mediation process can eventually overcome an initial reticence borne of ethnic or cultural differences.

Larry Langer was initially Florida Bar Board Certified in Workers' Compensation August 1, 1988, and Supreme Court Certified Circuit Civil Mediator on April 21, 2000. He earned his B.A. degree, cum laude, from the University of Pittsburgh in 1970 and his J.D. degree from Duke University in 1973. Larry also trained at the National Institute of Trial Advocacy in 1974, and the Duke University Private Adjudication Center in 2000.

Larry worked 1973-1974 at the Atlanta Regional Office of the Federal Trade Commission. He was Assistant County Attorney, Palm Beach County from 1974-79 , and then an Associate at the firm of Paxton, Crow, Taplin & Bragg. Larry twice served as a Judge of Compensation Claims for the Florida Department of Labor and Employment Security, from 1980-1984, and then as *pro hac vice* from January 16 to May 17, 2003; both of these tenures were in West Palm Beach. From 1984 to 1998 Larry was in private practice as the senior partner of Lawrence Langer, P.A., which later became Langer, Scheiner, and Thorne. From 2000 until his retirement in 2013, Larry worked as a State Mediator for the Office of Judges of Compensations Claims, part of the Florida Division of Administrative Hearings in West Palm Beach. Larry was admitted to The Florida Bar in 1973 and The Georgia Bar in 1974. He served the community as Chair of Palm Beach County Bar Association, Workers' Compensation Practice Committee in 1997-98. Larry served on The Florida Bar Workers Compensation Rules Committee 1998-2000. He is a past lecturer for the Florida Academy of Trial Lawyers and Florida's Dispute Resolution Center at their 2005 Annual Conference and a past lecturer at the Professional Mediation Institute Seminar, most recently speaking at the 2012 program.

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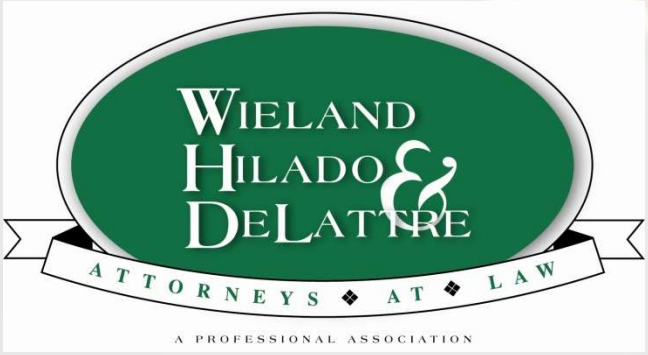

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