



Best Practices for Post-Disaster Insurance Claim Mediation Programs

Introduction

Hurricanes, wildfires, tornadoes and other natural disasters give rise to large numbers of insurance claims and related consumer complaints and disputes. Consumers who are unable to resolve their claim problems directly with their insurers and/or agents turn to private attorneys, local or statewide elected officials, their state regulator...or all of the above. State insurance regulatory agencies have taken varying approaches to meeting the increased consumer demand for help with claim dispute resolution after natural disasters.

In the aftermath of Hurricane Andrew in 1992, then the Northridge Earthquake in 1994, and numerous subsequent catastrophes, a number of state insurance regulatory agencies have created or participated in mediation programs. The goal of these programs is to assist in the recovery process by quickly and inexpensively resolving disputes related to coverage, settlements and various claim related matters. Mediation is an alternative to formal litigation and arbitration and is generally consensual and non-binding. A policyholder can participate in mediation and still pursue litigation if the dispute does not settle, as long as they haven't expressly waived that right. It is appropriate for a state insurance regulatory agency to have a leading role in establishing and/or overseeing a disaster claim dispute mediation program. State insurance regulators have relevant authority and expertise and providing consumer assistance is part of their mission.

Past programs have largely been ad hoc creations, varying in implementation and success. Data from state-run post disaster claim dispute mediation programs suggests that to date their effectiveness in resolving a substantial number of claim disputes fairly, quickly and inexpensively has varied widely. In some states, mediation programs were little used; in other states, policyholders have been largely dissatisfied with the programs, complaining that the process was inadequate, biased in favor of insurers and/or ineffective.

Increasing interest in ADR applications in disaster scenarios warrants examining past practices and how to improve upon them in the future. Moving forward, numerous parties have expressed interest in creating a permanent infrastructure for disaster-relief mediation programs, so states, insurers, and insureds can be ready when the next disaster strikes.

This United Policyholders report examines past efforts and best practices in mediation and outlines a model for state-run post-disaster mediation programs. This includes a plan for a Model Mediation Program that will allow for the rapid resolution of a large number of property claim disputes, while balancing the potential needs of individuals and communities harmed by large-scale disasters against the costs of such a program and the interests of insurers. The proposed Model Program aims to facilitate the quick resolution to disputed claims and to bridge the imbalance of power between policyholders and insurers. The first feature of the Model Program is permanency – the Model Program should have infrastructure permanently in place to allow for quick and effective implementation when a disaster strikes. The Model Program focuses on ensuring that it is well advertised and can actively place policyholders on notice of their right to mediate and how the program operates. The Model Program requires the ongoing reporting of outcomes to allow for a meaningful evaluation of its functions. The

appendices are a template for a Mediation Evaluation form and English and Spanish versions of a United Policyholders Roadmap to Recovery™ library publication that educates consumers on preparing for and using mediation to resolve an insurance claim dispute.

United Policyholders (“UP”) is a 501(c)(3) non-profit that is an information resource and voice for insurance consumers in all 50 states. See www.uphelp.org. The organization’s work is funded by donations and grants from individuals, businesses and foundations, and includes three programs that provided data used in this report:

Through the [Roadmap to Recovery™ \(“R2R”\)](#) program UP provides long term disaster recovery support and gives individuals and businesses free tools and resources to help solve the insurance problems that can arise after an accident, loss, illness or other adverse event. These include a library of claim tips, sample forms, educational videos, professional help directories, and articles written by leading experts in personal finance, construction and the law. UP derives information about consumer’s experiences with claim dispute mediation programs directly from consumers at our public educational workshops, periodic surveys of disaster victims and ongoing email and telephone communications from policyholders and policyholder advocates. UP provided input during the legislative drafting negotiations that created California’s statutory earthquake claim mediation program after the 1994 Northridge earthquake and in 2008 UP published our first *Policyholders Guide to Mediation*, an updated version of which is attached to this report as an appendix.

Through a [Roadmap to Preparedness](#) program UP teaches financial and disaster preparedness through insurance literacy outreach and education in partnership with civic, faith based, business and other non-profit associations. Through an [Advocacy and Action](#) program UP contributes to public policy initiatives related to insurance including the proceedings of the National Association of Insurance Commissioners, regulatory and legislative matters and the submission of friend of the court briefs in coverage and claim litigation. UP does not accept funding from insurance companies or sell insurance of any kind.

UP conducts research to support our three programs. This United Policyholders’ report evolved from work initiated by UP staff and a paper authored by Rutgers University School of Law students Oliver Barry and Abraham Tran under the supervision of Distinguished Professor of Law Jay Feinman. Tran won the First Congressional District of New Jersey Award for Scholarship in the Law for the paper. Revisions and editing to produce this report were done by UP Executive Director Amy Bach, Esq., (a consumer representative to the National Association of Insurance Commissioners) with assistance from Douglas DeVries, Esq. of Judicate West and Hastings College of the Law students Anne K. Scott and Daniel Veroff.

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Brief History of Mediation in Disaster Scenarios

In 1992, Hurricane Andrew struck Florida, prompting the creation of a Florida state program to mediate claims resulting from mass disasters. Since then, at least six other states have implemented mediation programs, including Alabama, California, Louisiana, Mississippi, Texas, and North Carolina.¹ In the aftermath of 2012's Superstorm Sandy, impacted states are in the process of reviving or creating mediation programs. Following a series of four storms that struck Florida in 2005, 12,160 mediation requests were received. By December of 2005, roughly one-half had been settled prior to mediation, and a settlement rate of 92-93% was realized on the remainder.² In 2008, Hurricane Ike struck the Gulf Coast region and, as of December the same year, more than 730,000 insurance claims were filed for damages sustained. Of these numerous claims, over a thousand were resulted in complaints to the Texas Department of Insurance.³ The largest data samples are from the programs created in the aftermath of Hurricane Katrina.

In August 2005, Hurricane Katrina, a category 5 hurricane, devastated the Gulf coast, flooding vast expanses of land. This was followed shortly after by Hurricane Rita, which added to the damage. The destruction of property in the wake of Hurricane Katrina was widespread and devastating; it is reported that 275,000 houses were destroyed. Damages were estimated to between \$80 and \$100 billion. Simultaneously, insurance providers faced logistical problems when insurance offices in the area were destroyed and local employees were displaced by the storms. Damage to the area made it difficult for insurance adjusters to travel to homeowner properties. Additional adjusters from other parts of the country were brought in to handle the increased quantity of claims; however, these adjusters were not familiar with the community or the types of damage associated with hurricanes.⁴ When over 900,000 insurance claims poured in, insurance providers were incapable of offering efficient relief.⁵ The same issues are now arising in Sandy's aftermath.

Recognizing the inevitable delays in Katrina's aftermath, Louisiana Governor Kathleen Blanco extended the time for homeowners to file insurance claims. Three months after the hurricanes, Louisiana Commissioner of Insurance, Robert Wooley, issued Emergency Rule 22, authorizing a mediation program to be administered by the American Arbitration Association (AAA).⁶ By November 2007, the Louisiana program had settled nearly 75% of the more than 12,000 mediation requests received. Similarly, in Mississippi, 82% of approximately 5,000 claims completed mediation.⁷

¹44 Am. Jur.2d Insurance § 1390 (2008).

²*Id.*

³*Id.*

⁴*Id.*

⁵Michael A. Patterson, *Evaluating the Louisiana Department of Insurance's Hurricane Katrina Homeowners Mediation Program*, 62 DISP. RESOL. J. 34 (2007).

⁶*Id.*

⁷David L. Lane, *The Storm is Just Beginning When the Hurricane Finally Ends: Applicability of Mediation to Settlement of Insurance Claims in Mass Disasters*, AMERICAN JOURNAL OF MEDIATION, available at <http://www.americanjournalofmediation.com/docs/The%20Storm%20is%20Just%20Beginning%20When%20The%20Hurricane%20Finally%20Ends.pdf>.

Katrina's programs were administered by the American Arbitration Association (AAA). The AAA is a large California based independent provider of ADR services. The programs were mandatory for insurance companies and optional for policyholders. It was an innovative attempt to provide thousands of policyholders with timely resolution to disputed claims. However, the efficacy of the programs was not universal.

The programs helped thousands of policyholders quickly reach settlements at a time when they desperately needed money to put their lives back together, prompting the state governments of Mississippi and Louisiana, their respective departments of insurance, and the insurance industry to tout the post Katrina program as a success. The Mississippi and Louisiana Department of Insurance reported that 11,000 claims had been mediated by August of 2006. The AAA reported that the settlement rate of the program, as of the same date, to be about 80%.⁸

But closure and settlement rates alone are not an accurate measure of whether a mediation program is producing fair settlements through a fair process overseen by competent, experienced and neutral mediators or whether vulnerable policyholders are being pressured or intimidated into under-settling. Anecdotal accounts by mediation participants relate stories of lowball offers, inadequate resources to prepare for and assist in the mediation proceeding, and failure by insurers to participate in good faith.⁹ Policyholders routinely report that insurance representatives show up for mediations lacking adequate dollar authority to settle the claim,¹⁰ that they received lowball settlement offers, that mediators were not knowledgeable in insurance law and/or discouraged them from pressing forward such that they felt the mediation was either a "waste of time" or another source of frustration.¹¹ Many policyholders who tried to mediate disputed claims after past hurricanes were being housed in FEMA trailers at the time and dealing with dislocation, tragic losses plus the stressful and unfamiliar claim process and all the related emotional challenges. Their insurance representative counter parts were not experiencing these challenges and were approaching the mediations from a far more secure position.

The imbalance in power, financial resources and technical knowledge that always exists between policyholders and insurers becomes much greater after a disaster. Despite the positive assessment by the government and the insurance industry of past mediation programs, there are failures that must be acknowledged. When considering the information pertaining to the number of disputes that were resolved via the mediation programs post-Katrina, we found no qualitative data to assess the soundness or fairness of these resolutions, beyond closure rates and subjective observations of consumer participants.

⁸ Susan Zuckerman, *Mediation Programs Helps MISS. and LA. Rebuild After Katrina and Rita*, 61 DISP. RESOL. J. 12, 16-17 (2006).

⁹ A Trip Down Memory Lane: The Town That Fought Back [hereinafter A Trip], available at <http://slabbed.wordpress.com/2008/04/06/a-trip-down-memory-lane-and-what-has-changed-since/>

¹⁰ Compiled from interview with Doug Handshoe, *Slabbed*, available at <http://slabbed.wordpress.com/>

¹¹ See A Trip, *supra* note 10.

The Organization of Issues in a Mediation Program

Past and future post-disaster mediation plans must be evaluated on the basis of three aspects: promotion of the program, program administration and safeguards for a fair outcome of the mediation proceedings. A Model Post-Disaster Mediation Program will succeed if it excels in these three areas. It must be publicized so that victims are aware of the program and able to benefit from it after disaster strikes. There must be cost-conscious criteria for eligibility and participation that will not overburden insureds or insurers. There must be trained, qualified and impartial mediators plus safeguards to ensure that victims are not unduly discouraged or intimidated into accepting less than they are entitled to. There must be clearly structured guidelines for conducting the mediation so that claims disputes can be resolved effectively, efficiently, and fairly.

Model Program Section 1.0 – Infrastructure and Promotion of the Program

1.1 Permanent Program - The Model Program must be put in place permanently, rather than created or implemented in response to one specific disaster.

In order to optimize the efficiency and effectiveness of a Post-Disaster Mediation Program, the program infrastructure must be put in place in advance and permanently, rather than created or implemented in response to one specific disaster. Post crisis is not the time to expend resources designing and constructing a new program. An established infrastructure maximizes the good that a mediation program can do for an affected community.¹² Planning, organizing, and implementing a fair and effective mediation program is time-consuming. A program created after a disaster occurs must use time and resources on planning and implementation. Consequently, a program with permanent infrastructure could put its time and resources to better use.

The program's first objective is to quickly resolve disputed claims. Hurricane Katrina displaced approximately 155,000 residents in Louisiana and Mississippi. Even when comparatively smaller disasters displace thousands of people, litigation of disputed claims, which can take years to resolve, might not be a viable option for policyholders. Victims of Katrina dealt with disputed insurance claims while living, if they were lucky, with friends, relatives, or in temporary FEMA trailers. They needed timely resolution to their claims. ADR attempted to provide that, but planning for the program did not begin until after Katrina struck.

Of the some 700,000 insurance claims filed in the aftermath of Katrina, the AAA settled roughly 80% of 17,000 mediated claims in Louisiana and Mississippi by 2007. This success rate indicates that policyholders were aware of the existence of the Katrina mediation program. However, the number of claims mediated and settlement rate do not paint a complete picture of how successful the program was or how much delay was caused because more data is

¹²Alan E. Gross, *Symposium – ADR in the Aftermath Post-Disaster Strategy: Conflict Resolution in the Aftermath of the World Trade Center Attacks: A Family Mediation Program*, 9 CARDOZO J. CONFLICT RESOL. 381, 391 (2008).

necessary for a meaningful analysis. To the contrary, the months of delays resulting in emergency rulings suggest that a pre-established or permanent plan could have helped to avoid the need to rush a plan into action. As well, a permanent structure would allow for the accumulation of valuable practical and institutional knowledge.

The Model Program must be put in place permanently, rather than created in response to one specific disaster.

1.2 Well-Advertised - The Model Program must be passively advertised prior to its implementation and actively advertised upon its implementation to maximize policyholders' awareness of the program.

The existence of a Post-Disaster Mediation Program should be well advertised. This will maximize awareness of the program. Advertisement of a mediation program is important to maximize the number of potential beneficiaries that will utilize the Model Program when the time comes.

State advertisement of past programs varied from good to terrible. North Carolina's Department of Insurance website provides a good model for advertising. The site has clear links to information about the program and mediation in general.¹³ Similarly, California's department of insurance successfully advertises California's mediation program and contains information regarding mediation generally, eligibility guidelines, what participants needed, and miscellaneous related areas.¹⁴ Other programs have not been well advertised. For example, useful information about a particular state's program is very difficult to find and is not particularly clear, even to people who know of the program's existence and are specifically intent on finding information about it.

Optimally, the Model Program will be advertised prior to the actual occurrence of a disaster, which triggers the programs implementation. This eliminates the need to squeeze program advertisement into a short and tumultuous time frame when communication is difficult and those affected by the disaster have other issues to contend with. Rutgers School of Law ADR Professor Viniar, however, points out that advertising efforts for ADR programs are often unsuccessful, regardless of how expensive or prominent they are, because average consumers will not find the advertisement relevant. Accordingly, he suggests that advertising may also be directed toward the mediators or local mediation agencies that will ultimately carry out the program. In this way, these specialists can spread the word in their own way and will be prepared to raise awareness when program implementation becomes necessary. Furthermore, costs can be reduced by avoiding expensive and ineffective mass advertising campaigns.

¹³See *Consumer Disaster Mediation*, available at http://www.ncdoi.com/Consumer/Consumer_Disaster_Mediation.aspx

¹⁴California Department of Insurance, *Consumers: Residential Property and Earthquake Claims Mediation Program*, available at <http://www.insurance.ca.gov/0100-consumers/0060-information-guides/0040-residential/earthquake-claims-mediation.cfm>.

Advertisement of the program is a separate element from notification by insurers. The program should be independently advertised by the state departments of insurance. Advertisement should be passive and active. Passive advertising should consist of department of insurance websites containing clear and easily accessible information regarding the program at all times. Other forms of advertisement can include brochures that are available at insurance offices, sent to new policyholders, or when requested by policyholders. Upon the implementation of the program departments should actively advertise and send this information directly to policyholders.

The Model Program will allow for clear advertisement of the program’s existence and availability – passively at most times and actively when the program implementation requirements are triggered.

1.3 Accessible Guidelines and Regulations – The Model Program’s guidelines must be readily available to policyholders.

Guidelines and regulations administering the program must be accessible in a number of locations, including online, through brochures, and by telephone. Multiple mediums through which the program is advertised will promote accessibility before, during, and after a disaster.

In past programs, legislation and regulations pertinent to the programs have not been generally available to the public. Because the Katrina program was not created until after the hurricane, policyholders were not able to learn about the program when avenues of communication became unreliable or inoperative.

California’s mediation program set a good example of how to create accessible guidelines. The program’s website sets forth a clear seven-step process leading up to and including mediation: 1) notification, 2) agreement to mediate, 3) selection of the mediator, 4) pre-mediation telephone conference, 5) preparing for the conference, 6) the mediation conference, and 7) the settlement. The program’s website further clarifies what would be done or expected at each step, and provides definitions for a lay user.¹⁵

Making information available to the consumer is the first step to improving the efficiency of the Model Program. In conjunction with active advertising to consumers about the program’s existence, the constant availability of program guidelines would increase the number of policyholders that know what to expect from the program and how to best take advantage of the program.

The Model Program provides clear and accessible guidelines for how the mediation process works, allowing policyholders to know what to expect from the program.

¹⁵See California Department of Insurance, *supra* n.14.

1.4 Notice – Insurers must notify policyholders about the availability of mediation through the Model Program when policies are purchased, when the program is implemented, and when a claim is disputed.

Insured must receive clear notice about the availability of the Post-Disaster Mediation Program following an event that satisfies the triggering requirements of the plan. Notice of the right to mediate is essential if policyholders are to utilize the program.

In the aftermath of Hurricane Katrina, insurers were required to notify each claimant of their right to mediate the claim. The Louisiana and Mississippi programs required insurers to notify policyholders who had filed a claim of their right to mediate. In Mississippi, the requirement mandated that the notice be sent within 10-days of the availability of mediation, although most states require a five-day period.¹⁶ Furthermore, notice had to be in writing, legible, conspicuous, and in at least 12-point type. Additionally notice was required to contain detailed instructions on how the insured was to request mediation and the insurer's address and phone number.¹⁷

Even critics of Katrina's mediation program generally feel it adequately notified policyholders of their right to mediate disputed claims. A permanent program is situated to be even more successful. The model program should both require insurance companies to advertise to policyholders the existence of the mediation program and its functioning when they first purchase the claim, including guidelines for what may trigger the program's implementation. Furthermore, insurers should provide notice when a disaster occurs and causes the program minimum damage requirements to be met. Lastly insurers should again give update notices to policyholders when the company is contacted about a claim, when a claim is filed, and when a claim is disputed. The notifications should follow all of the clarity, legibility, and informational guidelines the Katrina program used.

The Model Program should inform policyholders of the program's triggering requirements ahead of time, and keep policyholders informed on the program rules.

Model Program Section 2.0 - Eligibility and Participation

2.1 Good Faith Requirement – Insurance representatives must have knowledge of the claim and authority to settle for the full amount in controversy.

Parties are required to participate in mediation in good faith. The Florida program included in this requirement that insurance representative have knowledge of the claim and authority to settle for the full amount in controversy.¹⁸ This good faith requirement is

¹⁶See Lane, *supra* note 7.

¹⁷32 LA. REG. 60 (Jan. 20, 2006) (Emergency Rule 22).

¹⁸Alternative Procedure for Resolution of Disputed Prop. Ins. Claims, FLA. STAT. § 627.7015 (2004).

important to the mediation process and other programs included it as well. The program should provide for harsh penalties should insurers fail to comply with this requirement as less than good faith participation will undermine the integrity of the Model Program.

Understandably, the Good Faith Requirement is both an essential part of insuring the Model Program's success as well as the most difficult aspect to monitor and regulate. In general, the mediator conducting the ADR will be best suited to determine when there are good faith violations. Concrete requirements, such as a requirement to show up for mediation at scheduled times or a requirement to be prepared for settlement should be included to provide guidance where possible. However, additional monitoring will be difficult and may violate confidentiality of the parties.

The Model Program includes a Good Faith Requirement as an essential feature that includes clear guidelines and standards for how mediations are to be conducted.

2.2 Compensation Guidelines and Mediator Qualifications – Compensation for mediation must be fair to the mediator and commensurate with the complexity of the claims dispute. Mediators must have prior experience and training related to property insurance claims and litigation and be neutral vis a vis insurer versus insured.

The Model Program's costs will include payment to mediators and/or the costs of using neutral mediation facilities. The best practice for mediator compensation should be based on either an hourly or a daily rate. Rutgers School of Law ADR Professor Viniar notes that an hourly system of compensation will allow the parties involved, in conjunction with the professional mediator, to determine the importance of a specific claims dispute. Mediation involving a minor claim will not create as great an expense for those bearing the costs of mediation; similarly, when a large dispute is involved, the greater cost of paying a mediator for more hours will be offset by the greater benefit to be derived.

The downside to an hourly rate is that there is a direct incentive to the mediator to drag out proceedings, and an indirect one on the insured to penalize the insurer who would most likely be bearing the cost of the mediation. Though unlikely to be a substantial issue in a statewide large mediation program, this issue should not be completely ignored. When the issues being disputed are small – and likely to be quickly resolved – an hourly rate is probably desirable. When matters are more complicated, a daily rate may be appropriate.

Specific hourly or daily wages cannot be specified within the Model Program, because of the differences in compensation by region and which mediators are used. Guidelines for compensation, however, should be included on a state-by-state basis, with a minimum and fair compensation level that will reflect the decreased cost of mediation as compared to litigation.¹⁹

¹⁹ ADR Professor Viniar suggests that mediators should be compensated equivalently to equally qualified lawyers. Costs will be reduced, because a single mediator will still be less expensive for the cost bearer than a team of attorneys preparing for and arguing a claims dispute in court.

Furthermore, determinations of compensation will naturally be linked to which mediation agencies are retained to carry out the Model Program, discussed in Section 3.2 below. The choice of which mediation organization to use, whether it is the AAA or a court's list of approved mediators, will also vary on a state-by-state basis.

The Model Program will provide guidelines for fair mediator compensation based on an hourly wage scale associated with a pre-determined mediation organization or registry.

It is imperative that consumers complete a standardized mediator evaluation after participating in a state-run disaster insurance claim mediation. The evaluation forms should be used to determine whether the mediator was effective, adequately trained, neutral and worthy of being re-hired in the future. Appendix 1 is a template evaluation form.

2.3 Funding – Insurers must bear the general costs of mediation.

Insurers should bear most of the cost of mediation itself, because the insurance agencies stand to benefit financially from avoiding costly litigation and are best suited to pay the costs of mediation up front. ADR is not a realistic alternative to litigation if policyholders are responsible for all or part of the costs. Utilization of the program would suffer and the program would be less cost-effective. Additionally, many policyholders may be unable to pay for the cost of mediation in the aftermath of a disaster.

At the same time, policyholders should be incentivized to not overburden the process. Policyholders involved in disputes where the stakes of the mediation are high should be allowed to elect to continued mediation, as long as the policyholder is willing to assume some of the costs of continued mediation. A fair suggestion would provide that the insurers bear hourly mediation costs up to some percentage of the amount in dispute value. Subsequent costs could be split between the two parties.

At all times, the mediator will be in the best position to determine if continued Alternative Dispute Resolution is likely to result in a positive outcome or if it is a wasteful endeavor. If the benefit of continued mediation does not carry a significant probability of outweighing the costs, then the parties or the mediator can decline to continue negotiation, provided that all good faith obligations to negotiate are met.

Insurers will bear the majority of the costs of the program, though policyholders may be given an option for contributing to costs of continuing/finalizing a mediation.

2.4 Triggering Event – There should be clear criteria for the events that will trigger full implementation of the Model Program.

An established standard for a triggering event will allow the mediation program to take effect only when regular claim processes are inundated in the event of a disaster. Since previous mediation programs have been created in response to specific disasters, there are no helpful examples of what an appropriate triggering event would be.

In the past, Louisiana and Florida's mediation programs were specific to the disasters they were created in response to. California's program was prompted by an earthquake for which the governor declared a state of emergency.²⁰ State governments and the administrators of the Model Program should establish specific guidelines for events sufficient to trigger the program's implementation, based on each state's ability to cope with claim disputes through regular channels. Suggested quantifiers can be defined by amounts of property damage or number of claims received following a specific event or chain of events.

There should be a pre-established number of claims and/or types/size of events that will trigger full implementation of the program.

2.5 Participation of Insurance Providers – Participation in the Model Program must be mandatory for insurers.

Participation in the Model Program must be mandatory for insurers. In the Post-Katrina programs, participation was mandatory for insurers and optional for insureds. By contrast the post-Ike mediations were not mandatory for insurers, and only three insurance companies participated in Texas's program: AAA Texas, Allstate, and Farmers.²¹ This lack of participation in Texas's program was a critical flaw.

Mandatory participation for insurance companies who represent a sizeable portion of a particular state's policyholders will allow the Model Program to benefit the maximum number of disaster victims. The triggering amount should be determined on a state-by-state basis and should be linked to how many different insurance companies are active in providing property insurance in the state. Alternatively, the requirement can be stated in the negative, in that insurers, who provide property insurance coverage for less than a nominal amount (1-5%) of the state's policyholders or less than a nominal amount of the state's property value, may be exempt from participating.

Insurers must participate in the program and bear set-up and administration costs in proportion to their market share in the state.

²⁰See California Department of Insurance, *supra* n.14.

²¹Texas Department of Insurance, *2009 Hurricane Ike Mediation Pilot Program*, available at <http://www.trucemedia.com/assets/pdfs/MediationFlier-10-09.pdf>.

2.6 Eligibility for Mediation – State governments and program administrators should determine requirements to maximize the Model Program’s efficiency.

A minimum amount in controversy and amount disputed will be established to ensure that claims are only eligible for mediation when the potential benefits of a successful mediation outcome outweigh the costs of mediation. Most past programs have specified a minimum amount that must be in dispute, ranging from \$500 in programs in most states, including Texas,²² up to \$2000 in California.²³ State governments and the administrators of the program are best situated to determine what eligibility requirements will maximize the program’s efficiency.

The Model Program will clearly establish the minimum claim amounts in dispute that will qualify for mediation.

Model Program Section 3.0 – Conduct of the Mediation

3.1 Obligations for the Parties Prior to Mediation – The Model Program must require parties to be educated and prepared and assist policyholders in fulfilling these duties.

A Model Program must balance the objective of resolving a large number of claims quickly against the goal of adequately and fairly compensating disaster victims through a process that recognizes the inherent power gap that exists between insurers and policyholders.

At the same time, the importance of quick resolution to disputes may mean that, even with the risk of abuse, mediation is still a preferable option to litigation. High settlement rates of previous programs do indicate that mediation has been an efficient means of ensuring that participants receive some payment on their policies. Requiring ADR participants to be well prepared for mediation will further promote fair settlements, while possibly even increasing efficiency.

Understandably, fulfilling many obligations is not always possible in a post-disaster scenario. Insureds struggled in the aftermath of Katrina to produce relevant documents and claim information.²⁴ In Louisiana, some homeowners complained that they were not provided with sufficient instructions regarding what to bring to mediation. Furthermore, homeowners complained that claims adjusters failed to attend mediation with sufficient knowledge regarding the claims history or adjustments on the property. Similarly, some insurers

²²See Lane, *supra* note 7.

²³*Id.*

²⁴See Gross, *supra* n.12, at 363.

complained that homeowners attending mediation failed to bring any documentation, receipts, or photographs to substantiate claims.²⁵

Similarly, requirements upon policyholders prior to mediation may seem to unfairly burden them in an already trying time. However, this will help ensure that policyholders are educated and prepared for mediation. Specifically policyholders should be required to inventory the damage and possessions which comprise their claim. Policyholders should also be required to educate themselves on the mediation process itself as well as other remedies available to them, including other forms of ADR such as binding arbitration, appraisal, and traditional litigation.

Therefore, to promote fairness to the insurer and improve the efficiency of mediation under the Model Program, insureds should fulfill several obligations prior to mediation, including securing documentation and/or proof of claims necessary for mediation, preparing for the mediation process through reading/ viewing educational materials, and meeting with counselors or advisors in the pre-mediation process where necessary. Requiring both policyholders and insurers to prepare for claims is a proactive way to ensure that the mediation process is conducted as smoothly as possible. Furthermore, the program can facilitate the fulfillment of policyholder's duties, by active and passive advertisement of the program, notice from insurers, and the availability of advisors discussed in section 3.3. Advance guidelines will put policyholders on notice as to the need for preserving information, and can provide policyholders the opportunity to secure vital information or documentation in protected places, like on the internet.

The Model Program sets forth clear obligations of parties to prepare for mediation.

3.2 Administration – The Model Program should ideally be administered by an independent ADR provider with experience in post-disaster scenarios.

A successful mediation program should be managed by an organization experienced with ADR that possesses the resources to handle the difficult nature and high volume of claims arising in the aftermath of disaster scenarios. Selecting the specific organization will largely be a decision that must be reached between the states and the insurers implementing these programs. Delineating a specific organization, capable of handling a large volume of claims disputes, will improve how efficiently and effectively mediation is conducted.

Organizations experienced in ADR have successfully administered past programs. The Collins Center for Public Policy operated Florida's program.²⁶ The American Arbitration Association (AAA), the world's largest not-for profit alternative dispute resolution organization,

²⁵See Patterson, supra n.5.

²⁶<http://www.collinscenter.org/>.

operated the Louisiana and Mississippi post-Katrina programs and North Carolina's program.²⁷ The AAA successfully dealt with finding staff and facilities to use for mediation amidst the devastation Hurricane Katrina. The AAA operated Florida's 1992 program in response to Hurricane Andrew and later worked on similar programs in Hawaii responding to Hurricane Iniki; in California responding to the 1994 Northridge Earthquake; and in North Dakota responding to the 1998 Grand Forks flood.²⁸

In Louisiana, based on a sample of 2,654 forms reviewing mediators who received more than five evaluations, 62% received an excellent rating and 2% received a poor rating (27% were very good, 7% were good, and 2% were fair). Mediators were complimented on their ability to explain the process, motivate the parties and to communicate, and provide homeowners with a sense of security. Complaints regarded various topics, including the lack of separate rooms for caucus purposes.²⁹ AAA mediators were generally reported as competent and helpful in facilitating the program's goals.

Notably, many states already keep a list of registered and court-approved mediators that work in many situations. These lists may currently be smaller than what would be required in a post-disaster scenario. However, the creation of a permanent program will allow an advance list to be generated and can include reorganization of current mediator registries to include an expanded list for post-disaster scenarios.

The choice of which mediation organization to use will ultimately vary on a state-by-state basis. Although organizations like the AAA have been used successfully in the past, a state or court created registrar of approved mediators can be equally prepared to deal with the burdens of a post-disaster scenario. Furthermore, many states have an acceptable list of court-approved mediators in place.

The Model Program will clearly establish criteria for the agencies and/or organizations that will supply mediators to carry out the program.

3.3 Availability of Advisors – The Model Program must provide advocates and experts to policyholders in preparation for, as well as during, mediation.

It is essential that policyholders get adequate support and information on their insurance legal rights, their specific policy language, the issues in dispute and the mediation process. Experts and advisors should also be available to policyholders through the program. United Policyholders' Guide to Mediating Insurance Disputes, (Appendices 2 and 3) or a similar publication should be provided to every registrant at the outset of the process.

²⁷American Arbitration Association, *AAA Disaster Recovery and State Insurance Programs Experience*, available at <http://www.adr.org/si.asp?id=4919>; North Carolina Department of Insurance, *Disaster and Recovery: Disaster Mediation Program*, http://www.ncdoi.com/Consumer/Consumer_Disaster_Mediation.aspx.

²⁸Elizabeth Baker Murrill, *Mass Disaster Mediation: Innovative ADR, or a Lion's Den?*, 7 PEPP. DISP. RESOL. L.J. 401, 405-407 (2007).

²⁹See Patterson, *supra* note 5.

Past programs, such as Florida's program, sought to accomplish this by providing for a representative from the department of financial services to be available during mediation at the request of one of the parties. Louisiana's program similarly provided for an attorney or a representative from the Department of Insurance to be available during mediation at the request of one of the parties. Ideally, assistance should be available in preparation for, as well as during, mediation.

Importantly, this will add to the costs of the program. Nonetheless, giving policyholders access, even limited access, to the experts and resources used by insurers would go a long way to bridging the power gap. A means of efficiently providing assistance can be through telephone conferences with available experts, such as mediators carrying out the program or Department of Taxation representatives. Law schools could also provide a fiscally feasible solution. Law students could assist policyholders to prepare for mediation and as advocates before and during mediation without overburdening the program financially. Law schools could also provide neutral territory for mediation itself. This would mean that policyholders would be able to familiarize themselves with the mediation site beforehand and have access to face-to-face assistance in preparation for mediation.

At the same time, making an attorney available may not be a fair cost to impose upon the program's cost bearers. Individual policyholders will be allowed to secure counsel at their own expense, but having an attorney available at all times may be a redundant safeguard when in addition to a properly trained mediator.

The Model Program must include a process for providing information, guidance and support to policyholders in preparing for and participating in the mediation.

3.4 Structure of Mediation – The Model Program's structure should be established prior to implementation, and also allow for modification based on the triggering event, to meet the individual needs of different communities.

The program will have an established and clear structure to the mediation sessions to allow participants to understand what is expected of them, what will occur, and to ensure fairness to both parties. Proper and clearly established mediation structure will allow insurers to efficiently address a maximum number of complaints quickly, without wasting time and resources.

The Post-Katrina mediation program scheduled about 200 conferences a week, which took place in four two-hour, blocks a day. Cases with common parties were grouped together to maximize efficiency. AAA selected mediators for the program on a first come first serve basis.

California's program, as mentioned already (see section 1.3), has a clear structure. The program's website further clarified what would be done or expected at each step. Similarly, an optimal program requires that a specific structure be established by state governments and/or

administrators of the program prior to the program's implementation. The structure may of course need to be modified upon implementation based on the nature of the triggering event. This should allow flexibility to address the particular needs of affected communities. Nonetheless, integral features must include 1) an application process, 2) an informal method of educating policyholders about the process, 3) a formal agreement to mediate by both parties, including an mutually agreeable time and place for mediation, 4) a pre-mediation process that includes review and approval of materials that form the foundation for the mediation, 5) a clearly defined mediation process, and 6) a settlement or agreement to discontinue mediation.

The Model Program should include a flexible structure for mediation that can account for the variety of claims disputes, but must include 1) an application process, 2) an informal method of educating policyholders about the process, 3) a formal agreement to mediate by both parties, including an mutually agreeable time and place for mediation, 4) a pre-mediation process that includes review and approval of materials that form the foundation for the mediation, 5) a clearly defined mediation process, and 6) a settlement or agreement to discontinue mediation.

3.5 Rescission Period – The Model Program must have a cooling off period during which policyholders can back out of settlements reached through mediation.

Policyholders should have a cooling off period during which they can back out of binding settlements reached through mediation. During this period policyholders can rescind binding settlements reached through mediation. Policyholders are thus given time to reflect upon any settlement reached to decide whether it is truly in their best interests. The psychological stress policyholders affected by disasters are under, and the incentive to agree to any settlement offered, make this feature vital. Accordingly, most past mediation programs have had a 3-day cooling off period.

While the 3-day period tends to be an industry standard in many mediation cases, the arbitrary 3-day period may be too small a window of time for the lay policyholder in certain cases. The rescission period should be extended to allow for sufficient reflection on the impact any settlement might have, specifically when settlements may involve large amounts or complicated analysis. Because the circumstances that cause implementation will always be different, the administrator of the program should be given the power to set an appropriate rescission period to fit each situation. The extension of an extra few days, while not a large amount of time, gives a policyholder a better opportunity to consider the effect his settlement will have, as well as seek counsel for advice on the settlement. A weeklong "cooling off" period, as opposed to the traditional 3-day period, better protects the interests of policyholders.

The Model Program will provide for a flexible rescission period of at least 3 days, but up to a fair amount of time to be determined by the overseeing mediator.

3.6 Reporting Requirements – The Model Program must report enough information to allow for a meaningful analysis of the program’s success.

A successful mediation program must strive to constantly improve. Evaluation forms must be used after every mediation, (see sample at Appendix 1) and the results must be publicly available for review. Transparency will serve the three-fold purpose of increasing policyholders trust in the mediation process, help insure that the mediation process is not abused by either party, and allow for a meaningful analysis of the program’s success.

Lack of transparency has been a consistent flaw in past disaster mediation programs. Data to analyze past program’s results in any meaningful way does not exist. Information about the success of past mediation programs has not been reliable. In Louisiana, two evaluation forms were given to both parties following each mediation conference: one evaluated the mediator and one evaluated the program.

California’s program included mandatory reporting requirements regarding the AAA records settlement rates and other information.³⁰ However, California did not differentiate between settlements reached through mediated settlements and non-mediated settlements.³¹ Information about past mediation programs was limited to number of claims processed, settlement rates, and sometimes the total and mean amount of settlements. However, these figures alone do not lend themselves to a meaningful statistical analysis or demonstrate the value of the mediation to the policyholder.

Transparency should be achieved through reporting more comprehensive information about the mediation conferences and by assessing policyholder’s satisfaction with the mediation program. A disaster mediation program should require that administrators of the program and participating insurers report meaningful information about the program’s results. Required reports should reflect both the satisfaction of the insureds and allow for a meaningful statistical analysis of the program’s success.

The Model Program must require information about claim amounts, disputed amounts in controversy, and individual settlement offers to allow for a comprehensive and meaningful statistical analysis. Important statistics should also include the length of the mediation and the satisfaction of the parties concerning both the process and the results. Although some opponents of this feature will argue it undermines the confidentiality essential to success in mediation, anonymity of surveys may counteract this negative aspect. Moreover, the lack of transparency in mediation process undermines its functioning far more. Finally, any data that is collected from these surveys should be collected and reported by a fair and neutral party, such as the organization carrying out the mediation or the state’s Department of Insurance.

³⁰ C.I.C. § 10089.83(a).

³¹ California Department of Insurance, *2009 Annual Report of the Insurance Commissioner* available at <http://www.insurance.ca.gov/0400-news/0200-studies-reports/0700-commissioner-report/upload/CDIAnnualReport2009.pdf>.

The Model Program will include a process to collect data and report data after completion of the ADR process, with specific analysis pertaining to the amounts in controversy, claim amounts, disputed amounts in controversy, individual settlement offers, the length of the mediation, and the satisfaction of the parties.

Model Program Section 4.0 – Existing State Mediation Programs

Beginning with Florida, many states have already implemented similar claims mediation programs. From 2004-2005, eight major hurricanes devastated Florida. As a result, homeowners filed more than 2.5 million property insurance claims. In response, Florida's Department of Financial Services authorized the Collins Center for Public Policy, a nonpartisan Florida-based think-tank, to establish a mediation program to handle disputed hurricane-related insurance claims between insurance companies and policyholders. More than 25,000 policyholders and insurance companies utilized the program, without about 86 percent resulting in an average settlement of \$23,000 per claim.

Following the success of the program, Louisiana and Mississippi used the Florida program as a model for claims mediation efforts after Hurricane Katrina.³² The Louisiana program settled approximately 75% of its more than 12,000 mediation requests as of November 2007.³³ At least four other states – Alabama, California, North Carolina and Texas – have implemented or considered implementing similar programs.³⁴

With the help and design of the Collins Center, the Florida model implemented eight regional mediation supercenters where claimants could schedule mediations for specified time slots over the phone or online.³⁵ A policyholder (or insurer) may request mediation of a claim by contacting the DFS Division of Consumer Services. The insurance company then has 21 days to resolve the dispute. If a settlement is not reached, a contract administrator schedules mediation. The insurer pays a flat \$350 fee (\$250 to mediator; \$100 to contract administrator). Mediation is an informal process lasting about 1-2 hours where a Florida Supreme Court certified mediator helps the policyholder and insurance company focus on the issue in dispute and facilitate an amicable resolution of the dispute. The insurer representative must have full authority to settle the claim. Many of these disputed claims involved issues related to adjusting mistakes, fluctuating construction prices, confusion over policy coverage, poor documentation of loss, or communication problems between the insurance company and the policyholder.

³² The Collins Center, *Hurricane Mediation: Citizens Task Force on Claims*, available at <http://www.myfloridacfo.com/ica/tfcch/images/TAB10CollinsCenterMediation.pdf>

³³ Maria R. Volpe, Taking Stock: ADR Responses in Post-Disaster Situations, 9 CARDOZO J. CONFLICT RESOL. 381, 388 (Spring 2008).

³⁴ TEXAS DEPT. OF INS., BIENNIAL REPORT TO THE 81ST TEXAS LEGISLATURE, 35 (Dec. 2008), 35, available at <http://www.tdi.state.tx.us/reports/report10.html>; FLA. DEP'T OF FIN. SERV., ADVISORY COMM. ON STANDARD PERSONAL LINES, HURRICANE MEDIATION OVERVIEW (Oct. 4, 2005), available at <http://www.myfloridacfo.com/pressoffice/documents/retrievedocument.asp?documentid=%7B7bc0fb78-89c7-4dca-b408-7b98e1a70131%7D>; TEXAS DEPT. OF INS., HURRICANE IKE MEDIATION PROPOSAL DISCUSSION DRAFT (Jan. 12, 2009), distributed by the Department preparatory to a meeting of the Texas State Disaster Coalition on Jan. 15, 2009.

³⁵ The Florida program was initiated by DOI Emergency Rule in 1992 after Hurricane Andrew and codified in 1993 to help consumers resolve property insurance claims. See s. 627.7015, F.S.; Rule 69J-166.031, Fla. Admin. Code.

Common characteristics that define the approaches taken by the six known states to have implemented similar mediation programs include:

- In all programs, only residential claims are subject to mediation;
- Programs are optional on the part of the insured, while they are required of the insurer;
- Most programs specify minimum amounts that must be in dispute, ranging from \$500 in most programs to as much as \$2,000 in California;
- The insurer must make the insured aware of the mediation alternative very soon after it becomes aware that a dispute exists; Mississippi requires the notice to be sent within ten days, while most programs require a five-day period;
- All programs require the insurer to bear the cost of the mediation;
- Many programs discourage, but do not forbid, involvement of an attorney representing the insured;
- At least the Louisiana program provides for a minimum starting point in the negotiations – an acknowledged database of construction and remodeling costs.
- All programs provide for strict confidentiality.³⁶

Programs such as these have already proven useful to policyholders. All states should evaluate the successes and obstacles these programs have faced, and combined with the advice issued in this report, consider implementing programs suited to their unique needs.

³⁶ Melissa Blair et al., State Legislative Update, 2006 J. DISP. RESOL. 555, 567-71 (2006).

Conclusion

Large-scale disasters are an unfortunate reality of our world. Mediation can efficiently settle claim disputes and help benefits flow quickly to policyholders who need funds to rebuild and recover. However, there must be safeguards in place to protect policyholders from being pressured into accepting less than they are owed, and to ensure the quality and integrity of mediators. There must be administrative rules that allow the mediations to be conducted at the lowest possible cost without sacrificing integrity in any aspect of the process. There must be ongoing monitoring of mediator performance and procedural rules. The objectives of the program should be maximum utilization by policyholders, successful and expeditious resolution of disputed claims, and fairness to both insurers and insureds.

United Policyholders thanks and acknowledges the following people for contributing to this report:

Executive Director Amy Bach, Rutgers University School of Law Professor Jay Feinman, students Oliver Barry and Abraham Tran, Attorney/Mediator Douglas DeVries with Judicate West, Hastings College of the Law students Anne Scott and Daniel Veroff.

Appendix 1



POST-DISASTER MEDIATION EVALUATION FORM

Thank you for your recent participation in the post-disaster mediation process. Your feedback is a very important part of continuing efforts to improve this service. Information provided will be shared on a broad constructive level without claimant names referenced. Please help us, and all persons who will be utilizing the mediation process, by evaluating your experience and submitting this form. Even if some information is incomplete or unavailable, please complete the form as fully as reasonably possible and submit it at your earliest opportunity.

Mediation of: _____ [Name(s) of claimant(s), Optional]

Date(s) of mediation: _____ **Type of claim(s):** _____

Mediator's name: _____ **Claim number(s):** _____

Please rate the mediation process, the mediator and your overall experience with the process. If you would like to add further comments or additional information, or if you need additional space for your responses, please submit on a separate piece of paper together with this form.

Administration:	Please circle appropriate response		
Was the confirmation, scheduling and processing of the mediation effective?	Yes	No Opinion	No
Was the staff knowledgeable, responsive, courteous and thorough?	Yes	No Opinion	No
Were the conference facilities and amenities comfortable and convenient?	Yes	No Opinion	No
Would you recommend this mediation process to others?	Yes	No Opinion	No

In what ways, if any, do you feel the mediation process could be improved?

Mediator:	Please circle appropriate response		
Was committed to listening and getting all the information	Yes	No Opinion	No
Was prepared, knowledgeable and understood the parties' concerns	Yes	No Opinion	No
Discussed strengths and weaknesses in a neutral and effective manner	Yes	No Opinion	No
Worked at a good pace and used time effectively	Yes	No Opinion	No
Was tenacious and firm when necessary	Yes	No Opinion	No
Was insightful and/or provided creative solutions	Yes	No Opinion	No

In what ways, if any, do you feel the mediator could have been more helpful?

Overall Experience:	Please circle appropriate response		
Were you pleased with the mediator and the process?	Yes	No Opinion	No
Would you use this mediator again?	Yes	No Opinion	No
Would you recommend this mediator to others?	Yes	No Opinion	No

If your overall experience was not satisfactory to you, please explain why you feel that way.

Thank you. The time and effort you put into completing and submitting this important form is very much appreciated.

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Appendix 2



Policyholders Guide to Mediation

Mediation is an informal, voluntary, non-binding process for conducting settlement negotiations between you and your insurance company. Mediation can be a fast and cheap way to resolve insurance claim and coverage disputes. The mediator's skills and experience make a big difference.

Generally speaking, insurance company employees are trained in negotiation, mediation and litigation techniques and policyholders are not. So it is important that the mediator be fair and "level the playing field" as much as possible. You and the insurance company can use mediation as a way of "checking out" the strength of each other's arguments, evidence and credibility. Mediation can be a preview to a lawsuit. A mediation can take anywhere from an hour to a day or series of days.

It is important to remember that mediation is non-binding. If you think the insurance company is not offering enough during mediation, you are not obligated to accept the offer. The better you prepare for mediation, the better your chances are of settling. Be prepared to walk away. Many cases settle days or weeks after a mediation. Mediators use a variety of techniques to bring parties together on a settlement amount. A common technique is for the mediator to start by having everyone in the same room, then isolate each side in a different room and go back and forth to minimize confrontations and maximize constructive dialogue.

Here are your mediation options:

1. Private, professional mediator
2. Court-appointed mediator
3. Mediation program sponsored by your state insurance regulator's office.

Who pays the mediator's fee?

1. Fee can be split equally between you and the insurer.
2. Insurer pays the fee.
3. Insurer advances the fee; you agree to reimburse them for your half out of a settlement. Try and get them to agree to absorb the fee if you don't settle.
4. Look at your policy. There may be a payment provision covering claim adjustment expenses that you can use to get your insurer to pay for mediation fees.

Pre-Mediation "TO DO" list:

1. Find a mediator with experience in litigating or resolving insurance coverage and bad faith cases.

2. Only agree to a mediator that has no financial stake in the outcome.
3. Insist that the insurance company representative who attends must have sufficient dollar authority to pay what you are owed.
4. Make sure to exercise your right to get copies of “all claim related documents” in your insurer’s files prior to the mediation. (CA. Ins. Code sec. 2071)
5. Consult with or bring an attorney, especially if the insurance company is bringing one.
6. Keep your expectations low and be ready to walk away without settling. Many disputes settle after the initial mediation, so you may only be laying the groundwork for a future settlement.
7. Prepare, Prepare, Prepare.
8. Giving the mediator a written summary of your position in advance of the mediation is essential. It is advisable to seek an attorney’s help with this task.
9. Don’t be intimidated. You paid good money for your insurance protection and you are entitled the full benefits your policy and the law provide.

Mediation Downsides:

- Insurance company may not be seriously interested in settling but wants to use the proceeding to gather evidence and test the strength of your legal case.
- Insurance company may send a representative with low dollar authority.
- Mediator may inappropriately discourage/scare the policyholder to force a settlement.
- Mediator may tell insurance company things you ask them to keep secret.
- Mediator may have a financial stake in keeping the insurance company happy. Check references and past experience mediating for your insurance company.
- Insurance rep may take advantage of your inexperience with the mediation process and legal concepts.
- You may leave the mediation feeling it was a waste of time and money

Mediation Positives:

- Inexpensive, informal, non-binding. If you don’t like the result, you can walk away
- A very efficient way to put disputes behind you and move forward
- Educates both sides about the strengths and weaknesses of their positions and helps people and/or insurance company be more realistic.
- Prompt payment of agreed-upon amounts.
- Can be done without hiring a lawyer.

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Appendix 3



[Guía a la mediación para asegurados](#)

La mediación es una metodología extrajudicial voluntaria y no vinculante que permite al asegurado negociar una solución a sus disputas con la empresa aseguradora. La mediación puede ser más barata y eficaz a la hora de resolver disputas sobre diferencias de criterio relativas a la cobertura pactada entre ambas partes. Asimismo, la experiencia y habilidades del mediador son cruciales a la hora de conseguir un entendimiento y posterior acuerdo entre las partes.

En términos generales, los representantes de una empresa aseguradora están entrenados en técnicas de negociación, mediación y litigación mientras que los asegurados no. Por lo tanto, es importante que el mediador sea justo e intente equilibrar la balanza de poderes entre las partes en la medida de lo posible. Tanto el asegurado como la empresa aseguradora pueden emplear la mediación para determinar la validez y credibilidad de argumentos y pruebas. La mediación puede ofrecer una idea aproximada de lo que quizás pueda terminar sucediendo en juicio ordinario. La duración de una mediación puede variar desde una hora hasta extenderse a uno o varios días.

Es importante recordar que la mediación no es un método extrajudicial vinculante. Si usted creyese que la empresa aseguradora no le ofrece lo suficiente durante el transcurso de la mediación, usted no viene obligado a aceptar sus propuestas. Cuanto mejor y más se prepare para la mediación, mayores serán las posibilidades de alcanzar un acuerdo. Prepárese para marchar; muchos asuntos se resuelven a los varios días o semanas tras la mediación. Los mediadores emplean una variedad de técnicas para llevar a las partes hacia una solución mutuamente aceptable. Es una técnica común de los mediadores comenzar el proceso en reunión conjunta con las partes implicadas, para luego dar paso a reuniones por separado con cada una de las partes que el mediador utiliza para minimizar la confrontación y maximizar el diálogo constructivo con las partes y entre ellas.

Estas son sus opciones en mediación:

1. Mediador profesional privado
2. Mediador nombrado a instancia del Tribunal
3. Programa de mediación propuesto por la agencia reguladora de productos de seguros de su estado

¿Quién paga los honorarios del mediador?

1. Los honorarios se pueden pagar a partes iguales entre las partes.
2. La empresa aseguradora paga los honorarios del mediador.
3. La empresa adelanta los honorarios del mediador, pero el asegurado acuerda devolver la mitad de los honorarios previamente adelantados. Intente negociar que sea la empresa aseguradora quien pague la totalidad de los honorarios del mediador si no hay acuerdo entre usted y la empresa aseguradora.
4. Lea el contrato, la póliza. Cabe que exista alguna provisión en su póliza que contemple cubrir los gastos derivados de atender su reclamación como tomador de la póliza y que cubra el gasto de compensar los honorarios del mediador.

La Pre-Mediación y lo que hay que hacer:

1. Busque a un mediador con experiencia en litigación, o en la resolución de asuntos relacionados con la cobertura de pólizas de seguros en los que concurra la mala fe.
2. Solo acuerde mediar ante quien no tenga ningún interés en el resultado final de la mediación.
3. Insista en que el representante de la empresa aseguradora tenga poder de firma para resolver la disputa sea cual sea la cantidad disputada.
4. Asegúrese de ejercitar su derecho a obtener copias de todos los documentos que tenga su empresa aseguradora relativos a su reclamación **antes de que comience la mediación** (CA. Ins. Code sec. 2071).
5. Consulte o acuda a la mediación representado por abogado, máxime si la empresa aseguradora acude a la mediación con abogado.
6. No ponga grandes esperanzas en la mediación y esté preparado para abandonar la mediación si no hay acuerdo. Muchas disputas se resuelven tras la mediación, lo que significa que en ocasiones la mediación constituye el primer paso para lograr un acuerdo en el futuro.
7. Prepárese, prepárese, prepárese.
8. Es esencial ofrecer un sumario al mediador sobre su reclamación antes de que comience la mediación. Es aconsejable que consulte con su abogado para que le ayude a preparar su sumario.
9. No se sienta intimidado. Usted ha pagado para disfrutar de una cobertura y tiene derecho en virtud a su póliza y la ley a disfrutar plenamente de dicha cobertura.

Desventajas de la mediación:

- La empresa aseguradora puede no estar interesada en alcanzar un acuerdo con el asegurado, sino interesada en usar la mediación para acumular pruebas y comprobar la validez jurídica de su reclamación.
- La empresa aseguradora puede enviar a la mediación a un representante sin autoridad suficiente para alcanzar un acuerdo con el asegurado.
- El mediador puede influenciar indebidamente sobre el asegurado para forzar un acuerdo.
- El mediador puede revelar a la empresa aseguradora asuntos que el asegurado pidió que se mantuviesen confidenciales.
- El mediador puede tener un interés económico que le lleve a tener contenta a la empresa aseguradora. Realice las comprobaciones oportunas comprobando referencias y experiencias en mediación de su empresa aseguradora.
- El representante de la empresa aseguradora puede aprovecharse de la inexperiencia del asegurado sobre el proceso de mediación y conceptos jurídicos.
- Cabe que el asegurado termine abandonando la mediación sintiendo que fue una pérdida de tiempo y de dinero.

Ventajas de la mediación:

- La mediación es un proceso que no es caro, es informal y no es vinculante. Si no le gusta el resultado, no tiene que aceptarlo.
- La mediación es un procedimiento eficaz para resolver disputas que le permite seguir adelante con su vida.
- La mediación es un proceso que sirve para que ambas partes adquieran conciencia sobre la debilidad o fortaleza de sus respectivas posturas ayudando, por lo tanto, a asegurados y empresas aseguradoras a ser más realistas.
- Pago rápido del dinero acordado.
- La mediación es un proceso que se puede llevar a cabo sin contratar a un abogado.

We thank and acknowledge José Antonio García Álvaro with ADR Resources (ARyME) <http://adrresources.com> (w/o “www”) for translating United Policyholders original Policyholders Guide to Mediation into Spanish. Established in 1996, ADR Resources (ARyME) is a private institution dedicated solely to providing specialized information on international ADR, and to promoting a better understanding and use of alternative dispute resolution mechanisms to resolve civil and business disputes.”

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