

BASIC MEDIATION TRAINING

JUNE 21, 2016

WELCOME

Anita R. Casey, Esq., Executive Director

The West Virginia State Bar

Charleston, WV



OVERVIEW OF MEDIATION – PART I & II

TOM PATRICK, ESQ.

Associate Teaching Professor

West Virginia University College of Law

Morgantown, WV

Professor Thomas O. Patrick
WVU College of Law



Professor Tom Patrick has completed twenty-four years of law school teaching, primarily at the West Virginia University College of Law. He has also served as Visiting Professor at the Notre Dame Law School in 2002-03 and as Director of Lawyering Process at the Charlotte School of Law in 2009-10. He received his law degree from West Virginia where he served on the editorial boards of the *West Virginia Law Review* and the *Journal of College and University Law*. Following graduation, he clerked for seven years for the Honorable Robert E. Maxwell, United States District Judge. He is admitted to practice in West Virginia and North

Carolina.

During his tenure, Professor Patrick has taught legal research and writing, appellate advocacy, alternative dispute resolution, interviewing, counseling, negotiation, and mediation. He has developed an online ADR course, and he teaches two sections of that course during the Summer 2016 term. As an extension of his teaching, Professor Patrick has provided continuing legal education seminars and skills training for the West Virginia State Bar, the West Virginia Supreme Court, the Department of Education, Health and Human Services, the Public Service Commission, and many other entities. He has developed mediation initiatives and has trained mediators throughout West Virginia for its magistrate, family, circuit, and federal courts.


Professor Patrick was selected for the West Virginia University College of Law Faculty Service Award in 1997; he received the West Virginia State Bar recognition for “Outstanding Leadership and Dedication to ADR in West Virginia” in 2002; he was awarded a West Virginia State Bar Certificate of Merit in 2008; and he was selected as a West Virginia Bar Foundation Fellow in 2012. Professor Patrick was promoted to Teaching Professor in the Spring of 2014. He will retire from the College of Law at the end of December 2016.

Professor Patrick’s newest initiative is the development of an Ombuds office for West Virginia University, and he currently serves as the University’s first Ombuds; he also directs West Virginia University’s Faculty and Staff Mediation Program.


WVU_{LAW}

Overview of Mediation

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THE WEST VIRGINIA STATE BAR



WVU_{LAW} Mediation Overview

Primary-party dispute resolution processes

Do nothing	Rights	Power/Position
Control	Positions	Aggression
Safety	Interests	Dominance
Save emotional costs	Priorities	Ego-centric behavior
	Needs	Expend everything
	Values	



WVULAW **Mediation Overview**

Third-party dispute resolution processes

Rights/proof		Rights/reasons
Positions	Judicial Settlement Conference	Interests
Judge/jury	Early Neutral Evaluation	Court-annexed
Arbitration	Summary Jury Trial	Federal agencies
Voluntary/binding	Neutral Fact Finder	Special Education
Compulsory/non-binding	Ombudsman	Workers' Comp
ALJs	Mini-trial	Family Mediation
Private Judge/Jury	Med-Arb	Peer Mediation
		Private Mediation

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Advantages of Dispute Settlement

- Preserves confidentiality
- Reduces delay and expense
- Avoids creation of precedent
- Tailors the resolution to the parties'

- Priorities
- Values
- Needs
- Interests
- Rights

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Adjudication	Mediation
Focus—the past	Focus—the future
Focus—facts/law	Focus—relationships
Liability/fault	Restructured responsibility
Win—Lose	Win—Win
Result—rule of law	Result—custom resolution
Attorney-guided	Disputant-guided
Governed by court rules	Governed by the disputants' interests

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WVULAW **Mediation Overview**

Interest-based Mediation

Encourages _____

Facilitates a frank exchange of _____

Promotes a productive level of _____

Helps each party

 feel that his/her views are _____

understand the other person's viewpoint

 AND appreciate its reasonableness

 —at least from _____

Shifts the focus—from the _____ to the _____

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WVULAW **Mediation Overview**

Interest-based Mediation

- Provides the parties more _____ than court-ordered resolution
- Preserves or enhances the _____ of the parties
- Provides greater party _____ with the resolution
- Ensures greater _____ with the requirements of the resolution
- Enhances each party's _____ and returns to them _____ over their own lives

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WVULAW **Mediation Overview**

Why does conflict remain unresolved?

Public

Private

Event

Adjudication

1.

2.

3.

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WVULAW **Mediation Overview**

Scope and purpose of rules. Rule 1, W. Va. R. Civ. P.

These rules govern the procedure in all trial courts of record in all actions, suits, or other judicial proceedings of a civil nature whether cognizable as cases at law or in equity, with the qualifications and exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

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WVULAW **Mediation Overview**

Why are civil disputes not resolved *earlier* ?

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What are the barriers to negotiation?



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Mediation Defined

_____ third person—the mediator

_____ the parties to resolve—by agreement— some
or all of the differences between them

Decision-making authority _____

Mediator _____ to decide any issue



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Role [skill] of the Mediator

- _____ the parties to reach their _____ / _____
- _____ agreement
- _____ communication
- _____ issues and interests
- _____ information to be collected or exchanged
- _____ joint problem-solving
- _____ settlement alternatives

Flexible process—tailored to the _____ needs

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WVULAW **Mediation Overview**

Stage I Orientation

Stage II Information

Stage III Option

Stage IV Resolution

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WVULAW **Mediation Overview**

Stage I Orientation

- Mediator's Opening Statement
- Bringing decision-makers face-to-face
- "Playing field" and "ground rules"
- Helping the participants "agree" to mediation
- Setting tone; building rapport; establishing an atmosphere for resolution

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WVULAW **Mediation Overview**

Stage II Information

- Establishing an agenda
- Using Passive and Active Listening
- Facilitating the flow of information
 - Facts—Perceptions—Issues
 - Rights—Positions—Interests
 - Wants—Needs—Priorities
 - Inclinations: "Leaps of Faith"
- Asking questions

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WVULAW **Mediation Overview**

Stage III Option

- Spotting Dispute Resolution Barriers
- Keeping Negotiation—in focus? clear agenda?
- Generating Options
- Establishing objective criteria
- Testing Reality—viability? value?
- Helping the parties Select/Merge Options

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Stage IV Resolution

- Progress—movement
- Caucus
- Impasse
- Conditional agreement
- Full agreement
- Memorialize

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WVULAW **Mediation Overview**

Mediator Characteristics—Skills

- Effective in building _____ and _____
- Skillful at _____
- Ability to create a _____, _____ - _____ atmosphere between the disputants
- Ability to help the disputants _____ that may extend beyond their own perceived resolutions of the dispute

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WVULAW **Mediation Overview**

“Appropriate” cases—*perhaps*

- What are your client’s _____ for dispute resolution?
- What are the _____ to a successful negotiation?

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WVU**LAW** **Mediation Overview**

Client goals

- ✓ minimize cost
- ✓ minimize delay
- ✓ privacy
- ✓ maintain/improve relationships
- ✓ client participation desired/input critical
- ✓ develop skill in dispute resolution
- ✓ creative solution with lasting effect
- ✓ compliance with agreement or judgment
- ✓ neutral opinion (case evaluation)
- ✓ neutral decision (establish or overturn precedent)
- ✓ minimize/maximize recovery
- ✓ vindication

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WVU**LAW** **Mediation Overview**

Negotiation barriers

- ✓ communication breakdown
- ✓ unknown expectations
- ✓ posturing
- ✓ unrealistic expectations
- ✓ poor negotiation skills
- ✓ need for emotional outlet
- ✓ lack of preparation
- ✓ divergent lawyer/client interests or objectives
- ✓ reluctance to make the first "offer"
- ✓ divergent principles/values involved
- ✓ "sleeping" file problems
- ✓ wrong people or no people at the table
- ✓ disparate bargaining power
- ✓ information deficit
- ✓ factual determination critical
- ✓ legal determination critical

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WVULAW **Mediation Overview**

“Inappropriate” cases—*perhaps*

- Seeking to establish a right of recovery in a novel area of law
- Establish/overturn precedent
- Nature of the personalities/constituencies
- Resolution is not a high priority for the client

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WVULAW **Mediation Overview**

Mediation—it may be a matter of “style”

Evaluative	Facilitative	Transformative

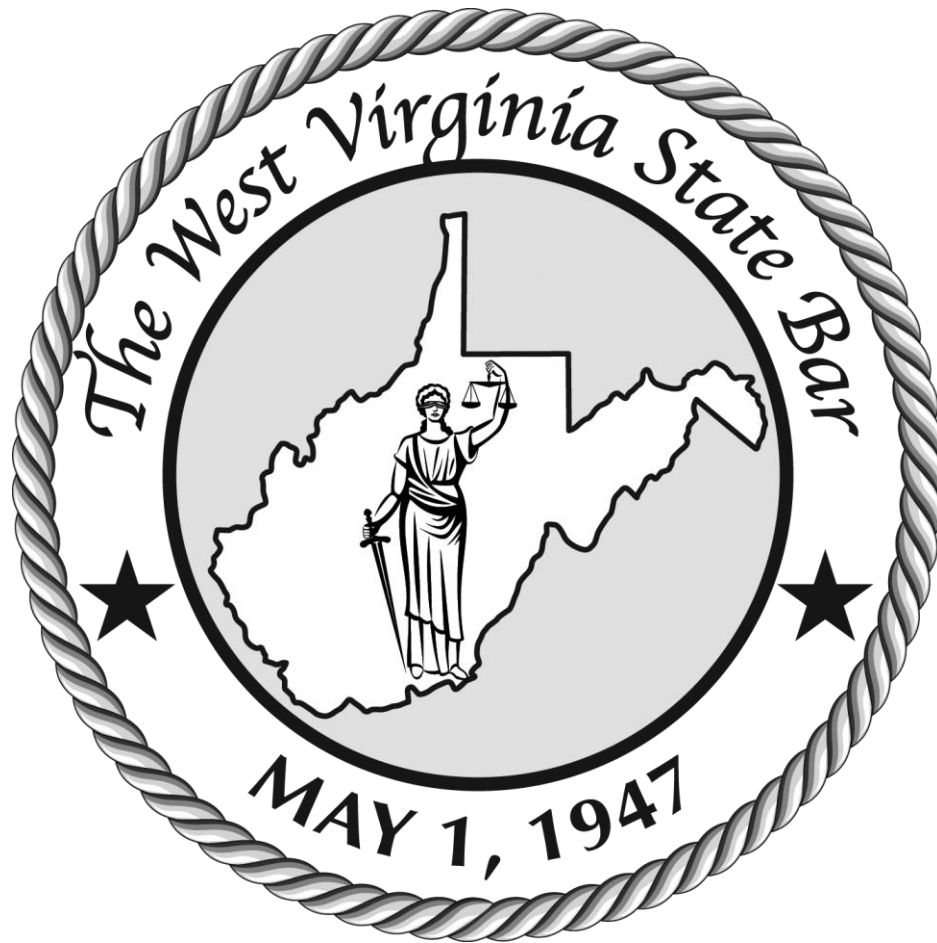
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WVULAW **Mediation Overview**

Mediation—it may be a matter of “style”

Evaluative	Facilitative	Transformative

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ELEMENTS OF MEDIATION – ORIENTATION AND INFORMATION GATHERING

JOHN COOPER, ESQ.

Cooper and Preston, PLLC

Parsons, WV

CURRICULUM VITAE

JOHN WATSON COOPER

EDUCATION:

High School: South Charleston High School, South Charleston, West Virginia, graduated, 1963
College: Wake Forest University, B.A. Pol. Science - June, 1967
Law School: West Virginia University College of Law, J.D. - May, 1970
(Member, West Virginia Law Review 1968-1970)

ADMITTED TO PRACTICE LAW:

West Virginia Supreme Court of Appeals - May, 1970
United States District Court for Southern & Northern Districts of West Virginia - 1970
4th Circuit Court of Appeals - circa, 1971
D.C. Circuit Court of Appeals - September, 1975
United States Supreme Court - July, 1974

EMPLOYMENT HISTORY:

O.E.O. Legal Aid Office - Wheeling, West Virginia - staff attorney, May, 1970, through July 31, 1970
Pinsky, Mahan, Barnes, Watson, Cuomo & Hinerman - Wellsburg and Weirton, West Virginia - August, 1970, to July 31, 1981; partner, 1973-81; general law practice with emphasis in personal injury litigation
Prosecuting Attorney for Brooke County, West Virginia, Wellsburg, West Virginia - January 1, 1977, to December 31, 1980
Special Assistant Attorney General for West Virginia representing West Virginia Board of Pharmacy - mid 1970's
Law Offices of John W. Cooper, Parsons, West Virginia - August 1, 1981, to January 1, 1988; private law practice
Cooper & Preston, Parsons, West Virginia - January 1, 1988, to January 1, 2002; private law practice with emphasis in litigation
Cooper, Preston & Douglas, PLLC, Parsons, West Virginia - January 1, 2002 to December 31, 2005 ; partner/member, private law practice with emphasis in litigation
Cooper & Preston, Parsons, West Virginia - 2006 to present; partner/member; private law practice with emphasis in litigation

PROFESSIONAL ACTIVITIES:

Private Practice in State & Federal Courts in West Virginia 1970-present
Mediator - State and Federal Courts in West Virginia, 1987-present
West Virginia State Bar, State Chairman, Young Lawyers Section, 1978-79; Secretary, 1977-78
West Virginia State Bar Disciplinary Board (July 1, 2010, to present) Chairman, 2014-2015, (previously served on predecessor disciplinary committee - Committee on Legal Ethics (1986-92);
Member, West Virginia State Bar, Judicial Selection Committee, 2005-2007
Member, Governor's Commission on Willow Island Disaster, 1978-79
Mental Hygiene Commissioner - 21st Judicial Circuit of West Virginia
Advisor, ATLA trial team, West Virginia University College of Law, 1998-2000

PROFESSIONAL ORGANIZATIONS:

West Virginia State Bar
West Virginia Association of Justice, 1981 to present; Board of Governors, 1998 to present; Executive Committee, 1999 (previously *sub nom*, West Virginia Trial Lawyers Association
Member, American Board of Trial Advocates, 1995 to present; Chairman, West Virginia Chapter, 1998 to 2000
Fellow, American College of Trial Lawyers, 2000 to present; Chair, State Committee, 2006-2007; Vice-chair, 2005-2006
American Bar Association
American Association of Justice (previously *sub nom*, Association of Trial Lawyers of America
Fellow, West Virginia State Bar Foundation
West Virginia Bar Association
National Association of District Attorneys (former member)
Campaign for Legal Aid of West Virginia, (State Co-Chair 2009-2011)

**Basic Mediation Training
Commencement of Process, Orientation & Fact
Finding**

**Presented by John W. Cooper
Flatwoods, West Virginia**

June 21, 2016

COMMENCEMENT OF MEDIATION PROCESS:

I. Trial Court and Federal District Court Rules Applicable to Mediation

Rule 25.02 of the West Virginia Trial Court Rules defines the mediation process as follows:

“Mediation is an informal, non-adversarial process whereby a neutral third person, the mediator, assists disputing parties to resolve by agreement or examine some or all of the differences between them. A judge or hearing officer who renders a decision or who makes a recommendation to the decision-maker in the mediated case is not a neutral third person. In mediation, decision-making discretion remains with the parties; the mediator has no authority to render a judgment on any issue of the dispute. The role of the mediator is to encourage and assist the parties to reach their own mutually acceptable resolution by facilitating communication, helping to clarify issues and interests, identifying what additional information should be collected or exchanged, fostering joint problem-solving, exploring resolution alternatives, and other similar means. The procedures for mediation are extremely flexible, and may be tailored to fit the needs of the parties to a particular dispute. Nothing in this rule shall be construed to deprive a court of its inherent authority to control cases before it or to conduct settlement conferences, which are distinguished from mediation.”

-Be familiar with the applicable Rules of Court which govern mediation. It is fundamental that one wishing to serve as a mediator should familiarize himself / herself with the trial court rules which govern mediation. The rules the state and federal courts in West Virginia have adopted contain subtle differences in the methods and procedures, but generally they are consistent with one another.

A. Rule 25.01, et seq., W.Va. Trial Court Rules in Civil Cases¹

¹ Attached, as Exhibit 1

- B. Local Rule 16.06 of the United States District Court for the Northern District of West Virginia²
- C. Local Rule 16.6 of the United States District Court for the Southern District of West Virginia³

II. **Conflicts and Disqualification.**

Once, a mediator is contacted about serving in a particular case, a conflicts check must be made to insure that he/she is not disqualified and can be neutral. All of the court rules mandate neutrality and provide a procedure of disqualification. The ethical considerations will be addressed by another presenter in the seminar so further comment will not be included in this presentation.

III. **Engagement letter**

Although some cases originate by court selection of the mediator, most originate by contact from one or more lawyers for the parties. Where the process originates by court selection, if the fees and expenses are not detailed in the order of appointment order, the mediator should immediately contact the parties and submit a letter outlining the scope of his/her services and the fee and expense obligations of the parties. Similarly, where requested to serve by the parties, the mediator should do likewise.⁴

IV. **Appearance of parties, persons with authority to settle, and insurance claims officers.**

-Clients, client representatives with authority to settle (and/or

² Attached, as Exhibit 2

³ Attached, as Exhibit 3

⁴ Sample letters of engagement from several current mediators in West Virginia are attached to these materials in Exhibit 4. The names have been redacted but these samples provide a basic framework for defining what the mediator will do, the methods or practices to be employed, and the fee arrangements.

insurance claims representatives) are required to attend in person unless permitted to attend by video conference, telephone or are excused.⁵ Sanctions are possible for non-appearance without prior excuse by the court or agreement of the parties. The ability to resolve typical civil cases depends upon the ability of the mediator and the parties and their representatives and insurance claims officers to have meaningful discussion or communication.

-It is very difficult to have frank discussions about the strengths and weaknesses of a case, about the history of jury verdicts in the court where the lawsuit is filed, about the propensities of a particular jurist, etc., in a telephone call with someone whom the mediator has never met. Often persons appearing by telephone are not immediately available and delays in the mediation process result.

-Sometimes, the appearance in person is impossible because of exigent circumstances or scheduling conflicts, but the consensus of most experienced mediators in this state is that such representatives should attend in person whenever possible. It is much easier to bring parties together to achieve a settlement when they are present in person with the mediator.

V. **Review of mediation statements and pleadings in advance of mediation.**

-The use of mediation statements varies with the mediator, with the parties, and with the facts and legal issues present in the cases.

-An effective mediator can bring parties who are willing to compromise together in the absence of a mediation statement.

-However, it is usually helpful for the mediator to walk into the mediation with some familiarity with the parties, the facts, the pleadings, and the legal issues presented in the case.

-The nature of what may be supplied to the mediator prior to mediation will be determined by the mediator (and sometimes by the court order scheduling the mediation).

⁵ In the U.S. District Court for the Northern District of W.Va., appearance of such representatives is mandatory. LR Civ P 16.06(c).

- A. Copies of complaint, answer, counterclaims, and crossclaims,
- B. Short mediation statement (2 - 3 pages) of the underlying facts, claims, theories of liability and defense, damages, and the respective strengths and weaknesses of the parties cases.

-Some counsel prepare 2 or 3 bound 5" notebooks with supporting exhibits, excerpts from deposition transcripts, and discovery responses. The author finds most of these unnecessary, but on occasion they may be helpful in understanding complex cases. Although unnecessary, most mediators will take the time to review them if received sufficiently in time prior to the mediation.

-Many mediations occur pre-suit or soon after suit is filed. In these cases, more detailed mediation statements are obviously necessary because the parties may not have pleadings or discovery information with which they can educate the mediator about the nature and circumstances of the dispute.

-Mediators are not selected to choose sides. Rather, the mission is to try to bring parties together to resolve a dispute.

-As long the mediator is familiar with the claims and defenses of the parties, the available funds to provide a settlement, and the general legal theories and arguments, that should suffice.

-Thus, consideration of the interests and needs of the party are typically as important, if not more important, than the position of each party on liability, causation, and damages.

-Some prepare video presentations, although these are typically created for view by the opposing party's client representative and insurance claims officers.

- C. Dispositive motions and supporting memoranda of law- it is a common practice for counsel to file motions for summary judgment with supporting memoranda of law, and motions *in limine* with supporting memoranda of law shortly prior to the date of mediation. In most instances, the Court has not ruled on the motions by the date

of mediation.

-Counsel apparently copy the mediator with these documents to persuade the mediator as to the strengths of the defense or the likelihood that critical evidence may be excluded. Again, the function of the mediator is to review the materials submitted by the parties in advance of mediation to get a general understanding of the facts and issues, but not to decide the case on its merits. That is the role of the jury or the judge!

-Certainly, if a party has a particularly strong legal argument which may be dispositive of the case, the mediator would like to be advised in the mediation statement, but submitting the motion, supporting memoranda of law, with attached deposition transcripts, answers to lengthy interrogatories, expert witness reports, medical records, etc., are not needed in the absence of a complex case or a personal injury case with catastrophic injuries.

VI. **Orientation**

A. **Introduction of Parties and Insurance Claims officers / risk managers**

-Determine familiarity and experience of parties with mediation process

-Discuss mediator's background

-Determine if joint session / opening statements will be utilized in mediation

B. **Use of Opening or Joint Sessions.**

-Although it varies among mediators, many no longer utilize joint session unless a party insists.

-Some parties have prepared extensive mediation brochures, bound notebooks and/or video presentations for review by opposing parties and insurance claims representatives.

-The mediator should determine this in advance and he/she may wish to have that party tender copies to the opposing party well in advance of mediation so all persons with settlement authority and insurance claims officers have an opportunity to review them before the day of mediation.

-Otherwise, if the person with authority and funds to settle has to get approval from other persons, it may not be helpful to see the same for the first time on the day of the mediation.

-Caveat about joint sessions: In posturing, the lawyer or party who speaks in a joint session may say something which angers or antagonizes opposing party and makes successful mediation difficult.

C. Describe what mediation is and how it differs from arbitration

-Provide very brief history of Court Ordered Mediation in West Virginia

- Determine experience of parties in mediation

-Less formal than trial proceedings

-Tell parties that you want to listen to what each has to say – not just what their lawyers have to say.

-Not a discovery tool

-Mediator will treat parties with respect and courtesy

-Risk of jury trial or bench trial

-Typically, only one party walks away from trial with favorable results

-Parties have no input into outcome once case is submitted to jury or judge

-Jury system may be best system of resolving disputes, but makeup

of jury panel can (1) affect how case is decided on liability issues
(2) damages awarded may be impacted by juror background and biases

-Experienced lawyers win some cases they should have lost, and have lost cases they thought they would win.

-May win on liability issues, but not recover what sought on damage issues.

-Proceeding through trial process inevitably results in substantial additional legal fees and litigation expenses to all parties expert witness fees for review, preparation, travel expenses and appearance at depositions and at trial deposition and other discovery expenses, motion practice, hearings and rulings on dispositive motions and motions *in limine*.

-Additional anxiety and loss of opportunity costs for parties, their companies and families

-Mediation allows parties to participate in the outcome of case

-Successful mediation requires listening and compromise by all parties

-Successful mediation typically results in all parties not walking away totally happy with settlement - evidence of compromise

-Discuss importance of confidentiality

-Need for parties to trust mediator and to understand that he/she will only share information of each party when authorized to do so.

-Need for parties to share information with other side

-Where needed, discuss trial court rules of mediation

- Mediator will file report with court, but cannot be called as witness in court unless parties reach an agreement to settle and then a party reneges.

-Discuss method of mediation being employed by mediator in this case

-Conveyor of messages vs. more active questioning approach to help mediator understand nature of dispute and possible common grounds for resolution

-ask counsel and parties about strength's and weaknesses they see in the case

-Advise all parties not to become upset or to abort mediation as a consequence of beginning and early offers or demands made by the opposing party during mediation may seem demeaning to a party to make what appears to be unreasonable negotiation by the other party

-Explain posturing

VII. Gathering Information.

-By the time of the actual mediation, mediator likely will already have mediation statements, pleadings, and other documentation from counsel.

Thus, mediator will have basic understanding of general facts as outlined by lawyers.

-If unfamiliar with the specific legal issues in a complex case, may want to review a statute or regulations cited by parties if not provided in mediation statement.

-Let lawyer speak, but then allow the party to speak.

-Listen to lawyer's comments.

Sometimes, the lawyer is trying to communicate that he/she needs mediator to help the client comprehend a range of settlement values or verdicts and that the client may have "unreasonable expectations"

-Listen to the party, before talking!!! Then, listen, listen, and listen!

-Discuss what type of information has been provided to mediator in advance, but explain that the information provided will remain confidential until parties allow mediator to share it with the other side.

- Mediation statements
- Pleadings
- Exhibits
- Reports

-Listen again

-DO NOT LET LAWYERS PREVENT THE CLIENT FROM TALKING WITH YOU.

Many times, you will learn something from listening to the parties that is much more important in finding common ground for settlement than what the lawyer has to say.

VIII. Determine the Actual Needs and Wants of Parties.

1. What do the parties with authority really need and want?

Sometimes mediation offers a forum to achieve a need or goal of a party that would not be available in litigation. In civil litigation, the remedy is typically an award for money. But mediation may provide a vehicle for providing something other than money as a solution or part of the solution to the dispute.

A mediator must always try to be aware of what else is going on, trying to understand any hidden agendas and barriers to effective problem solving.

During the fact-finding process, search for a strategy to separate yourself from the problem, while listening and being empathetic to the parties' respective positions.

A. Damage awards and injunctive relief does not always provide prevailing party with a full remedy.

Examples:

- an apology or publicized statement acknowledging mistake or wrongdoing
- Exchange of property in boundary dispute
- Forgive note and/or release of deed of trust of plaintiff borrower in lender liability suit
- Buy out of interest on one party in injunction and damage action involving breach of covenant/ restriction suit
- Contractor completes contract to satisfaction of owner in breach of contract suit.
- Rehire terminated employee or remove negative statements from personnel file in wrongful termination case.
- Repair or replace vehicle in “lemon-law” case
- Keep outcome confidential to protect reputation of settling party.

B. Where money is the object, what do the parties really need.

-Listen to what the clients and those with authority to settle are saying, not just what the lawyers are saying.

-Find out how the facts have impacted each party and what he/she feels is necessary to correct harm

-Listen to what the insurance claims officer is saying and try to find out the range of authority he/she has brought to mediation

-Lawyers’ fees and expenses must be addressed when working toward resolution other than pure money settlement.

C. In case I have made it clear already, **LISTEN** to what the litigants have to say

IX. **Conclusion**

Mediation is a very effective means of alternative dispute resolution if the parties come to the table with a willingness to listen and to compromise. It is the role of the mediator to educate the parties in a brief period of time what the process is about and how the mediation process will be conducted

on that date. The importance of trust and confidentiality must be understood by all parties and the mediator should see permission to share information with the other parties if he/she believes it will facilitate the process. The mediator should discuss with the parties whether the process (1) will involve joint sessions with all parties together and then private engaging in private caucuses with the mediator, or (2) whether the mediation will only be conducted in private separate sessions with the mediator. One the parties are oriented to the general process, the private caucuses take place. With respect to fact-finding, a familiarity with the nature of the dispute and the general facts are helpful, but lengthy mediation statements and supporting documentation are not typically needed. It is helpful to have some information prior to the mediation to expedite it and to have an understanding of what the dispute between the parties involves. But the most effective fact finding is determining what the interests and needs of the parties may be. Effective mediation results from finding common grounds and a framework upon which a resolution of the case might be reached.

EXHIBIT 1

West Virginia Trial Court Rules:

Rule 25.01. Scope.

These rules govern mediation in the judicial system in West Virginia. These rules are to be read *in pari materia* with Rules 31 through 39 of the West Virginia Rules of Practice and Procedure for Family Court.

Rule 25.02. Mediation Defined.

Mediation is an informal, non-adversarial process whereby a neutral third person, the mediator, assists disputing parties to resolve by agreement or examine some or all of the differences between them. A judge or hearing officer who renders a decision or who makes a recommendation to the decision-maker in the mediated case is not a neutral third person. In mediation, decision-making discretion remains with the parties; the mediator has no authority to render a judgment on any issue of the dispute. The role of the mediator is to encourage and assist the parties to reach their own mutually acceptable resolution by facilitating communication, helping to clarify issues and interests, identifying what additional information should be collected or exchanged, fostering joint problem-solving, exploring resolution alternatives, and other similar means. The procedures for mediation are extremely flexible, and may be tailored to fit the needs of the parties to a particular dispute. Nothing in this rule shall be construed to deprive a court of its inherent authority to control cases before it or to conduct settlement conferences, which are distinguished from mediation.

Rule 25.03. Selection of Cases for Mediation.

Pursuant to these rules and W. Va. R.Civ.P. 16, a court may, on its own motion, upon motion of any party, or by stipulation of the parties, refer a case to mediation. Upon entry of an order referring a case to mediation, the parties shall have fifteen (15) days within which to file a written objection, specifying the grounds. The court shall promptly consider any such objection, and may modify its original order for good cause shown. A case ordered for mediation shall remain on the court docket and the trial calendar.

Rule 25.04. Listing of Mediators.

The West Virginia State Bar shall maintain and make available to circuit courts, interested parties, and the public a listing of persons willing and qualified to serve as mediators in the circuit courts. The State Bar shall establish minimum qualifications for training and experience, application procedures and fees, and other appropriate requirements for persons interested in being listed. The listing shall identify those persons who are willing to serve as mediators on a

volunteer basis (i.e., without compensation). The listing shall be open to all persons who meet the qualifications and complete the application required by the State Bar.

Rule 25.05. Selection of Mediator.

Within fifteen (15) days after entry of an order or stipulation referring a case to mediation, the parties, upon approval of the court, may choose their own mediator, who may or may not be a person listed on the State Bar listing. In the absence of such agreement, the court shall designate the mediator from the State Bar listing, either by rotation or by some other neutral administrative procedure established by administrative order of the chief judge of the circuit court.

Rule 25.06. Compensation of Mediator.

If the parties by their own agreement choose a mediator who requires compensation, the parties shall by written agreement determine how the mediator will be compensated. If the parties do not select a mediator by agreement, the court may designate a mediator who may require compensation. If it has established a budget approved by the Supreme Court of Appeals for this purpose, the court may reimburse a volunteer mediator for reasonable and necessary expenses, according to Supreme Court of Appeals travel regulations.

Rule 25.07. Mediator Disqualification.

A mediator shall be disqualified in a mediation in which the mediator's impartiality might reasonably be questioned, including but not limited to instances where: (a) the mediator has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts relating to the mediation; (b) the mediator served as a lawyer in the matter in controversy, or a lawyer with whom the mediator previously practiced law served during association as a lawyer in the matter, or the mediator has been a material witness concerning the matter; (c) the mediator knows that, individually or as a fiduciary, or the mediator's spouse, parent or child wherever residing, or any other member of the mediator's family residing in the mediator's household, has an economic interest in the subject matter in controversy or is a party to the matter or has any other more than de minimis interest that could be substantially affected by the proceeding; (d) the mediator or the mediator's spouse, or a person within the third degree of relationship to either of them, or the spouse of such person: (i) is a party to the matter, or an officer, director or trustee, of a party; (ii) is acting as a lawyer in the proceeding; (iii) is known by the mediator to have more than de minimis interest that could be substantially affected by the matter; (iv) is to the mediator's knowledge likely to be a material witness in the matter.

A mediator shall keep informed about their own personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the mediator's spouse and minor children.

Any party may move the court to disqualify a mediator for good cause. In the event a mediator is disqualified, the parties or the court shall select a replacement in accordance with TCR 25.05 and 25.06.

Rule 25.08. Provision of Preliminary Information to the Mediator.

Before the first mediation session, the court or mediator may require the parties to provide to the mediator pertinent information including but not limited to pleadings, transcripts, and other litigation-related documents.

Rule 25.09. Time Frames for Conduct of Mediation.

Unless otherwise agreed by the parties and the mediator or ordered by the court, the first mediation session shall be conducted within sixty (60) days after appointment of the mediator. Mediation shall be completed within forty-five (45) days after the first mediation session, unless extended by agreement of the parties and the mediator or by order of the court. The mediator is empowered to set the date and time of all mediation sessions, upon reasonable notice to the parties.

Rule 25.10. Appearances; Sanctions.

The following persons, if furnished reasonable notice, are required to appear at the mediation session: (1) each party or the party's representative having full decision-making discretion to examine and resolve issues; (2) each party's counsel of record; and (3) a representative of the insurance carrier for any insured party, which representative has full decision-making discretion to examine and resolve issues and make decisions. Any party or representative may be excused by the court or by agreement of the parties and the mediator. If a party or its representative, counsel, or insurance carrier fails to appear at the mediation session without good cause or appears without decision-making discretion, the court *sua sponte* or upon motion may impose sanctions, including an award of reasonable mediator and attorney fees and other costs, against the responsible party.

Rule 25.11. Participation.

No party may be compelled by these rules, the court, or the mediator to settle a case involuntarily or against the party's judgment. All parties involved in mediation, however, and their respective representatives, counsel, and insurance carriers shall participate fully, openly and knowledgeably in a mutual effort to examine and resolve issues. "Bad faith," as used in insurance litigation as a legal term of art, is not applicable to the mediation process.

Rule 25.12. Confidentiality of Mediation Process.

Mediation shall be regarded as confidential settlement negotiations, subject to W.Va. R.Evid. 408. A mediator shall maintain and preserve the confidentiality of all mediation proceedings and records. Confidentiality as to opposing parties within a mediation session shall be maintained in a manner agreed upon by the parties and mediator. For example, all information may be kept confidential unless disclosure is specifically authorized by the party, or, all information may be shared unless specifically prohibited by the party. A mediator may not be subpoenaed or called to testify or otherwise be subject to process requiring disclosure of confidential information in any proceeding relating to or arising out of the dispute mediated.

Rule 25.13. Immunity.

A person acting as mediator under these rules shall have immunity in the same manner and to the same extent as a circuit judge.

Rule 25.14. Enforceability of Settlement Agreement.

If the parties reach a settlement or resolution and execute a written agreement, the agreement is enforceable in the same manner as any other written contract.

Rule 25.15. Report of Mediator.

Within ten (10) days after mediation is completed or terminated, the mediator shall report to the court the outcome of the mediation. Unless otherwise required by the court, the mediator's report shall state the style of the case, the civil action or other administrative identification number, and whether a settlement was reached. With the written consent of the parties, the mediator may identify any pending motions, discovery, or issues which, if resolved, would facilitate the possibility of settlement or resolution.

Rule 25.16. Statistical Information.

The Supreme Court of Appeals shall determine the repository of statistical records and the method for statistical reporting on court-based mediation. The courts, mediators, parties, and counsel shall cooperate with requests for information under this rule. Court-based mediation statistics compiled at the direction of the Supreme Court of Appeals shall be accessible by the public in the same manner as other court records.

EXHIBIT 2

Local Rule 16.06 of the United States District Court for the Northern District of West Virginia

LR Civ P 16.06. Mediation.

(a) Cases to Mediate. The judicial officer may order mediation *sua sponte* or at the request of any party. The Northern District of West Virginia also supports the voluntary use of alternate dispute resolution and will endeavor to facilitate mediation or similar proceedings when the presiding judicial officer finds a request to do so appropriate and timely. The parties are free to engage in mediation without court involvement so long as it does not interfere with court-ordered deadlines.

(b) Selection of Mediator; Notice of Nomination. The parties are expected to agree upon a mediator, the amount of the mediator's fee, and the responsibility for payment. If the parties are unable to agree on a mediator, then the parties shall promptly notify the presiding judicial officer, who shall appoint a mediator, set the amount of the mediator's fee, and assign responsibility for payment. The parties may request that a judicial officer (who is not the presiding judicial officer) conduct the mediation. Such requests are particularly appropriate in complex cases or in cases in which a party is financially unable to bear its proportionate share of the mediation expense. Except with consent of the parties, a magistrate judge who has conducted a mediation shall not thereafter handle discovery disputes or other substantive matters in the case.

(c) Preparation for Mediation Conference. Attendance at the mediation conference is mandatory for counsel and the parties or their representatives who have full authority to make final and binding decisions, in accordance with the order scheduling the case for mediation. All parties and their counsel shall be prepared to knowledgeably discuss the facts and issues of the case and shall participate in mediation in good faith.

(d) Mediation Statements. The mediator may require the submission of written mediation statements. If the mediator does not require submission of written mediation statements, any party may submit a written mediation statement. Mediation statements submitted in writing to the mediator are confidential.

(e) Confidentiality. Mediators shall maintain strict confidentiality with respect to all information that is communicated by the parties and their counsel in connection with the Settlement Week conferences. The only information relative to an individual conference that will be reported to the Court by the mediator will be: (1) the fact that the conference was actually held; (2) whether the mediator intends to conduct further mediation in the case in the future; and (3) whether, in the opinion of the mediator, the case should continue routinely through the judicial process or might profit from being scheduled for a status or settlement conference before the Court. The mediator is also required to advise the Court if a representative without settlement authority attends the conference or if either party disrupts the mediation process, fails to appear or fails to negotiate in good faith.

Mediation shall be regarded as confidential settlement negotiations, subject to Rule 408 of the Federal Rules of Evidence. A mediator shall keep confidential from opposing parties information obtained in an individual session unless the party to that session or the party's counsel authorizes disclosure. A mediator may not be subpoenaed or called to testify or otherwise be subject to process requiring disclosure of confidential information in any proceeding relating to or arising out of the dispute mediated.

(f) Impartiality of Mediator. A mediator shall not serve in a case in which the mediator's impartiality might reasonably be questioned. Possible conflicts of interest shall be promptly disclosed by the mediator to counsel and pro se parties.

(g) Immunity. A person acting as a mediator under these Rules shall have immunity in the same manner and to the same extent as a judicial officer.

(h) Mediation Report. Unless a different time period is set by the judicial officer, within seven (7) days of the conclusion of mediation, the mediator shall file with the Clerk's Office a Mediation Report Form, whether the mediation did or did not result in settlement. This form can be found at the Court's web page at www.wvnd.uscourts.gov under the "Forms" link. This form shall be filed with the Clerk's Office where the case is pending. It is the responsibility of the parties to ensure compliance with this Rule.

(i) Settlement Proceedings. In the event mediation of a pending civil matter by a judicial officer who is not the presiding judicial officer in the case, results in a complete settlement of the case the mediation judicial officer is authorized, in addition to filing the obligatory mediation statement, to forthwith convene a Court proceeding with the parties, parties representatives, and counsel present, to spread on the record the terms of the settlement agreement reached; to call upon the parties, parties representatives and counsel present to confirm the terms of the settlement; and to authorize the entry of an appropriate order of dismissal by the presiding judicial officer.

EXHIBIT 3

Local Rule 16.6 of the United States District Court for the Southern District of West Virginia

LR Civ P 16.6. Mediation.

(a) Cases to be Mediated. The judicial officer may order mediation *sua sponte* or at the request of any party. When so ordered, the following provisions of this local rule shall control. The Southern District of West Virginia also supports the voluntary use of alternative dispute resolution and will endeavor to facilitate mediation or similar proceedings when the presiding judicial officer finds a request to do so appropriate and timely. The parties are free to engage in mediation without court involvement so long as it does not interfere with court-ordered deadlines.

(b) Motion for Exception to Mandatory Mediation. An attorney or a *pro se* party may file a motion for leave not to engage in mediation. The presiding judicial officer may grant the motion for good cause shown.

LR Civ P 16.6.1. Timing of Mediation.

Mediation shall take place at any time ordered by the court. The parties may consult with each other and agree upon a mutually convenient date, time, and place for the mediation and ask the court to approve such arrangements.

LR Civ P 16.6.2. Selection of Mediator; Notice of Nomination.

The parties are expected to agree upon a mediator, the amount of the mediator's fee, and the responsibility for payment. Not later than 7 days before the date set for mediation, or as otherwise directed by the court, the parties shall file a notice of nomination with the clerk, setting forth the name, address, telephone number, facsimile number, and e-mail address of the nominated mediator. The form "Notice of Nomination," available from the clerk and on the court's web site, shall be used. If the parties are unable to agree on a mediator, then the parties shall promptly notify the presiding judicial officer, who shall without delay appoint a mediator, set the amount of the mediator's fee, and assign responsibility for payment. The parties may request that a judicial officer (who is not the presiding judicial officer) conduct the mediation. Such requests are particularly appropriate in complex cases or in cases in which a party is financially unable to bear its proportionate share of the mediation expense.

LR Civ P 16.6.3. Appointment of Mediator.

Upon the filing of a Notice of Nomination, or upon selection of a mediator by the presiding

judicial officer, an Order Appointing Mediator will be entered, using the form available from the clerk and on the court's web site.

LR Civ P 16.6.4. Attendance at Mediation.

Unless the court directs otherwise, the following persons shall attend the entire mediation in person: (a) all lead trial counsel; and (b) any party who is prosecuting a claim (i.e., the plaintiff(s) and any defendant who has made a counterclaim, cross-claim, or third-party complaint). Unless the court directs otherwise, any other party or his/her/its representative who is knowledgeable about the facts of the case, and who has full authority to negotiate on behalf of the party and to approve or recommend a settlement, shall attend the entire mediation in person or, with prior approval of the judicial officer, by telephone or other electronic means such as video-conference.

LR Civ P 16.6.5. Mediation Statements; Confidentiality.

The mediator may require the submission of written mediation statements. If the mediator does not require submission of written mediation statements, any party may submit a written mediation statement. Mediation statements submitted in writing to the mediator are confidential. Oral statements made during the mediation are confidential.

LR Civ P 16.6.6. Impartiality of Mediator.

A mediator shall not serve in a case in which the mediator's impartiality might reasonably be questioned. Possible conflicts of interest shall be promptly disclosed by the mediator to counsel and *pro se* parties.

LR Civ P 16.6.7. Compensation of Mediator.

Mediators will be compensated at the rate established when the mediator was selected, with payment as agreed by the parties or ordered by the presiding judicial officer.

LR Civ P 16.6.8. Notification to Judicial Officer; Report of Mediator.

Immediately upon the completion of mediation resulting in the settlement of all or part of a case, the parties shall notify the chambers of the presiding judicial officers. Within 7 days of the close of mediation, the mediator will file with the clerk a report which states that all or part of the case was settled (specifying which part of the case settled) or that it was not settled. If all or part of the

case was settled, the parties shall, at the mediation, place in writing the terms of the settlement, and all participants shall sign the terms of the settlement, with the mediator retaining the original. Within 30 days of the mediation, the parties shall submit to the chambers of the presiding judicial officer, an agreed order of dismissal as to all or part of the case that was settled.

EXHIBIT 4

Dear Counsel:

This letter is to confirm that I will serve as the mediator in the above-referenced matter.

Date, time and location. The mediation will take place
located at: _____, beginning at _____ a.m. on _____. If for some reason
the date, time or location are problematic, please feel free to contact my Legal Assistant,
I can be reached via email at _____ can be reached at _____
1. Please use the public parking lot across the street from my
or the public lot one block down.

Hourly rate. I charge \$250 per hour for two-party mediations. I charge \$300 per hour if three or more parties are involved. The rates apply for review of pre-mediation submissions and actual mediation time. I charge half of my hourly rate for travel time.

Unless there is an agreement to the contrary, the mediation fee is divided and paid equally by the parties.

Attendance. I prefer the parties and the insurance representatives with authority to make settlement decisions to attend in person. If the individuals are not available, please notify all parties and me so that the appropriate arrangements can be made for telephonic participation.

Pre-mediation submissions. I do not require formal pre-mediation submissions, however, I find that they are generally helpful. The information provided will be held by me in strict confidence. I will review the information in advance of the mediation so that we can hopefully get off to a running start. Please feel free to email any mediation documents to my attention prior to the mediation. If you do email any documents to me, kindly copy _____ on the email as well.

I leave it to the wisdom of the parties to decide what might be useful for me to read to prepare for the mediation. Ordinarily, accident reports, medical summaries or discharge summaries, expert reports and/or disclosures generally suffice to get me up to speed on the case.

I look forward to a successful mediation.

Very truly yours,

Dear

This will confirm the mediation in the above-referenced matter scheduled on **Tuesday**,

at a.m. at

. Directions are enclosed.

My rate is Two Hundred Twenty-Five Dollars (\$225.00) per hour and I charge for travel time and mileage. My standard practice is to request a very brief confidential Mediation Statement from all counsel. The Mediation Statement is not disclosed to other counsel or parties, but should include, at a minimum, the following:

- a. identification of all parties;
- b. brief statement of facts;
- c. brief statement of liability;
- d. statement of damages; and,
- e. status of settlement negotiations.

I invite counsel to provide me with any information that has not yet been disclosed to opposing counsel. Please indicate as such if you plan to do so, in order to prevent any inadvertent disclosure. **Unless agreed to otherwise, representatives of the parties with settlement authority must attend the mediation in person as opposed to participating by telephone. If representatives with settlement authority plan to participate by telephone, please let me and opposing counsel know as soon as possible.**

If the Mediation Statements and supporting documentation are thorough enough, my practice is to dispense with opening statements and immediately begin the mediation after the introduction of all parties. It is requested that counsel clear the entire day for the mediation and that no time constraints be placed.

It has been my experience that dispositive motions that have been filed, but not yet ruled upon, always have an impact on the mediation. If there are pending dispositive motions that will prevent a good faith effort at resolving this case at the mediation, please let me know. Also, please let me know if there are parties who have chosen not to participate in the mediation.

Please forward your Mediation Statements to me at my office at your earliest convenience, preferably by e-mail.

I look forward to seeing you at the mediation. Thank you.

Very truly yours

Dear Counsel:

This is to confirm that I am pleased to serve as your mediator in the above civil action.

Date & Location: As I understand it, the parties have chosen to mediate this civil action at the _____, located at _____, on _____.
I will be ready to start at the appointed hour.

Emergency Notification -Other Unforeseen Circumstances: Your Mediator has included his cell phone number and home phone number below. In the event it becomes necessary to cancel the mediation on short notice, the parties assume the responsibility to contact the Mediator and provide contact information so that the mediator can convene a conference call to discuss any such issues. Please use cell phone or home phone for after hour contact. See "Contact Information For Mediator" below.

Housekeeping Matters: Scheduling: To facilitate scheduling mediations, I have delegated scheduling to my Assistant, I _____. If you have scheduled a mediation with her, I assume that you have pre-cleared the date and location with opposing counsel. If, upon receipt of this letter, you are surprised over date, time, or location, please take a moment to call opposing counsel or _____, or email or call me at _____. The parties, Court, and your mediator are better served if these housekeeping matters are dealt with upon receipt of this scheduling letter.

Hourly Rate: Responsibility For Payment of Mediation Fee & Other Billing Particulars My hourly rate is \$200.00 per hour. I charge my hourly rate portal to portal. Each party who uses the services of a mediator is responsible to pay his/her/its prorata share of the charges. Counsel is expected to procure collection of mediation fees from the Client. Because of re-occurring losses sustained in mediating cases with pro se, unrepresented parties, advance deposits will be required from all parties where a pro se party is expected to share in the mediation cost. If you believe there may be an issue over payment, allocation, or proration of mediation fees, you are encouraged to discuss this at the mediation.

Mediator's Records & Retention: The Mediator destroys all records six (6) months after the mediation was conducted, unless it is clear that a mediation may be reconvened in the future, in which case records will be maintained for use at the subsequent proceeding, provided however, that in no event shall records be kept more than twelve (12) months from the date of the first proceeding. The mediator's notes are the property of the mediator. No party, their attorney or representative has any right to obtain copies of any part of the mediator's records. Notes, drawings, illustrations, and other documents which are created by a party, drawn by a party, prepared by a party, or signed by the parties, their lawyers, or representatives at the mediation, and which are not exchanged between or among the parties during the mediation proceeding, are confidential documents, and no party, their attorney or representative has the right to obtain copies thereof from the mediator after the conclusion of mediation.

Settlements & Settlement Agreements: Any settlement reached at mediation shall be reduced to writing and signed by the parties to be charged, or in lieu thereof, the attorney or representative may sign on behalf of a party, but in doing so, the attorney or representative represents that he/she has the power to bind the party. Settlement agreements shall be provided to each settling party, and upon request the Mediator will file a copy of the settlement agreement with the Court. The Mediator does not retain original settlement agreements. The Mediator will not retain copies of signed, confidential settlement agreements.

Cancellation Fees: A cancellation fee may apply if mediation is canceled less than four work days prior to mediation. Cancellation fees, if imposed, are generally in the amount of \$200.00 per party, provided that cancellation on day of mediation will be a four (4) hour minimum.

Contact Information for Mediator: If you need to contact me after hours, the following information may be helpful.

Email: _____ (I have remote access to email server from home)
Cell Phone: (304) _____

Home Phone: (304)

Conflicts: I have run an intra-office conflicts check, and I am unaware of any conflicts which would preclude me from serving as your mediator.

Required Attendance of Decision Makers: Past experience has convinced me of the importance for all parties and their representatives to appear in person, and the Trial Court Rules require as much in state court, and the Judges in Federal District Court generally require physical appearance absent agreement to the contrary. It is my earnest request that each party and representative who has authority to make settlement decisions attend in person not telephonically. Provided however, the parties are free to stipulate and agree to telephonic appearances or appearance by video conference. This should be agreed to prior to start of mediation, and the mediator should be provided a confirmatory memoranda which indicates as much.

Pre-Mediation Contact With & Submissions To Mediator: I recommend, but will not require, you to provide mediation submissions to the Mediator. In any event, you **should** provide the Mediator a copy of the scheduling order, the complaint, answer, crossclaims, counterclaims, and any amendments thereto, and the responses filed thereto.

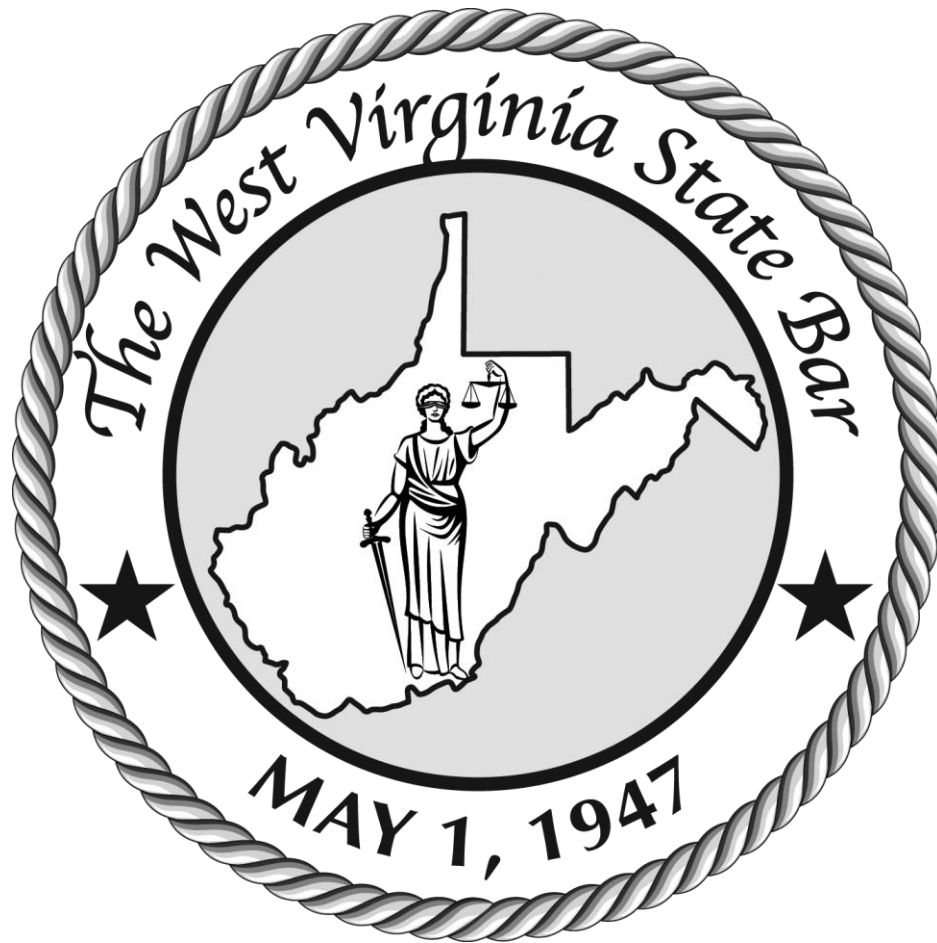
If you do elect to provide a pre-mediation statement, you may want to provide the following information:

1. Summary of uncontested facts
2. Summary of disputed facts.
3. Summary of contested issues of law with citations to points of authority you believe are controlling. And if there are dispositive motions, you may provide copies of the motion and response, if applicable.
4. Summary of settlement discussions conducted prior to mediation.
5. A frank discussion of your estimation of the strengths and weaknesses of your claim or defenses.
6. A discussion of any discovery disputes.
7. A summary of material discovery which has not transpired and which will transpire after mediation.

Absent instruction to the contrary, all information and documents you provide me will be treated as being confidential. I will review the information you provide me in advance of the mediation. All information provided me should be mailed so I will receive it by _____ gives me time to review it. In lieu of US Mail, you may e-mail any documents to me at _____

I look forward to seeing each of you on resolving your dispute(s)/claim(s) at that time.

at the appointed time and hopefully



ELEMENTS OF MEDIATION - OPTION GENERATION, RESOLUTION AND CLOSURE

J. RUDY MARTIN, ESQ.

Jackson Kelly PLLC

Charleston, WV

This is an advertisement



J . R U D Y M A R T I N
 B I O G R A P H Y

Phone: (304) 340-1212 | Fax: (304) 340-1050 | Email: rmartin@jacksonkelly.com
 500 Lee Street East, Suite 1600, Charleston, WV 25301-3202

J. Rudy Martin is Counsel in the Firm's Commercial Law Practice Group whose practice is focused on insurance-related issues, including coverage issues, insurer bad faith liability, insurance agent and broker professional liability, consultation on insurance issues and claims adjustment. Mr. Martin had 14 years experience in the insurance industry prior to law school, during which he attained the Chartered Financial Consultant, Chartered Life Underwriter, Chartered Property and Casualty Underwriter and Life Underwriter Training Counsel Fellow professional designations.

Mr. Martin enjoys an active and expanding practice as a mediator, arbitrator and facilitator in litigation matters, as well as in business disputes outside the litigation context. He is actively involved with the West Virginia State Bar Alternative Dispute Resolution Committee and serves on its Education Subcommittee regularly training lawyers to serve as mediators. He is also the former Chairman of the State Bar Alternative Dispute Resolution Committee's Training and Education Subcommittee. Mr. Martin attended the Advanced Mediation Workshop at Harvard Law School.

In addition to his involvement with the West Virginia State Bar, Mr. Martin is also a member of the Kanawha County Bar Association and the Defense Trial Counsel of West Virginia.

Mr. Martin has taught a number of insurance courses and has written several articles, including an article on alternative dispute resolution, which was published in Portuguese as "A Mediacao: Um Instrumento Valioso Para As Empresas," in Mediacao compiled and edited by Jose Vasconcelos-Sousa, Quimera 2002.

Mr. Martin is a Virginia native. He attended Emory & Henry College where he received a Bachelor's degree in history. He received his Juris Doctor degree from the College of William & Mary Marshall-Wythe School of Law.

Legal Experience

1990 - Present Jackson Kelly PLLC

Professional Experience

2015 West Virginia Offices of the Insurance Commissioner, Hearing Examiner
1973 - 1987 Insurance and financial planning sales, management, marketing and training in captive agency and independent agency settings

Education

- 1990 J.D. College of William & Mary, Marshall-Wythe School of Law (VA)
- 1973 B.A. Emory & Henry College (VA) (History)

Bar Admissions

- 1990 West Virginia

Court Admissions

- 1994 U.S. Court of Appeals, Fourth Circuit
- 1993 U.S. District Court, Northern District of West Virginia
- 1990 U.S. District Court, Southern District of West Virginia
- 1990 West Virginia Supreme Court of Appeals

Professional Involvement:

- West Virginia State Bar, Alternate Dispute Resolution Committee, Former Education and Training Sub Committee Chairman
- Kanawha County Bar Association
- Defense Trial Counsel of West Virginia, Insurance Committee
- Martinsville-Henry County (VA) Association of Life Underwriters, Former Member, President 1983-1984
- Lex Mundi Dispute Resolution and Insurance/Reinsurance Practice Groups
- American Arbitration Association Roster of Arbitrators and Mediators

Professional Training:

- Chartered Financial Consultant
- Chartered Life Underwriter
- Chartered Property & Casualty Underwriter
- Life Underwriter Training Counsel Fellow
- Advanced Mediation Training - Harvard Law School (MA)

Teaching and Lecturing:

- Presenter, Indemnification Issues, Jackson & Kelly Insurance Industry Seminars
- Presenter/Panelist/Coach, West Virginia State Bar Basic and Advanced Mediation Training Seminars
- "Accident and Insurance Law Series," Legal Ease, KCS-TV Channel 11, Winter/Spring 2001
- National Business Institute Seminar, "Insurance Law: Third Party Coverage in West Virginia," 2002
- Coordinator/Presenter on Arbitration, The West Virginia State Bar Law School Alternate Dispute Resolution Program, West Virginia University College of Law, March 29, 2003
- Lorman Education Services Seminar, "Fundamentals of an Effective Insurance Program Audit in West Virginia," 2003
- National Business Institute Seminar, "Discovery in West Virginia Bad Faith Litigation," 2003
- Presenter, "Insurance and Indemnification Issues," in "The Elements of Good Contracts," Mylan Pharmaceuticals Inc. Continuing Legal Education Series, Sept. 2, 2004
- Presenter, "Preparing For Mediation" in "Advocacy in Mediation," West Virginia Continuing Legal Education Mountaineer CLE Series, Sept. 24, 2004
- Guest Lecturer, "Arbitration in West Virginia," West Virginia University College of Law Alternative Dispute Resolution Class, April 25, 2005, and March 14, 2007
- Presenter/Coach, "Option Generation and Closure," Magistrate

- Court Mediation Training Program, West Virginia University College of Law, May 9-10, 2005, May 8-9, 2006
- Presenter, "The Legal Assistant/Paralegal's Role in Mediation Advocacy," Legal Assistants/Paralegals of West Virginia Second Annual Meeting and Seminar, May 12, 2006
- Lorman Education Services Seminar, "Understanding The Current Commercial General Liability (CGL) Policy In West Virginia," 2006
- Presenter, "How Insurance Issues Can Affect Mediation Outcomes," West Virginia College of Law Alternative Dispute Resolution Society ADR Day, March 14, 2007
- West Virginia Chamber of Commerce Alternative Dispute Resolution Seminar, "Resolving Disputes - A Better Way, What Happens When Good Intentions Go Awry," sponsored by Jackson Kelly PLLC; Bragg & Associates, Inc.; and Jackson Kelly Solutions LLC, April 4, 2007
- Presenter, Ethical Issues and Expert Witness Issues in Bad Faith Litigation, Lorman Educational Services Seminar, "Insurance Bad Faith Claims in West Virginia," 2007
- Judge, The Washington and Lee University School of Law 2008 Robert J. Grey, Jr. Negotiation Competition, Final Round
- Presenter, Washington and Lee School of Law 1st Annual Mediation Primer Workshop, Jan. 2009
- Presenter, "Indemnification - Let Someone Else Feel Your Pain (Or at Least Share It)," Jackson Kelly PLLC Deliberate Intent Seminar, July 20, 2010
- Presenter, "Who Pays the Piper? Trigger Theories and Allocation of Losses Where Multiple Insurance Policies are on the Risk," Jackson Kelly PLLC Deliberate Intent Seminar, Jan. 18, 2012
- Presenter, "Arbitration in West Virginia," Eastern Panhandle Bar Association's Spring CLE, April 22, 2016

Writings and Publications:

- *The Colonial Lawyer: A Journal of Virginia Law and Public Policy*, Editorial Staff, 1989-1990
- Lees-Haley, P.R. & Martin, J.R., *Evaluating Mild Brain Injury Claims*, 2000, Jackson & Kelly PLLC
- "Alternative Dispute Resolution: A Kinder, Gentler Approach to Resolving Business Issues," *West Virginia Executive Magazine*, Spring 2001, also published as "A Mediacao: Um Instrumento Valioso Para As Empresas," in *Mediacao* compiled and edited by Jose Vasconcelos-Sousa, Quimera 2002
- Venti, K.; Martin, J.R.; Glover, M.A.; and Givens, D.S., "Fighting for the Full Offset in Deliberate Intention Exception Claims: Strategies and Considerations for Pre-Trial, Settlement, and Trial," 2001 *W.Va. D.T.C.* 184, June 2001
- Martin, J.R.; Obenchain, J.M., "Agreements to Purchase Insurance: Avoiding The Illusion of Coverage," 2002 *W.Va. D.T.C.* 196, June 2002
- Martin, J.R.; Smith, M., "Mediation: Just How Confidential Is It? An Overview of Reported Decisions," 2004 *W.Va. D.T.C.*, CD Tab 11, May 2004
- Crislip, S.R.; Martin, J.R.; Anderson, J.L., "Think Before You Write: The Importance of Understanding State Law Governing Excess and Surplus Lines Agents/Brokers and Their Ability to Bind Coverage," *Declarations* (publication of the Excess/Surplus Lines Claims Association), p. 26, Winter/Summer 2005
- Martin, J.R.; Mankins, J.M., "Duties and Obligations of Insurance Agents and Brokers," 2006 *W.Va. D.T.C.*, CD3, May 2006
- Contributor, ADR Chapter, *West Virginia Lawyer's Handbook*, 2006 Ed.
- Martin, J.R., "The Ossification of Mediation in West Virginia," *The West Virginia Lawyer*, April-June 2012

Awards and Honors:

- Named the Best Lawyers' 2016 Charleston, West Virginia, Arbitration "Lawyer of the Year"
- Selected by his peers for inclusion in *The Best Lawyers in America*® for Arbitration, Insurance Law, International Arbitration - Commercial, International Arbitration - Governmental and Mediation, 2006-2016
- Named in *West Virginia Super Lawyers*® in the practice of Alternative Dispute Resolution
- Bio Ethics and the Law Moot Court Team, 1990
- Virginia Association of Life Underwriters Outstanding Local Association, 1984
- Martinsville-Henry County Association of Life Underwriters, Man of the Year, 1983
- Graduated cum laude, Emory & Henry College, 1973

OPTION GENERATION AND CLOSURE

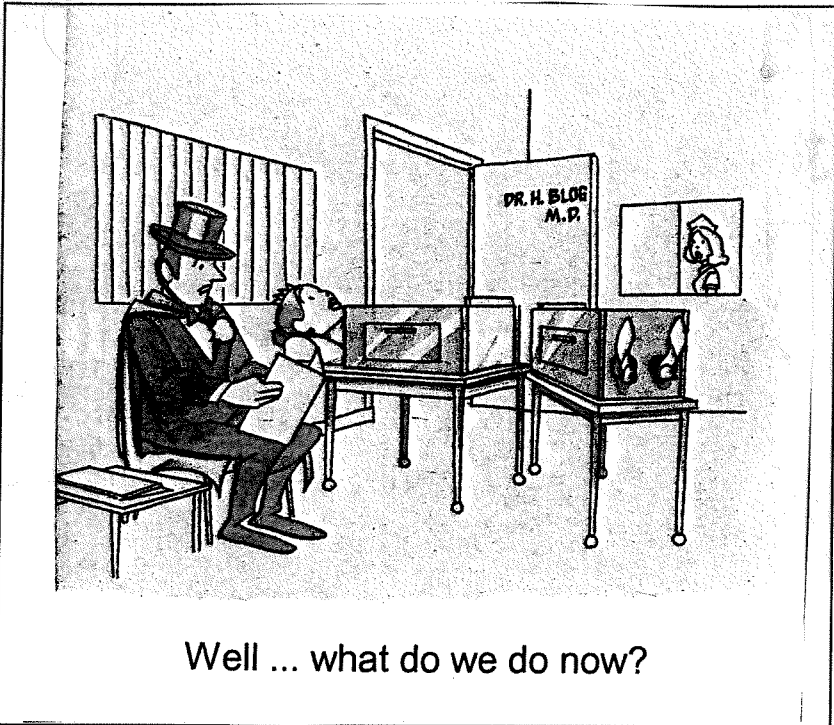
BASIC MEDIATION TRAINING

June 21 and 22, 2016



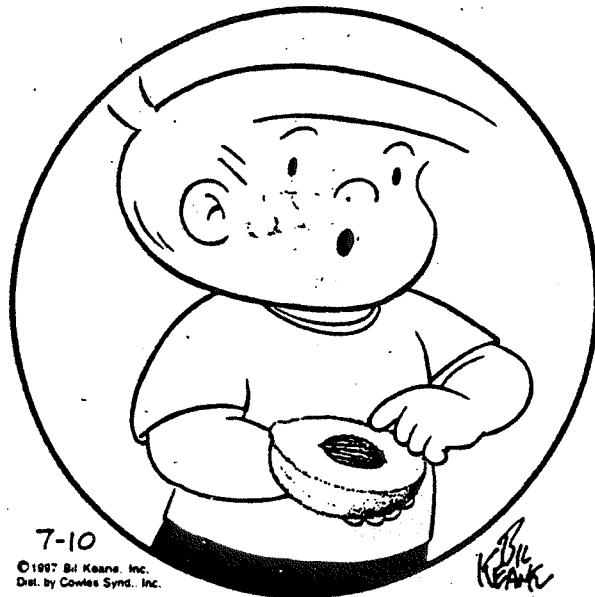
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FAMILY CIRCUS

By Bil Keane



7-10

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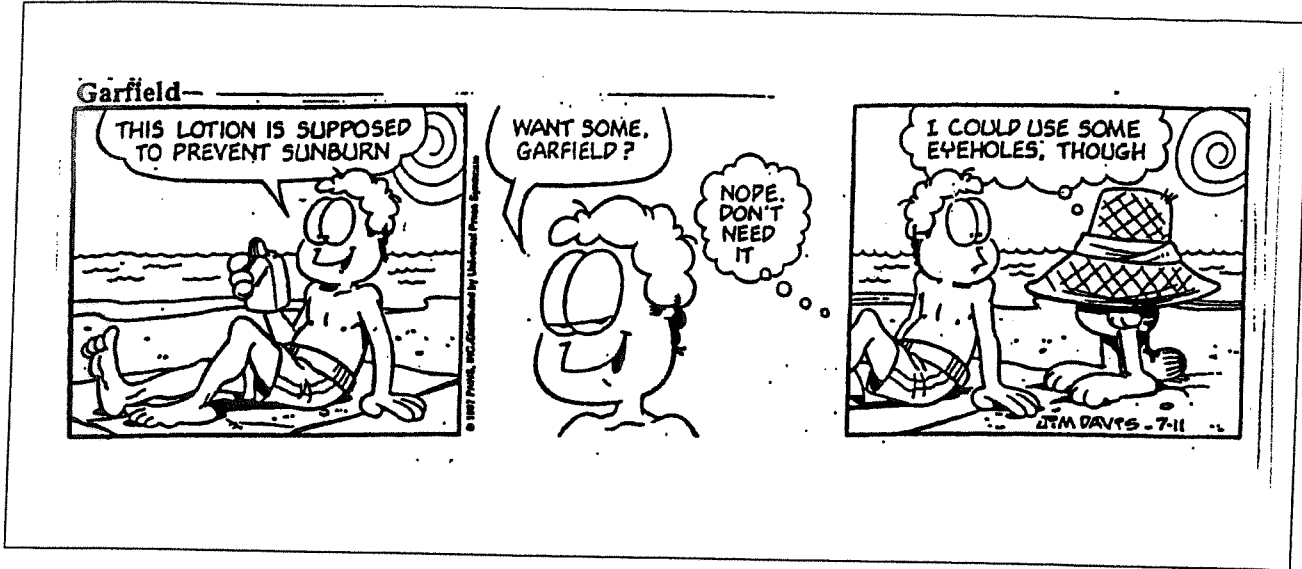
Bil Keane

"It's a good thing peaches don't
have as many seeds as
watermelons."



*"It's time to go see the client.
I better put my 'Intently Listening' glasses on."*

Option Generation:



- Listen, Listen, Listen!
- Take Good Notes
- Confidences
- Empathy

Be Positive

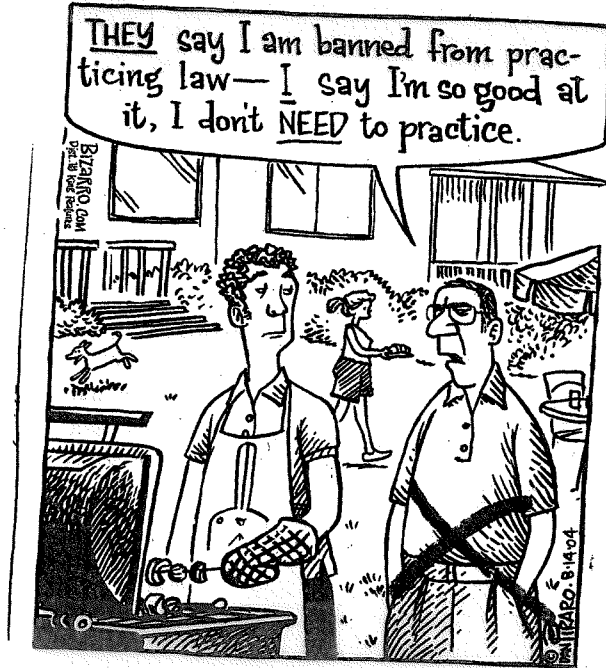
Bad Facts



Semantics

- Neutrality
- External Influences
- Their “Day” in Court
- Do NOT Be Passive
- No Premature Conclusions
- Selective Disclosure
- Hypotheticals

Bizarro



One Barrier to Resolution

- Focus on Interests
- Math
- Body Language
- What Said, How Said, Not Said
- Flexibility
- Multiple Negotiations
- Work Hard, They Will Too

Focus on Progress

“The Race”/Timing



Emphasize Positive

- Protect the Process

- Client Control

- Details, Details!

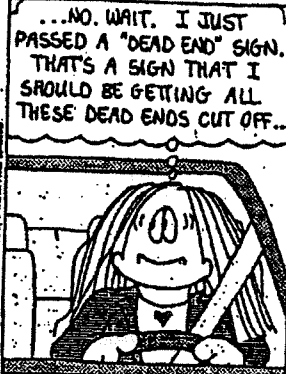
- Avoid Bottom Lines

- Apology

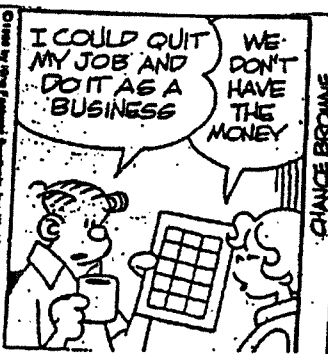
- Focus on Future

CATHY

By Cathy Guisewite



Hi and Lois



Closure:

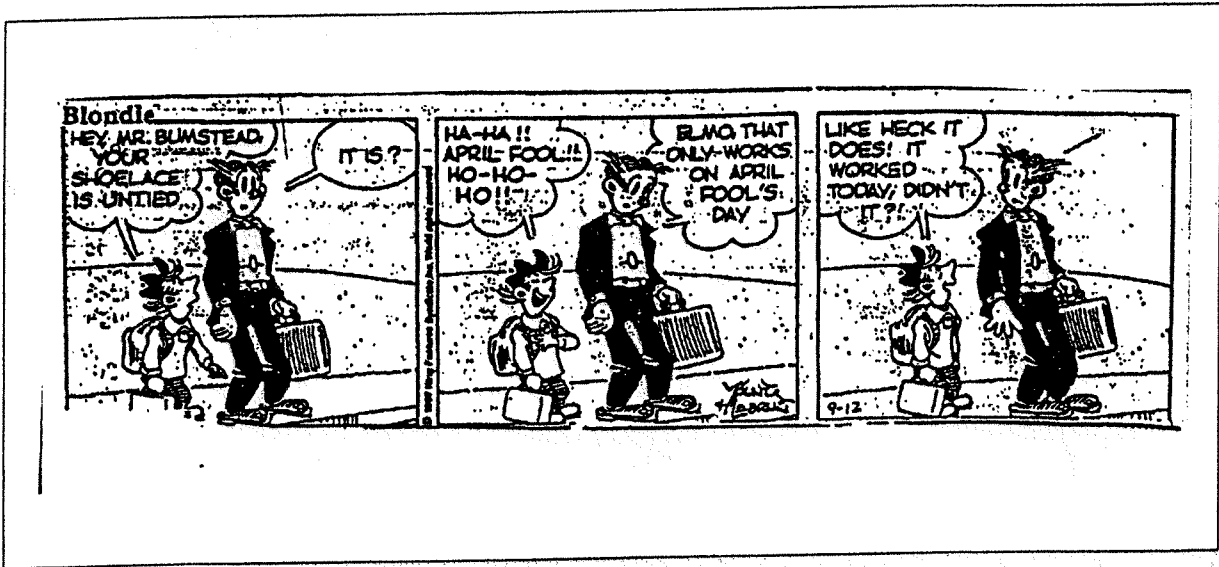
- Know Terms of Settlement
- Memo of Settlement
- Agreed Judgment and Dismissal Order
- Outcome Report

Ethics:

- Explain Your Role

Do Not Persuade

Your Opinions – Careful!

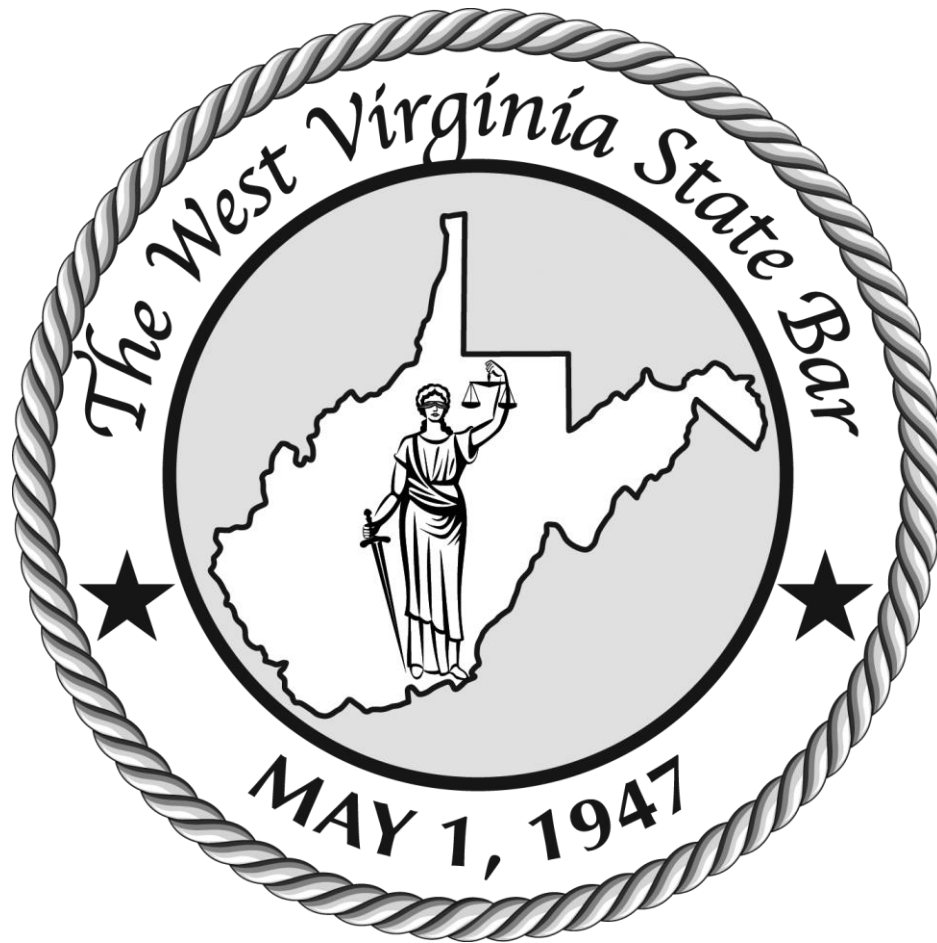


NO MORE IMPASSE

Bizarro

By Dan Fraw





MEDIATION - A COMPREHENSIVE APPROACH TO CONFLICT RESOLUTION

MICHAEL JOHN ALOI, U.S. MAGISTRATE JUDGE

U.S. District Court for the Northern District of West Virginia

Clarksburg, WV

BASIC MEDIATION TRAINING

“The Promise of Mediation”

West Virginia State Bar

**June 22, 2016
Flatwoods, WV**

**Presented by:
Michael John Aloï, U.S. Magistrate Judge
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Michael John Aloï

Michael John Aloï grew up in the small coal mining town of Farmington, WV. He is the youngest child of Sam and Frances Aloï and the grandson of Italian immigrants.

In 1980, he graduated from West Virginia Wesleyan College, with honors, where he received the Sheridan Watson Bell Award for Outstanding Christian Leadership. In 1983, he graduated from WVU College of Law, the only member of his class to receive both the Order of the Coif and Order of Barristers and where he also received the Patrick Duffy Koontz Award for Leadership, Scholarship and Character. He presently serves as an adjunct professor at the WVU College of Law.

After graduation from law school he began the private practice of law with his cousin, Timothy J. Manchin, in Fairmont, WV, which continued for the next 28 years. In 1987 he was one of the original mediators selected for the Pilot Settlement Week Program in the Northern District of West Virginia, and thereafter he mediated over 2000 cases. He was the only lawyer in the state of West Virginia selected to be a fellow of the American College of Civil Trial Mediators.

He has served as an Arbitrator for the American Arbitrator Association, a Hearing Examiner for the West Virginia Ethics Commission, an Impartial Hearing Officer for the WV Department of Education and a Hearing Examiner pro tempore for the WV Department of Human Rights.

Judge Aloï received an AV rating from Martindale-Hubbell, the highest rating a lawyer can receive. He also received the WV State Bar Certificate of Merit, the WV Wesleyan College Alumni Service Award, the Association for Justice Member of the Year Award and the WVU Appalachian Center for Law and Public Service Pro Bono Attorney of the Year Award. He served as President of the WV State Bar in 2002-2003.

Judge Aloï served as President of the WV Wesleyan College Alumni Association and also served on its Board of Trustees. He served as President of the Marion County United Way, South Fairmont Rotary and Family Service of Marion and Harrison Counties.

In August of 2011, he was appointed by Governor Tomblin as a Circuit Court Judge for Marion County and thereafter elected for the position. As a Circuit Court Judge he established the First Drug Court in Marion County. He was also appointed by the Chief Justice for special assignment to sit on the WV Supreme Court of Appeals and was one of two circuit court judges in the state selected to attend the Justice Reinvestment Act National Conference.

On October 1, 2015 he began his appointment as US Magistrate Court Judge for the Northern District of West Virginia. He is married to Dr. Susan Aloï and they have four children, Joey, Alexander, Hannah and Iris, and a daughter-in-law, Roxy.

The Promise of Mediation¹

Judge Michael John Aloï

INTRODUCTION

The notion of healing and invoking higher principles to deal with a range of contemporary problems is weaving its way into the mainstream....This movement raises two questions for the mediation professionals.

First, have we, as mediators, been constrained by our role definition as a neutral from sharing more of our humanity? Have we been prohibited from drawing upon our higher consciousness or spiritual center to be present to the dispute in a way that might foster healing and inspire parties to seek the highest good? One could say we have preciously guarded neutrality as the standard at the expense of examining the role of compassion. We have honed our skills as conflict technicians, not conflict healers. I think we have an opportunity to ask if there is a way we can bring who we are at a higher level into our practice.

Second, are we asking enough of our disputants? Can we raise their goal aspirations; asking them to reach deeper into themselves than their self-interest to look at resolutions that bring genuine peace and healing or that address the greatest good? Are we doing enough as conflict interveners merely to bring about settlement without encouraging healing between parties who have continuing obligations or impact on the wider community? We are never just one against the other; we are always two parts of something larger. Should we have a responsibility to the whole – the greater good”?

When we talk about augmenting the healing potential of mediation, we are talking about a twofold approach. **How can we remain connected to the highest and the best within ourselves? How can we inspire the highest and best within our clients?** There is more to all of us than the elements of the dispute, and calling all of who we are into play is the untapped potential of mediation – Lois Gold (Bowling pp183-84).

I. INVOKING HIGHER PRINCIPLES

Few mediators question that ethics should play an important role in our work. However, there is not the same consensus concerning the role of spirituality in our work.

Ken Cloke, in his discussion of “Elements in a Unified Theory of Conflict Resolution” under the category of “Likely Level, Percent, Style of Resolution” provides an excellent context in which to discuss the notion of invoking higher principles in our work. The following outcomes are listed:

¹ The Promise of Mediation is the title to a book on “Transformative Mediation” authored by Robert A. Baruch Bush and Joseph P. Folger.

Stop the Fighting (20%) *Conciliation*
Settle the Issues (60%) *Settlement*
Resolve the Underlying Reasons for the Dispute (90%) *Resolution*
Reach Forgiveness (98%) *Transformation*
Reconcile (100%) *Transcendence*
Synergy, Community (100%+) *Systems Design*

As civil mediators we spend 90% of our work – stopping the fight – settling the issues – and resolving the underlying issues. But what about the remaining 10% where Forgiveness and Transformation, Reconciliation and Transcendence take place. It is my belief that the remaining 10% only occurs if we invoke higher principles into our mediation practice.

This is not an ideological directive. Imposing one's view of higher principles in the mediation process can be as harmful as failing to recognize the presence of higher principles in the process as evidenced by the parties' words and actions.

Upon reflection of my work as a mediator and now as a Judge², the most satisfying moments (moments of light) were those where forgiveness and reconciliation occurred. The most disappointing moments (moments of darkness) were those when these opportunities were missed.

Upon further reflection it became clear to me that the more intentional I was about being open to the presence of higher principles mediation, the more these moments of light occurred – and all of us were better for them having occurred. These moments took place in every type of civil mediation – be it personal injury cases, contract disputes, property disputes, and medical malpractice cases, moments occurred that honored the highest and best within all of us.

II. LAWYERS AS PEACEMAKERS/HEALERS OF CONFLICT

PEACEMAKER

“Abraham Lincoln’s Advice to Young Lawyers”

"The leading rule for the lawyer, as for the man of every other calling, is diligence. Leave nothing for tomorrow which can be done today. Never let your correspondence fall behind. Whatever piece of business you have in hand, before stopping, do all the labor pertaining to it which can then be done...

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser-- in fees, expenses, and waste of time. **As a peacemaker the lawyer has a superior opportunity of being a good man.** There will still be business enough...

² See: “Mindfulness and Judging” by Judge Jeremy D. Fogel. - Federal Judicial Center. 2016.

"There is a vague popular belief that lawyers are necessarily dishonest. I say vague, because when we consider to what extent confidence and honors are reposed in and conferred upon lawyers by the people, it appears improbable that their impression of dishonesty is very distinct and vivid. Yet the impression is common, almost universal. Let no young man choosing the law for a calling for a moment yield to the popular belief; **resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer.**"

-Abraham Lincoln

HEALERS OF CONFLICT

"The entire legal profession – lawyers, judges, law teachers -- has become so mesmerized with the stimulation of the courtroom contest, that we tend to forget that we ought to be healers of conflict. Doctors, in spite of astronomical medical costs, still remain a high degree of public confidence because they are perceived as healers. Should lawyers not be healers? Healers, not warriors? Healers, not prosecutors? Healers, not hired guns? For many claims and trials by adversarial contest must in time go the way of trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people."

-Former US Supreme Court Justice Warren Burger

UNITE PARTIES DRIVEN ASUNDER

"My joy was boundless. I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter men's hearts. I realized that the true function of a lawyer was to **unite parties riven asunder**. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby -- not even money, certainly not my soul."

-Mahatma Gandhi

MOST CREATIVE SOCIAL EXPERIMENTS OF OUR TIME

Former Harvard President and Law School Dean, Derek Bok predicts that society's greatest opportunity in the next generation "will lie in tapping human inclinations towards collaboration and compromise rather than stirring our proclivities for competition and rivalry. If lawyers are not the leaders in marshaling cooperation and designing mechanisms that allow it to flourish, they will not be at the center of the **most creative social experiments of our time.**"

-Derek Bok "What are America's
Law Schools Doing Wrong? A Lot."
12 Student Lawyer 46 (1983)

III. HOW DO WE APPROACH OUR WORK IN A MORE HOLISTIC MANNER **-SOME THOUGHTS**

Mediation is a sacred space because it is a place where our hopes and fears are expressed, where healing and growth; forgiveness and reconciliation; confession and acceptance take place. Where our best and worst of qualities are exposed.

1. Acknowledge (Accept-embrace-celebrate!) that the space you are occupying in mediation is sacred.
 - a. There have been times during the course of a mediation or facilitation, when I have had the impression that something happens in the room, something more important than the agreement that is emerging, that the conflict is itself just a vehicle for the creation of something sacred, something whole, something holy. –Sara Cobb (Bowling p. 215).
 - b. Today if we have no peace, it is because we have forgotten that we belong to each other – that man, that woman, that child is my brother or sister. If everyone could see the image of God in his neighbor do you think we would still need tanks and generals? ...The suffering must know that we love them, that they are wanted.....we are trying to bring peace to the world through our work. But the work is the gift of God (Mother Teresa/Collopy)

SPIRITUAL PRACTICES FOR BUILDING PEACE – A POEM

Three Spiritual Practices for Building Peace:

To Listen –
Seek and embrace the voice behind the voice
To Love –
Find that God in the other even the enemy
To Accompany –
Walk and share bread along the way
Oh people, yours is not work or a job.
Can you not hear it calling.
The voice inside,
The wellspring of vocation?
“Go. Go on my friend.
Take courage.
Trust yourself.
Let your life speak
This is who on earth you were meant to be”

-Excerpts from the Poem, “Do You Hear It Calling,” John Paul Lederach

LISTEN

“Listening is an act of love.” The Story Corps Project, NPR

Mindfulness means paying attention in a particular way: on purpose, in the present moment, and non-judgmentally. This kind of attention nurtures greater awareness, clarity, and acceptance of present moment reality (Kabat-Zinn p.4).

That all of us are humans and as such inhabit our own stories, the historic traditions that make each of us unique not just a “case.” In fact, each patient’s traditions not only are continued in the uniqueness of this moment, to be listened to and savored, but are integral to the generation of the suffering and healing of this particular human. Listening, not just hearing, is essential to the healing process. (Adams)

Non-Judgmentally

In the course of knowing Mother (Teresa) I always saw her receive each person the same way. She saw the face of God in everyone, always approaching each person with love, compassion, and the gift of her complete self. Time was never an issue. I once asked her “How is it that you never seem to judge anyone who comes to you?” she said “I never judge anyone because it does not allow me to love them.”(Collopy pp).

“Reserving judgment is a matter of infinite hope.”

– Francis Scott Fitzgerald

When we make a judgment, we stop listening, when we stop listening we stop caring, when we stop caring we are no longer of use to anyone.

TO LOVE

My Uncle June (Joe Manchin Jr.) was a Physical Therapist. He was treating the grandchild of a dear friend of his. After several days of no “hands-on” therapy but simply visits with the child his friend became frustrated and said “Joe – when are you going to do something for my grandchild?” My Uncle June responded “You don’t understand – I can’t help her until she trusts me – she loves me – then I will be able to help her.

I always try to follow a simple rule. “You only have to have two loves in your life – for God – and for the person in front of you at any particular time”(Carter 218).

TO ACCOMPANY

If we expect those with whom we share this Sacred Space to share their most intimate thoughts with us we too must become vulnerable and we must walk with them and share along the way.

IV. BEING RELATIONAL: THE SEVEN WAYS TO QUALITY INTERACTION & LASTING CHANGE

(From the Book by Louise Phipps Senft and William Senft. Published by Health Communications, Inc. 2015).

A. The Four Ways of Quality Interaction

- 1. Being Engaged**
- 2. Being Centered**
- 3. Being Grounded**
- 4. Being Clear**

B. The Three Ways to Lasting Change

- 1. Being Generous**
- 2. Being Humble**
- 3. Being Kind**

V. PRESENCE (BEING) THE THIRD PHASE

There are three phases of Professional Development. The first phase is **doing**. We have a clear sense of how to develop skills....The second phase is **knowing**. Again, we have a clear sense of how to respond to what we know. We read, study, and find a teacher or guide.....The third phase is **being**.

Qualities that contribute to being are numerous: for example, acceptance, morality, empathy, compassion, patience, non-judgment, trust, creativity, flexibility and optimism. Each quality can be developed, yet one quality encapsulates all and is synonymous with being – **presence**. Etymologically speaking, *present* is from the present participle of the Latin (*pre*) *praesens*, *present*, meaning, “to be before: in the sense of to be before one at hand/” Thus *presence* is being exactly where we are and mentally focused before whoever is with us in this moment of now. Presence is possible only when we are aware now, not lost in the past or future. Presence expands as we elevate our own healing and is therefore developmental, not magical. Presence is the context for resolving conflict. (Bowling, ACR p12)

GETTING IN SPIRITUAL SHAPE

- (a) Mindfulness Practice
- (b) Prayer
- (c) Music
- (d) Poetry
- (e) Meditation
- (f) Silence

We all must spirituality exercise daily so that in the most difficult and stressful of moments we will be “Spiritually Strong” and respond to the moment in a kind, thoughtful and meaningful way.

To make possible true inner silence, practice:

Silence of the eyes, by seeking always the beauty and goodness of God everywhere, closing them to the faults of others and to all that is sinful and disturbing to the soul;

Silence of the ears, by listening always to the voice of God and to the cry of the poor and needy, closing them to all other voices that come from fallen human nature, such as gossip, tale-bearing, and uncharitable words;

Silence of the tongue, by praising God and speaking the life-giving Word of God that it the Truth, that enlightens and inspires, brings peace, hope, and joy, and by refraining from self-defense and every word that causes darkness, turmoil, pain, and heath;

Silence of the mind, by opening it to the truth and knowledge of God in prayer and contemplation....and by closing it to all untruths, distractions, destructive thoughts, rash judgments, false suspicions of others, revengeful thoughts, and desires;

Silence of the heart, by loving God with our heart, soul, mind, and strength and one another as God loves, and avoiding all selfishness, hatred, envy, jealousy, and greed. I shall keep the silence of my heart with greater care, so that in the silence of my heart I hear His words of comfort and from the fullness of my heart I comfort Jesus in distressing disguise of the poor, for in the silence and purity of the heart God Speaks. (Mother Teresa/Miller pp 83-84).

VI. ETHICS

ETHICAL GUIDANCE FROM THE MODEL STANDARDS OF CONDUCT FOR MEDIATORS SUPPORT A MORE HOLISTIC APPROACH TO MEDIATION

Introduction

The Model Standards of Conduct for Mediators are the result of the joint efforts of the American Bar Associates, American Arbitration Association and the Association for Conflict Resolution. The August 2005 edition is attached for your convenience.

The standards are as follows:

- I. Self-Determination
- II. Impartiality
- III. Conflicts of Interest
- IV. Competence
- V. Confidentiality
- VI. Quality of the Process
- VII. Advertising and Solicitation
- VIII. Fees and Other Charges
- IX. Advancement of Mediation Practice

Other than what I refer to as “practice management” standards, that being Standard III Conflict of Interest, Standard VII Advertising and Solicitation, and VIII Fees and other Charges, the significant majority of the standards address issues that support viewing the mediation process in a more holistic manner.

Standard I. Self Determination.

- a. A mediator shall conduct mediation based on the principle of party self determination. Self Determination is the act of coming to a voluntary, un-coerced decision in which each party makes free and informed choices as to the process and outcome.
- b. A mediation shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, outside pressure from Court personnel, program administrators, provider organizations, the media or others

Standard II Impartiality.

- a. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.
- b. A mediator shall conduct mediation in an impartial manner and avoid conduct that gives the appearance of partiality.
 - 1. A mediator should not act with partiality of prejudice based on any participant's personal characteristics, background, values, beliefs' or performance at a mediation or any other reason.
- c. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

Standard IV. Competence.

- A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.
 - 1. Any person may be selected as mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator competence. A person who offers to serve as mediator creates the expectation that the person is competent to mediate effectively.
 - 2. A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.
 - 3. A mediator should have available for the parties' information relevant to the mediator's training, education, experience and approach to conducting a mediation.
- B. If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practical and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.
- C. If a mediator's ability to conduct a mediation is impaired by drug, alcohol, medication or otherwise, the mediator shall not conduct the mediation.

Standard V. Confidentiality

- A. A mediator shall maintain confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.

Standard VI. Quality of the Process

- A. A mediator shall conduct a mediation in accordance with the Standard and in a manner that promotes diligence, timeliness, safety, presence of the appropriate parties, party participation, procedural fairness, party competency and mutual respect among all participants.

- a. **A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.**
- b. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.

Standard IX. Advancement Mediation Practice

A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:

- a. Fostering diversity within the field of mediation.
- b. Striving to make mediation accessible to those elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.
- c. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.
- d. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.

B. A mediator should demonstrate respect for differing point of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.

“Be the change you wish to see in the world.”

- Gandhi

South African Prayer

“For Courage to Do Justice”

Open my eyes that I may see the needs of others;
 Open my ears that I may hear their cries;
 Open my heart so that they need not be without care during their time of distress;
 Let me not be afraid to defend the weak because of the anger of the strong,
 nor afraid to defend the poor because of the anger of the rich.
 Show me where love and hope and faith are needed,
 and use me to bring them to those places.
 And so open my eyes and my ears
 that I may this coming day be able to do some work of peace.

WORKS CITED

1. Adams, Patch, Gesundheit. Rochester VT: Healing Arts Press, 1993;
2. Bowling, Daniel and David Hoffman. Bringing Peace into the Room: How the Personal Qualities of the Mediator Impact the Process of Conflict Resolution. San Francisco: Jossey –Bass, 2003;
3. Bowling, Daniel. “Who am I as a Mediator: Mindfulness, Reflection and Presence.” ACR Resolution, Fall 2005, 12-15;
4. Carter, Jimmy, Living Faith. New York, NY: Random House, 1996;
5. Cloke, Ken. “Why Every Conflict Breaks Your Heart ‘Conflict As a Spiritual Crisis.’” ACR Resolution, Fall 2005, 16-21;
6. Collopy, Michael. Architects of Peace: Visions of Hope in Words and Images. Novato, CA: New World Library, 2000;
7. Fox, Erica and Marc Gafni. “Seeing With New Eyes: One Step Toward the Field of the Future.” ACR Resolution, Fall 2005, 22-25;
8. Kabat-Zinn, Jon. Wherever You Go There You Are. New York, NY: Hyperion, 1994;
9. Lederach, John Paul. “Do you Hear It Calling.” ACR Resolution, Winter 2003, 39;
10. Miller, John, Life: A User’s Manual. Novato, CA: New World Library, 1998;
11. Model Standard of Conduct for Mediation; and
12. Cloke, Ken, The Crossroads of Conflict. Canada: Janis Publications, Inc.,, 2006, 313.



ETHICS

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Andrea J. Hinerman has served as Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel since January 26, 2004, and as Senior Disciplinary Counsel since 2008. Prior to joining ODC, she served as a law clerk for the Honorable Irene C. Burger, when she was a Circuit Judge for Kanawha County and for the late Honorable Robert E. Maxwell, Senior District Court Judge for the Northern District of West Virginia. She also spent two years in private practice. She is a graduate of the West Virginia University College of Law.

ETHICS IN MEDIATION

June 21 & 22, 2016

Basic Mediation Training
Flatwoods, West Virginia

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- I. **WEST VIRGINIA HAS NOT ADOPTED SPECIFIC RULES OF ETHICS FOR MEDIATORS, ALTHOUGH SOME MEDIATION PRINCIPLES ARE NOW ENCOMPASSED WITHIN THE RULES OF PROFESSIONAL CONDUCT.**
 - A. Amendments to the Rules of Professional Conduct became effective January 1, 2015. ODC's website contains a link to the revised Rules.
 - B. New Rule 2.4 of the Rules of Professional Conduct entitled Lawyer Serving as Third-Party Neutral was adopted.
 1. Rule 2.4(a) states that "[a] lawyer serves as a third party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter."
 2. Rule 2.4(b) states that "[a] lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client."
 3. Comment [2]- Recognizes that the lawyer may be subject to court rules or other law that apply to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as ... the Model Standards of Conduct for Mediators jointly prepared by the

- American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.
4. Comment [3] “Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer’s service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, this will be sufficient. For others, particularly those who are using the process for the first time, more information may be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer’s role as third-party neutral and a lawyer’s role as a client representative, including the inapplicability of the attorney-client privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.”
 5. Comment [4] “A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer’s law firm are addressed in Rule 1.12.”
 6. Comment [5] “Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration, the lawyer’s duty of candor is governed by Rule 3.3. Otherwise, the lawyer’s duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.”

II. MEDIATION IS AN INFORMAL, NON-ADVERSARIAL PROCESS WHEREBY A NEUTRAL THIRD PERSON, THE MEDIATOR, ASSISTS DISPUTING PARTIES TO RESOLVE BY AGREEMENT OR EXAMINE SOME OR ALL OF THE DIFFERENCES BETWEEN THEM. (RULE 25.02, TRIAL COURT RULES)

- A. Decision making discretion remains with the parties; the mediator has no authority to render a judgment on any issue of the dispute.
- B. The role of the mediator is to encourage and assist the parties to reach their own mutually acceptable resolution by facilitating communication, helping to clarify issues and interests, identifying what additional information should be collected or exchanged, fostering joint problem-solving, exploring resolution alternatives, and other similar means.
- C. Procedures for mediation are extremely flexible, and may be tailored to fit the needs of the parties to a particular dispute.

- D. Remember, however, nothing in Rule 25.02 shall be construed to deprive a court of its inherent authority to control cases before it or to conduct settlement conferences, which are distinguished from mediation.

III. BOTH THE RULES OF MEDIATION AS THEY EXIST FOR THE TRIAL COURT AND THE FAMILY COURT IMPOSE A DUTY OF CONFIDENTIALITY.

Rule 43(d) - Family Court Rules
Rule 25.12 - Trial Court Rules

IV. RULE 43(D) OF THE FAMILY COURT RULES CITES RULE 25.12 OF THE TRIAL COURT RULES.

- A. Rule 25.12 presumes there will be individual sessions and provides for confidentiality of information obtained in those sessions for the opposing party in a manner agreed upon by the parties and mediator. Rule provides that mediation shall be regarded as confidential settlement negotiations, subject to W.Va. R.Evid 408. Mediator shall maintain and preserve the confidentiality of all mediation proceedings and records. Mediator may not be subpoenaed or called to testify or otherwise be subject to process requiring disclosure of confidential information in any proceeding relating to or arising out of the dispute mediated.
- B. Rule 43(d) also provides that all persons involved in premediation screening and mediation shall preserve the confidentiality of negotiations, of all written materials utilized in the processes, of all information obtained in the processes, and of all agreements; and with the exception of the abbreviated premediation screening report, the Mediation Outcome Reports, and any mediated agreement, shall keep such matters confidential from the court. No premediation screener or mediator may be subpoenaed, called to testify, or otherwise be subject to process requiring disclosure of confidential information in any proceeding relating to or arising out of the dispute mediated.

V. THE CONFIDENTIALITY CONCEPT IN THE MEDIATION RULES IS SIMILAR TO THE CONCEPT SET FORTH IN RULE 1.6 OF THE RULES OF PROFESSIONAL CONDUCT FOR LAWYERS.

- A. Based on concept of loyalty.
- B. Rule 1.6 Exceptions:
 - 1. Prevention of criminal conduct, report suspected child abuse or neglect.
 - 2. Prevent, mitigate or rectify criminal conduct resulting in financial injury to another in furtherance of which the client has used or is using the lawyer's services.
 - 3. Secure legal advice, or informal ethics advice from ODC
 - 4. Establish claim or defense on behalf of lawyer in a controversy

between lawyer and client, to establish defense to criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of client.

5. To comply with other law or court order.
 6. Limited disclosure to detect conflicts of interest.
- C. However, Trial Court Rule 25.12 does not address if there is an exception.

VI. RULE 42 OF THE FAMILY COURT RULES PROVIDES: "ALL MEDIATORS SHALL BE SUBJECT TO CANON 3* OF THE CODE OF JUDICIAL CONDUCT REGARDING DISQUALIFICATION."

- A. Requires written motion "for good cause" which any party may file
- B. Court must rule in ten (10) days.
- C. If motion granted, Court must appoint new mediator within five (5) days.
- D. * The Code of Judicial Conduct was amended by Order of the Supreme Court dated November 2, 2015, effective December 1, 2015. Disqualification is now found under Canon 2, Rule 2.11 of the Code of Judicial Conduct.

VII. RULE 25.07 OF THE TRIAL COURT RULES PROVIDES FOR MEDIATOR DISQUALIFICATION

- A. Does not specify written motion, but does require "good cause."
- B. If granted, parties, by agreement and with court approval, or the Court, if the parties cannot come to agreement, may select a replacement in accordance with Trial Court Rule 25.05 and 25.06.
- C. You must disqualify yourself if your impartiality might reasonably be questioned. You should disclose on the record information that you believe the parties or their lawyers might consider relevant to questions of disqualification even if you believe there is no real basis for disqualification.
 1. Personal Bias/Prejudice concerning a party or party's lawyer or a personal knowledge of the disputed evidentiary facts relating to the mediation.
 2. Served as a lawyer or partner/associate or former partner/associate served as lawyer in the matter or have been a witness in it.
 3. Economic interest (including as a fiduciary) of self, spouse, parent or child, wherever residing, or other family member living in your household
 4. You or your spouse or a person within third degree of relationship to either of you, or the spouse of such person (great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew or niece)
 - (l) Is a party to the proceeding;

- (ii) Acting as lawyer;
- (iii) Is known to have a more than de minimis interest which could be affected by the proceeding;
- (iv) Is likely to be a material witness in the proceeding.

D. You have duty to keep yourself informed about your personal and fiduciary economic interests and make reasonable effort to be informed about personal economic interest of your spouse (or domestic partner) and minor children.

VIII. YOU SHOULD PERFORM DUTIES WITHOUT BIAS OR PREJUDICE. THIS MEANS BOTH WORDS AND CONDUCT.

- A. Facial expressions / body language.
- B. Nor permit staff or others under your control to do so.

IX. ATTORNEY ATTENDANCE AT MEDIATION.

- A. Trial Court Rule 25.10 requires counsel of record and decision making representatives to be present and if you and/or the decision making representative fails to appear without good cause, the court *sua sponte* or upon motion may impose sanctions, including award of reasonable mediator and attorneys fees and other costs against the responsible party.
- B. Family Court Rule 43(a) provides “[c]ounsel may attend mediation.”

X. WHO ENFORCES MATTERS OF CONDUCT REGARDING MEDIATORS?

- A. The Courts
- B. The Office of Disciplinary Counsel
- C. Other licensing boards

XI. WHEN ACTING AS MEDIATOR, LAWYER STILL BOUND BY THE RULES OF PROFESSIONAL CONDUCT.

- A. Rule 1.0 - Terminology
- B. Rule 1.1 - Competence
- C. Rule 1.2(a) - Scope of Representation & abiding by client’s decision to accept or reject offer of settlement
- D. Rule 1.3 - Diligence
- E. Rule 1.4 - Communication
- F. Rule 1.5 - Fees & Expenses - Bottom Line - must be reasonable
- G. Rule 1.6 - Confidentiality of Information
- H. Rule 1.7 - Conflict of Interest - Concurrent Conflict
- I. Rule 1.9 - Conflict of Interest - Former Client
- J. Rule 1.10 - Imputed Disqualification
- K. Rule 1.12 - Former judge or arbitrator
- L. Rule 2.4 - New Rule - Lawyer Serving as Third-Party Neutral

- M. Rule 3.3 - Candor toward the tribunal
- N. Rule 3.5 - Impartiality and decorum in the tribunal
- O. Rule 4.1 - Truthfulness in statements to others.
- P. Rules 7.1 - 7.5 - Advertising
- Q. Rules 8.4(c) and 8.4(d) - Professional misconduct to engage in conduct involving dishonesty, fraud, deceit or misrepresentation and in conduct that is prejudicial to the administration of justice
- R. L.E.I. 88-03 - Settlement Agreements Requiring Complainants to Withdraw Ethics Complaints - DON'T DO IT!
- S. Rule 2.4 of the Rules of Lawyer Disciplinary Procedure – The Office of Disciplinary Counsel shall evaluate all information coming to its attention by complaint or from other sources alleging lawyer misconduct or incapacity.

XII. TYPICAL ALLEGATIONS MADE AGAINST LAWYERS WHO ARE ACTING AS MEDIATORS BY PARTIES WHO ARE NOT CLIENTS.

- A. Did not understand mediator's role.
- B. Felt intimidated by the mediator and the mediation process.
- C. Mediator exhibited bias towards the other side.
- D. Mediator coerced them into accepting a settlement.

XIII. TYPICAL ALLEGATIONS MADE AGAINST LAWYERS REPRESENTING PARTIES IN MEDIATION.

- A. Did not understand mediation process.
- B. Felt intimidated by their lawyer, by the other lawyers, and parties (i.e. the whole mediation process).
- C. In domestic matters, felt abandoned by lawyer because lawyer did not attend mediation.
- D. Felt their lawyer did not defend their interests during mediation.
- E. Felt they were pressured to accept settlement at mediation.

XIV. CALL OR WRITE THE OFFICE OF DISCIPLINARY COUNSEL FOR INFORMAL ETHICS ADVICE.

- A. If you have a question, call or write before you take action.
- B. If you take action before you call or write, then we will have a different conversation called a "Self Report."
- C. Be advised, we will not tell you what we think about another attorney's conduct or whether that other attorney is violating the Rules of Professional Conduct. If you want to know, then file a complaint if you believe it is a violation of the Rules and if the misconduct raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. This is Rule 8.3(a) of the Rules of Professional Conduct.