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From Conflict to Conflict Resolution: Establishing ALJ Driven Mediation Programs in Workers' Compensation Cases

By The Hon. Howard W. Cummins, Ph.D.*

I. ALTERNATIVE DISPUTE RESOLUTION AND MEDIATION

Mr. President, the awful beast is back. The Tennessee snail darter, the bane of my existence, the nemesis of my golden years, the bold perverter of the Endangered Species Act is back. In the midst of a national energy crisis, the snail darter demands that we scuttle a project that would produce 200 million kilowatt hours of hydroelectric power and save an estimated 15 million gallons of oil. Let me stress again, Mr. President . . . I have nothing personal against the snail darter. (Senator Howard Baker of Tennessee on the Senate floor, September 10, 1979)¹

* This paper is based on Dr. Cummins's research of revitalized workers' compensation programs in New York, Pennsylvania, North Carolina, Oregon, Maryland, and Virginia. At the time, he was an ALJ in the District of Columbia Department of Employment Services' (DOES) Administrative Hearings Division (AHD). It is appropriate to offer thanks to the Hon. E. Cooper Brown, currently Vice Chairman and Deputy Chief Judge of the Administrative Review Board, U.S. Department of Labor and Administrative Law as well as the Hon. Melissa M. Klemens, Administrative Appeals Judge (AAJ) DOES for their help and encouragement in the early stages of the drafting of this paper. Thanks are also due to the Hon. Larry Tarr, AAJ, DOES; Rachel Wohl, Esq., Executive Director, Maryland Mediation and Conflict Resolution Office; and the Hon. Holly Summers, Presiding Administrative Law Judge, Oregon Workers' Compensation Board.

¹ Congressional Record remarks re Senate S12274, September 10, 1979.

Every day administrative law judges (ALJs) mediate conflicts between tenants and landlords; homeowners and neighbors; health departments and citizens; environmentalists and energy producers; and, yes, snail darters and dam builders. The public is unaware of the extent to which these decisions affect their daily living. The public may be even less aware of the critical role ALJs play in striving for a rational and balanced use of community resources by the persons who provide them, e.g., bus drivers, electricians, doctors, lawyers, social workers, teachers, judges.

To understand the role of mediation in workers' compensation systems, the "how" of mediation, and the components necessary for a mediation program to be effective, this paper will look to three of the most recently revitalized and effective systems in the country: Oregon, Maryland, and Virginia. It will provide a general overview of these systems and discuss specific aspects of how the systems work and the advantages they offer. To add a practical aspect to the discussion, and to aid those who might be considering establishing a mediation system, the last section of this paper will provide a template for adding a mediation component to the system best known to the author: the Administrative Hearings Division (AHD) of the District of Columbia's Department of Employment Services (DOES).

In fulfilling their societal role, ALJs across the nation are finding alternative dispute resolution (ADR) is a cost-effective tool for resolving conflicts. The *Maryland Rules of Procedure* define ADR as "the process of resolving matters in pending litigation through a settlement conference, neutral case evaluation, neutral fact-finding, arbitration, mediation, other non-judicial dispute resolution process, or combination of those processes."² One of the most versatile tools in the ADR toolbox is mediation.

Turning to mediation and its benefits, one needs to have an understanding of the basics of the process. Oregon's Administrative Rules for the Workers' Compensation Board offers them:

² See *Maryland Rules of Procedure*, Title 17, Alternative Dispute Resolution, and Chapter 100 – Proceedings in Circuit Court.

Special Definitions:

(1) Mediation. Mediation is a voluntary process for resolving disputes by which an independent neutral third person, in the role of mediator, assists two or more parties to a controversy in reaching a mutually acceptable resolution . . .

(2) Mediator. A mediator is an independent neutral third person whose role is to assist the parties in resolving their dispute by mutual agreement. The mediator has no authority to decide the outcome of the controversy or to force settlement upon the parties. The mediator, for purposes of these rules, is an employee of the Workers' Compensation Board, with the authority of an Administrative Law Judge, who satisfies the qualifications prescribed in OAR 438-019-0010(1) and (2).

(3) Party. For purposes of OAR 438 division 019, party means any person identified in OAR 438-005-0040(11) and any other person identified by the mediator as necessary to the mediation.

Standards of Mediator Conduct:

(1) Mediators have duties to the parties, to their profession, and to themselves. They should be honest and unbiased, act in good faith, be diligent, and never seek to advance their own interests at the expense of the parties.

(2) The mediator must maintain impartiality toward all parties. Impartiality means a commitment to serve all mediation parties as opposed to a single party. The mediator should disclose to the parties any affiliations which the mediator may have with any participant and obtain all parties' consent to proceed as mediator.

(3) The mediator has an obligation to assure that all parties understand the nature of the mediation process, the procedures to be utilized, and the particular role of the mediator. Each party's consent

to proceed with mediation should be obtained early, prior to the beginning of substantive negotiations.

(4) The mediator shall inform the parties of their rights to withdraw from mediation at any time and for any reason. If the mediator believes that the parties are unable or unwilling to participate effectively in the mediation process, the mediator should suspend or terminate the mediation. If the parties reach a final impasse, the mediator should not prolong unproductive discussions.

Confidentiality:

(1) Unless there is a written agreement otherwise, any communication made in mediation which relates to the controversy being mediated is confidential.

(2) The mediator shall create and maintain a separate mediation file. All memoranda, work product, and other materials contained in the mediation file are confidential.

(3) The names and case numbers of cases for which mediation has been requested and the outcomes of those mediations are not confidential.

(4) Any mediation agreement that requires approval by the Administrative Law Judge who mediated the agreement or the Board pursuant to ORS Chapter 656 and OAR Chapter 438 shall not be confidential.

(5) Statements, memoranda, materials, and other tangible evidence that are subject to discovery under the Board's Rules of Practice and Procedure are not confidential unless they were prepared specifically for use in mediation.³

³ OR. ADMIN. R. 438-019-0020 (2010), *available at* http://arcweb.sos.state.or.us/rules/OARS_400/OAR_438/438_019.html

The steps involved in mediation are described by the Northern Virginia Mediation Service:

STAGE I: ORIENTATION

Primary Goal - Developing Trust in the Mediator and the Process:

- Welcome introductions make initial connections.
- Outline how the process works along with procedures.
- Describe the role of the mediator.
- Cover ground rules; especially confidentiality.
- Review agreement to mediate.

STAGE II: IDENTIFYING ISSUES & UNDERSTANDING THE PARTIES

Primary Goal - Getting Issues and Perspectives on the Table:

- Hear the perspective of each party without interruptions from the other party.
- Paraphrase by the mediators.
- Summaries by the mediators.
- Accept and respond to intense emotions and feelings.
- Set out open-ended questions in an open ended exchange to elicit possible solutions.
- List the issues.

STAGE III: PROBLEM-SOLVING

Primary Goal - Generating Agreed Upon Solutions:

- Assist parties in clarifying and prioritizing issues to be resolved.
- Assist parties in generating possible options for each issue.
- Help parties to evaluate options and to select the ones that will work best.
- Assist parties in moving from “positions” to “interests.”
- Help parties to identify short and long-term issues and associated solutions.

- Frame issues, launder language, paraphrase, and summarize.

STAGE IV: WRITING THE AGREEMENT

Serve as scribe in composing an organized, professional looking document:

- Assist parties to include the important specifics they may need.
- Assist parties in planning next steps after the memo of agreement is completed
- Prepare parties for explaining the document to others who may be affected.⁴

The manner in which these steps are put into practice in other jurisdictions will depend upon whether the system in question is facilitative or evaluative. In a facilitative system, the ALJ acts as an intermediary between parties, conveying information, but not offering any opinion, reasoning or solution to the conflict. In the evaluative system, the mediator takes on an active role—evaluating each party’s case and offering solutions to the problem being mediated.⁵

Oregon’s experience with mediation provides proof of the benefits and savings realized by incorporating mediation into a previously overburdened judicial system. In its 2005 Report to the Oregon State Legislature, the Oregon Court of Appeals stated “[i]n 2005, the court . . . continued our highly successful appellate settlement conference program. Each year, 100 to 150 civil, domestic relations, and workers’ compensation cases settle through this unique mediation program.”⁶

Other statistical approaches reinforce the positive results mediation can have on judicial systems. The chart immediately

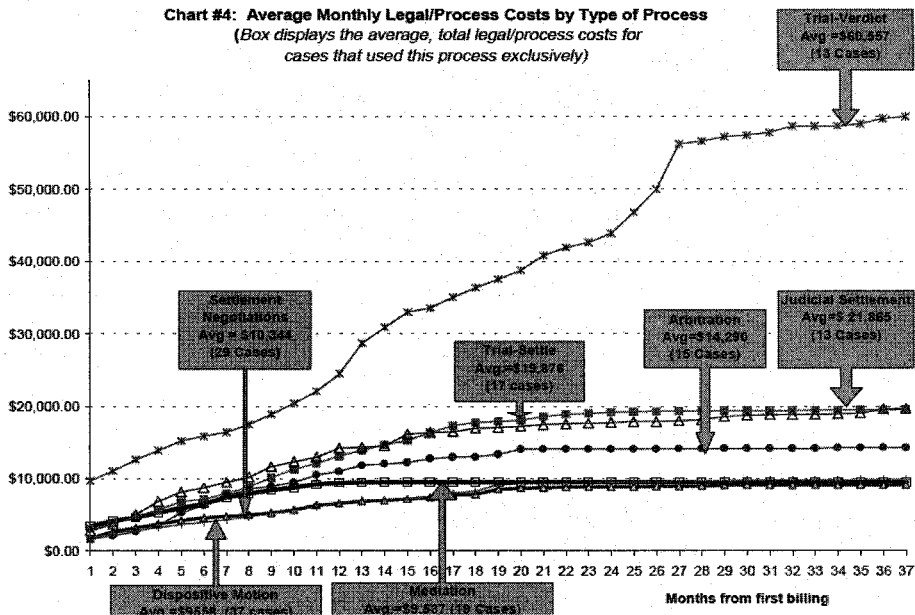
⁴ Ervin Mast and Susan Shearouse, *Mediation Skills and Process* (printed class material) (on file with Northern Virginia Mediation Service); see <http://www.nvms.us>.

⁵ The Virginia Worker’s Compensation Commission (VWC) uses the evaluative approach where mediation is voluntary. The VWC does not use the services of private sector mediators.

⁶ State of Oregon, Dep’t of Justice, Oregon Court of Appeals 2005 Report, at 7 (2005), <http://www.publications.ojd.state.or.us/2005CARReport.pdf>, page 7.

below is taken from a 2001 report by the Oregon Department of Justice to the Oregon Legislature. It illustrates the results of Oregon's pilot mediation project and underscores the value of mediation as a cost-effective solution:

What does it "cost" the state to resolve disputes in litigation? What does it cost the state to *not* take a dispute to court? Is mediation less "costly" than litigation?⁷



At an average of \$60,557, the cost of resolving cases by taking them through a trial to verdict is the most expensive process. At the other end of the spectrum is mediation, which costs about \$9,357.

⁷ State of Oregon, Dep't of Justice, *Collaborative Dispute Resolution Pilot Project*. The authors point out that "legal/process costs" include all the charges, billings and expenses associated with a particular process such as the DOJ attorney billing, mediator and expert witness fees, and related expenses, but does not include the amount of any award or settlement resulting from the process or time invested by agency staff who may be involved in the process/case. *Id.* at 6, note 12. The Study is also quoted in an article discussing the positive application of the Oregon data nationally. See generally U.S. Institute for Environmental Conflict Resolution, *ECR Cost-Effectiveness: Evidence From The Field* (Apr. 16, 2003), http://www.ecr.gov/pdf/ecr_cost_effect.pdf

Not only is mediation less expensive, mediated cases generally take less time to resolve when compared to other forms of resolution.

A 2002 study of Maryland's mediation program also showed that resolving conflicts through mediation saves time and money. The study was conducted by Dr. Marvin B. Mandell and Andrea Marshall of the Maryland Institute for Policy Analysis and Research with the cooperation of the Maryland Mediation and Conflict Resolution Office (MACRO).⁸ The study looked at 400 workers' compensation cases filed in the Circuit Court for the City of Baltimore.⁹ The cases were randomly assigned to two groups: one which was ordered to mediation and the other to a control group where mediation was not utilized.¹⁰ The study concluded:

- Nearly 25% of the cases in the mediation group were disposed of prior to the discovery deadline, compared to only 11% in the control group,
- Exactly 43% of the cases in the mediation group were disposed of prior to their scheduled settlement conference, compared to only 28% in the control group,
- More than 80% of the cases in the mediation group were disposed of prior to their scheduled trial date, compared to only 70% in the control group,
- Only 37% of cases in the mediation group had two or more notices of discovery compared with 56% in the control group, and
- Of the 200 cases referred to mediation, only 17 opted out of the process.¹¹

⁸ Marvin B. Mandell & Andrea Marshall, *The Effects of Court-Ordered Mediation in Workers' Compensation Cases Filed in Circuit Court: Results from an Experiment Conducted in the Circuit Court for Baltimore City*. Baltimore: Maryland Institute for Policy Analysis and Research, University of Maryland Baltimore County (2002).

⁹ *Id.*

¹⁰ *Id.*

¹¹ The completed study was prominently featured by Chief Judge Bell in the *Maryland Judiciary Annual Report 2001 – 2002*, available at <http://www.courts.state.md.us/publications.html>. A partial list of articles and information on the Maryland programs can be found at the website of the National Institute for Conflict Resolution: http://www.niacr.org/state_tp/maryland.htm.

This study was a key part of efforts undertaken by Chief Judge Bell of the Maryland Court of Appeals and his colleagues to deal with the problems investigated in the Mandell/Marshall study. The process began with the creation of the Maryland ADR Commission in February of 1998.¹² The Commission was created to investigate and provide solutions to the problems caused by the fact that Maryland's combined trial courts had about two million cases that resulted in backlog, high cost, and long delay as well as long waiting periods for parties in conflict and time management problems for the courts.¹³ The ADR Commission's Director, Rachel Wohl, Esq., was responsible for coordinating the efforts of about 100 people working on six committees and the feedback of about 700 other persons.¹⁴ After a year and a half of study, the Commission published *Join the Resolution: The Maryland ADR Commission's Practical Action Plan*.¹⁵ *Join the Resolution* describes a plan for advancing the appropriate use of ADR throughout Maryland's courts, neighborhoods, families, schools, businesses, government agencies, criminal/juvenile justice systems and other organizations and settings.¹⁶

After the ADR plan was developed by the Commission, the question became who was going to implement it and carry on its work? The ADR Commission believed that a statewide dispute resolution office was needed not only to implement the work, but also to encourage ADR across the state. Based on a consensus of the Commission, Chief Judge Bell established the Maryland Judiciary's Mediation and Conflict Resolution Office (MACRO).¹⁷ MACRO is a court-related agency, which serves as an alternative dispute

¹² *MACRO's History*, Mediation and Conflict Resolution Office, www.courts.state.md.us/macro/history.html (last visited Sept. 30, 2010).

¹³ *See Id.*

¹⁴ *See Id.*

¹⁵ Robert M. Bell, *Join the Resolution: The Maryland ADR Commission's Practical Action Plan*, available at <http://www.courts.state.md.us/macro/joinresolution.html>.

¹⁶ *See id.*

¹⁷ *Consumer's Guide to Mediation Services in Maryland*, PEOPLES LAW (2003), www.peoples-law.org/core/mediation/adr_directory/MACRO_Guide.pdf.

resolution resource for the state.¹⁸ MACRO supports innovative dispute resolution programs and promotes the appropriate use of ADR in every field.¹⁹

Maryland's experience mirrors a 1998 assessment by Virginia's Workers' Compensation Commission (VWC). The VWC found its system suffered from docket congestion in claims processing and adjudication of contested cases that increased costs and delayed claims resolution.²⁰ The VWC initiated a voluntary mediation program with three stated goals:

- Increas[e] customer satisfaction by expediently resolving contested issues with solutions that are acceptable to all parties;
- Alleviat[e] docket congestion by removing appropriate cases early in the adjudication process; and
- Improv[e] communication among the parties and between the parties and the [VWC].²¹

The new mediation program started in 1999 when the VWC created the Office of the Ombudsman to oversee the program.²² The Ombudsman primarily works with the parties to resolve disputes.²³ The VWC found that often disputes could be resolved by the Ombudsman fostering a dialogue between the parties, exchanging information, and resolving misunderstandings.²⁴ If the Ombudsman is unable to resolve the dispute by talking with the parties, the parties

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Salvatore Lupica, *Painless Problem Solving: The Commission's Informal Dispute Resolution System*, VIRGINIA'S WORKERS' COMPENSATION COMMISSION, www.uwc.state.va.us/VWCCContentManagement/content/deae2b83-84a9-11df-915d-b9f4d8d8256b/medsoc3_art.pdf.

²¹ *Id.*

²² See <http://www.vwc.state.va.us/ombud.htm> for more detail on the mediation process

²³ *Id.*

²⁴ *Id.*

can choose to have the dispute considered by one of the VWC's trained mediators.²⁵

The VWC found that mediation was an effective tool in meeting its three goals. Moreover, even if mediation could not fully resolve the conflict, it could narrow the number of disputed issues, which narrowed the issues for litigation and thereby saved time, money, and cut the stress level of the participants.

Before concluding this segment it should be pointed out that while mediation in workers' compensation cases has many positive aspects, some commentators have raised systemic challenges to its use.

First, there is no doubt mediation can add a step to a system, thereby potentially causing additional delay. Certainly, mediation could postpone an adversarial hearing. Therefore, the challenge is to determine whether the benefits of mediation outweigh, delay, or amend the process to limit or eliminate the delay.²⁶

A second challenge is whether mediation can be effective in a system such as workers' compensation, where so many of the remedies are defined by statute. For example, every workers' compensation system has a statutorily set monetary amount of indemnity benefits that an injured worker can receive, often two-thirds of the worker's pre-injury average weekly wage. There may be less incentive to participate in mediation since there is no chance that a worker will receive a higher benefit (or the insurance company will be able to pay a lower benefit) if the case went to hearing.

A third challenge concerns the attorney's pecuniary interest in mediation. Very often an attorney receives a higher fee if a case settles without going through the hearing stage. Therefore an attorney may be tempted to utilize mediation as a way to simply negotiate a final settlement, rather than seeking to limit the issues for hearing or resolve the dispute through the exchange of information.

The last challenge concerns public sector cases, that is, cases in which the employer is a political jurisdiction. A public sector workers' compensation employer has less economic incentive to participate in mediation than a private insurance company. The

²⁵ *Id.*

²⁶ Some systems, such as Virginia, meet this challenge by not allowing its hearing officers to continue a hearing solely because the parties are participating in mediation.

challenge for public sector mediation is to identify non-economic incentives that will foster the political will to participate in mediation.

II. EXCELLENCE

One of the most important goals of any mediation program is mediator excellence, insuring that the mediators are knowledgeable and well trained. Maryland, Oregon, and Virginia have taken somewhat different paths toward this goal. Looking at those differences not only offers alternatives to jurisdictions considering program change but can also stimulate thinking by those who continually work to improve their current programs.

Maryland's MACRO program tackled the excellence issue early on.²⁷ One finds a useful discussion of the differences between "high" and "low" hurdle excellence programs in MACRO's history.²⁸

MACRO is one of the primary supports and sources for staff of the Maryland Program for Mediator Excellence (MPME). The others are representatives from mediation organizations, private practitioners, mediation users and other interested parties.²⁹ In MACRO's published history of MPME there is a discussion written by Charles Pugh that explains the difference between "high" and "low" hurdle excellence programs.

Some programs with a "high hurdle" might require considerable training, experience, and/or observation to be certified. A "low hurdle" program may demand only limited training and mediation or co-mediation experience. A "high maintenance" program may

²⁸ See MACRO, *The Maryland Program for Mediator Excellence From the Beginning*, AMERICAN BAR ASSOCIATION page 4, <http://meetings.abanet.org/webupload/commupload/DR014500/newsletterpubs/MarylandMPMEFromtheBeginningfinal2.doc>.

²⁹ MPME Tree, <https://jportal.mdcourts.gov/apps/mpme/mpmetree.do>. MPME also has a well designed and well written description of its program online. Using the analogy of a tree, the authors present the program in a manner making it understandable to laypersons. See MPME Tree, *About MPME: A Brief Description*, <https://jportal.mdcourts.gov:443/apps/mpme/aboutmpme.do?method=briefDesc>.

require little to become a mediator but would typically call for mediators to enhance their awareness and skills via co-mediation, follow-up training, inservices, coaching, or handling a large number of cases. A "low maintenance" program imposes few mandates on a mediator once s/he has received a credential.³⁰

MPME, overseen by the Maryland Mediator Quality Assurance Committee, opted for the "low hurdle" approach. After reviewing the research, conducting several regional forums and participating in a three day "future search" process, the Committee members developed the following policy goals:

- Voluntary means of promoting quality mediation in Maryland are preferable to licensing or mandatory credentialing (of mediators).
- A [m]ediators' commitment to long-term improvement and education ("quality assistance," "life-long learning") is more important than "hurdles" to promote quality.
- The definition of "quality mediation" may not be the same in every context (e.g., differing styles and expectations, mandatory v. voluntary participation, imposed or party-selected mediator, substantive specialization).³¹

³⁰*The Maryland Program for Mediator Excellence From the Beginning, supra* note 29, at 4-5.

³¹ Many believe mediation by its very nature calls for voluntary process only. There is a growing body of literature that disagrees. See Catherine Morris, *Mandatory and Court-Annexed Alternative Dispute Resolution (ADR) Processes*, PEACEMAKERS TRUST, <http://www.peacemakers.ca/bibliography/bib46mandatoryADR.html>.

Other sources can be found by searching the keywords "mandatory mediation U.S." on <http://www.google.com>. The citations found in doing so make clear why the 2008-2009 financial crisis has led to additional momentum for mandated mediation especially in the area of home foreclosures. The latter emphasizes the fact that the value of mediation is dawning not only on practitioners, but the financial community, legislators, and the general public.

- Hurdles should be modest, with "incentives and encouragements to participate" offering a middle way between mandatory certification and wholly voluntary approaches, e.g., Mediator Registry, educating users, support and advice framework[s], opportunities for mentoring and targeted discussion).
- All mediators have something to learn about good mediation, and benefit from exposure to a variety of educational sources.
- Performance-based assessment should have a place in Maryland mediator's quality assistance system, but probably more as a means of pinpointing possible shortcomings for follow-up attention rather than in a "pass-fail" way.
- Good mediators come from a variety of backgrounds, and many have developed skills through means other than "approved" training. Any effort to address quality that is exclusive, as opposed to inclusive, risks reducing diversity and eliminating potentially excellent mediators.³²

Oregon might be defined as a "medium" hurdle program that combines characteristics of high and low in a manner allowing its courts and agencies local options. Oregon mediator qualifications are set out across a wide range of programs and state agencies. They run from this detailed statement of qualifications for the Oregon Workers' Compensation Board:

- (1) A mediator shall have completed at least 30 hours of basic mediation training and hold a certificate demonstrating such training.

³² See *The Maryland Program for Mediator Excellence From the Beginning*, *supra* note 29; see generally *About MPME: A Brief Description*, *supra* note 30. See also MPME, *About MPME*, <https://jportal.mdcourts.gov/apps/mpme/aboutmpme.do?method=intro> for an even more up-to-date goal statement.

(2) Such training described in section (1) of this rule shall address the following areas as outlined in OAR 718-040-0040(3):

- (a) Active listening, empathy and validation;
- (b) Sensitivity to and awareness of cross-cultural issues;
- (c) Maintaining neutrality;
- (d) Identifying and reframing interests and issues;
- (e) Establishing trust and respect;
- (f) Using techniques to achieve agreement and settlement, including creating a climate conducive to resolution, identifying options, working toward agreement, and reaching consensus;
- (g) Shaping and writing agreements; and
- (h) Ethical standards for mediator conduct adopted by state and national organizations.³³

Virginia also could be classified as a “medium hurdle” program. There are no formal requirements for mediators.³⁴ However, mediation is carried out by Deputy Commissioners of the Workers’ Compensation Program, who must be members of the Virginia State Bar. Another aspect of the Virginia program which is designed, in part, to assure excellence are regulations which mandate that all mediated settlements must be reviewed by a Deputy Commissioner other than the mediator.

As for mediation in divisions other than Virginia’s Workers’ Compensation Program, there are varying requirements. A brief sample indicates the degree to which the state has taken an interest in ensuring its mediators have adequate preparation:

In Virginia, mediators may be certified pursuant to the “Guidelines for the Training and Certification

³³ *Department of Consumer and Businesses Services, Workers Compensation Board, Division 19, Mediation, 438-019-0010*, OREGON STATE ARCHIVES (Aug. 13, 2010), available at http://arcweb.sos.state.or.us/rules/OARS_400/OAR_438/438_019.html.

³⁴ See VIRGINIA’S JUDICIAL SYSTEM, *Certification Requirements*, http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/certification_process/certification_requirements.html (last visited Oct. 15, 2010).

of Court-Referred Mediators” established by the Judicial Council of Virginia. You must have earned a minimum of a Bachelor's Degree to qualify for certification as a court-referred mediator in Virginia. You may apply for a waiver of this requirement by submitting a letter to Dispute Resolution Services describing your relevant work and life experience. The letter must be accompanied by a resume and two letters of recommendation that address your oral and written communication skills. Additional information may be requested. If certification is your objective, you should seek a waiver prior to beginning mediation training.

Mediators may be certified in four categories: General District Court (GDC), Circuit Court-Civil (CCC), Juvenile and Domestic Relations District Court (J&DR), and Circuit Court-Family (CCF).³⁵

Each has its own supplemental requirements.³⁶

Locating the qualifications for mediators in every state can be a formidable task. Fortunately, the Institute of Government, College of Professional Studies at the University of Arkansas at Little Rock has already done the job.³⁷ The results of its survey, done as part of a contract with the Federal Mediation and Conciliation Service, can easily be found on the website of the Mediation Training Institute.³⁸ A review of the listings prompts the question “why can’t there be one set of qualifications for every jurisdiction?”

The answer lies at the very heart of the mediation process. First, while mediation is as old as the Code of Hammurabi, it is only in the last twenty years that states have taken a greater interest in it as a potential device for saving time and money. Second, state-specific

³⁵ *Id.*

³⁶ *See Id.*

³⁷ MEDIATION TRAINING INSTITUTE, *State Requirements for Mediators*, www.mediationworks.com/medcert3/staterequirements.htm (last visited Oct. 15, 2010).

³⁸ *See* Mediation Training Institute, *State Requirements for Mediators*, <http://www.mediationworks.com/medcert3/staterequirements.htm>.

standards reflect each jurisdiction's social and political culture, history, and goals in legislating mediation programs.

As an example, the Oregon program arises from a culture that emphasizes the informal, open nature of ADR, particularly when it comes to mediation. Thus, Oregon relies on a system with a minimum of formal structure, no formal state mandated mediation association, no disciplinary committees.³⁹

Of course, jurisdictions strive for balance. As an instance, Virginia's program tries to strike a balance between meeting the needs of claimants with the desire of Virginia employers to keep the state a low-cost state for workers' compensation. It has been suggested one of the reasons for this is a desire to insure the state will remain economically competitive with its neighbors Maryland and North Carolina.

A brief survey of states other than Oregon, Maryland, and Virginia show a variety of approaches to mediation.⁴⁰ A number of jurisdictions have opted for more formal structures.⁴¹ For instance, the Arkansas Alternative Dispute Resolution Commission oversees all aspects of mediation practice through a formal set of rules, regulations, and procedures.⁴² The latter includes formal education requirements, certification, continuing education, and other practice requirements as minimums.⁴³ The Commission also has detailed procedures for disciplinary action.⁴⁴

One might note the range of approaches state to state and simply say "to each their own." But, the differences can also be attributed to the principle set out above. To be effective, the more a jurisdiction's mediation system mirrors that jurisdiction's political

³⁹ Interested readers might want to compare the Oregon Mediation Association's *Core Standards of Mediation Practice* with the standards of the Oregon State Bar. See <http://www.omediate.org/pg61.cfm>; <http://www.osbar.org/discipline/sprb.html>.

⁴⁰ See *Certification Requirements*, *supra* note 36, at 9; *Core Standards of Mediation Practice*, *supra* note 41, at 9.

⁴¹ See ARKANSAS ALTERNATIVE DISPUTE RESOLUTION COMMISSION, http://courts.state.ar.us/pdf/certification_requirements.pdf.

⁴² See *Id.*

⁴³ See *Id.*

⁴⁴ See *Id.*

culture, the more likely citizens will have confidence in utilizing that system.

While states utilize different approaches to mediation, there is also a movement to mandate uniformity. The Uniform Mediation Act (UMA), drafted in 2001, has been adopted by eleven states and is under consideration in Massachusetts, New York, and Hawaii.⁴⁵

The UMA is endorsed by the American Arbitration Association, the Judicial Arbitration and Mediation Service, the CPR Institute for Dispute Resolution, the National Arbitration Forum as well as the American Bar Association Section on Dispute Resolution. Some organizations are opposed to the Act, finding it too restrictive.⁴⁶ One such organization is the broad-based National Association for Community Mediation.⁴⁷

III. THE HOW OF MEDIATION

Oregon's Workers' Compensation Board extends an invitation to parties interested in testing mediation:

Mediation can be a positive alternative to litigation. Mediation saves time and expense, removes uncertainty, and allows the parties to create a resolution of their case in a manner that serves their best interests.

WCB offers the services of Administrative Law Judges (ALJs) trained in the formal mediation process. WCB does not charge any fee to the parties for providing mediation services.

Many types of cases have been found to be well suited for mediation: mental stress cases;

⁴⁵ See INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION AND RESOLUTION, *Legislation: Where the Uniform Mediation Act Stands in the States*, <http://www.cpradr.org/Edit/News/tabid/45/articleType/ArticleView/articleId/239/Default.aspx>. See also UNIFORM LAW COMMISSION, *The National Conference of Commissioners on Uniform State Laws, Mediation Act*, <http://www.nccusl.org/Update/ActSearchResults.aspx>.

⁴⁶ See NATIONAL ASSOCIATION FOR COMMUNITY MEDIATION, *"Interest Statement" on the Uniform Mediation Act*, <http://www.nafcm.org/pg73.cfm> (Last updated Aug. 21, 2003).

⁴⁷ See *Id.*

complex occupational disease claims; cases with old dates of injury that have both accepted and denied conditions; cases that also include claims under the Americans with Disabilities Act, civil rights claims with the Oregon Bureau of Labor and Industries, and claims with other employment-related issues; cases with permanent total disability claims; any other case that the parties consider appropriate for settlement.

The Board's mediation program is voluntary; all parties must want to mediate the dispute. If a case does not settle at mediation, it is simply put back on the hearing docket. The ALJ who mediates the case will not preside at the hearing, and there is no communication between the ALJ-mediator and the trial ALJ.

If you decide you wish to pursue mediation, WCB will schedule the mediation as soon as possible, consistent with the schedules of the parties, their representatives, and the ALJ-mediator. Mediations are usually held at the Board office (e.g., Portland, Salem, Eugene, or Medford) closest to where the parties are located.

The usual attendees at a mediation include the claimant, the claimant's attorney, a representative for the employer/insurer, the attorney for the employer/insurer, and anyone else with ultimate settlement authority. In addition, the claimant's spouse or a close family member may attend.⁴⁸

Again, no party to a workers' compensation case is required to pursue mediation; however, once all of the parties have expressed their desire to try mediation, it is expected that all parties will approach the mediation in good faith and commit to working toward resolution. Depending on the

⁴⁸ The inclusion of a spouse or a close family member illustrates how this system reflects the more informal manner of life in the Northwest. It well might not be the case in jurisdictions where more formal procedures are adhered to reflecting the political culture in those jurisdictions.

complexities of the case, a mediation may take several hours, all day, or even longer to achieve resolution. The ALJ-mediator is committed to stay with the process as long as the parties are making progress.

In an effort to get mediations docketed as quickly as possible, WCB has created an "ALJ-Mediator Availability List." Here's how it works:

On WCB's website home page, under "WCB on the Web," click on the words "ALJ-Mediator Availability List." That will take you to the List, which shows the names of the ALJs who potentially are available to do mediations. If one or more dates are listed under a particular ALJ's name, that means that at that point in time the ALJ is available to do a mediation on such date(s). If you identify an ALJ-mediator and a date that works for you, and you subsequently confirm with opposing counsel that the date will work for him/her, you can call the ALJ-mediator's secretary and get the mediation scheduled on that date. After the mediation has been scheduled, WCB will remove the date from the "ALJ-Mediator Availability List" on our website.⁴⁹

The Virginia Workers' Compensation Commission extends a similar invitation.⁵⁰ One of the most important aspects of both programs is that they emphasize that mediation is voluntary, at no charge to the claimant and employer, that it is conducted by impartial ALJs employed by the Board and the Commission, and that if

⁴⁹ Department of Consumer Business & Services, *Medation of Workers' Compensation Disputes*, www.cbs.state.or.us/external/wcd/communications/ed_conference/09hand/dispute_resolution.pdf.

⁵⁰ Virginia Workers' Compensation Commission, *VWC Customer Assistance & Mediation Services* (Sept. 25, 2010, 08:00 AM), <http://www.bwc.state.va.us/portal/bwc-website/HelpfulResources/CustomerAssistance>.

mediation is not helpful the parties retain their right to a formal hearing.⁵¹

Whereas Oregon and Virginia separate workers' compensation claims from others conflicts amenable to mediation, Maryland's MACRO is a "one stop shop." The activities of the program are set out in its ninety-eight page *Consumers' Guide*.⁵² It not only outlines how MACRO works, but also shows how an effective program can reach out to its citizens by telling them what mediation is all about, its benefits, all statewide mediation resources (county by county), counsels on how to find and choose a mediator, lists Maryland and national mediation websites and concludes with a section on ADR definitions and standards of conduct for mediators.⁵³

One could not ask for more. Or could one? There are ALJs and interested parties who might well say, "thank you very much; nice look at systems that work, but what about those that don't or those where responsible administrators and stakeholders are looking to mediation as a way of improving existing workers' compensation systems?"

That question can be answered. In doing so it affords an opportunity to consider the details that system administrators must take into consideration when designing a mediation component to be added to existing programs. The District of Columbia's Department of Employment Services is currently reviewing such a program.⁵⁴ Key elements of that draft are set out below. They are offered as a check list for those in any jurisdiction contemplating the same sort of

⁵¹ *Id.*; State of Oregon Workers' Compensation Board, *Mediation: It Can Work for You* (Sept. 29, 2010, 08:00 PM), <http://www.cbs/or/us/external/web/contents/medbro1.pdf>.

⁵² Maryland Mediation and Conflict Resolution Office, *Consumers' Guide: Alternative Dispute Resolution (ADR) Services in Maryland* (Sept. 29, 2010, 08:00 AM), <http://www.marylandmacro.org/> (click on "Consumer's Guide to ADR Services" hyperlink).

⁵³ *Id.*

⁵⁴ Government of the District of Columbia Office of the Inspector General, *Findings and Recommendations: Key Findings*, DEP'T OF EMPLOYMENT SERVS. WORKERS' COMPENSATION PROCESSES – RESOLUTION OF DISPUTED CLAIMS 1, 2 (Sept. 29, 2010, 08:00 AM), http://oig.dc.gov/news/PDF/release07/DOES_Final_ROI_WEB_POSTING_Complete.pdf.

effort. They can also be used to stimulate internal dialogue regarding the question “just what’re we getting ourselves into.”

IV. THE DISTRICT OF COLUMBIA

The District’s interest in mediation quickened when its Inspector General issued a report entitled *Department of Employment Services Workers’ Compensation Processes – Resolution of Disputed Claims*.⁵⁵ The Report was a wide-ranging and thorough review of Department of Employment Services (DOES) workers’ compensation claims and adjudication program. Among the many findings and recommendations, the report discussed mediation in workers’ compensation cases:

Finding: Office of Workers’ Compensation (OWC) rarely uses mediation to resolve disputed cases.

Recommendation: That the Director (D/DOES) finalize mediation regulations and train claims examiners in mediation as planned.

DOES Response: Agree with Comment.⁵⁶

In addition, the Inspector General quotes DOES’ follow-up statement:

Agree with Comment: mediation is a topic currently under discussion with the workers’ compensation stakeholders’ taskforce. It appears that the feeling of the attorneys is that mediation should be a mandatory step in the *formal* hearing process, similar to the way that it is accomplished in many of the court systems. Further, it is questionable that mediation could be made compulsory at the OWC (*informal*) level and would

⁵⁵ Charles J. Willoughby, *Department Of Employment Services Workers’ Compensation Processes—Resolution Of Disputed Claims Special Evaluation*, OFFICE OF INSPECTOR GEN. (July 2007), http://oig.dc.gov/news/PDF/release07/DOES_Final_ROI_WEB_POSTING_comp1 etc.pdf.

⁵⁶ *Id.* at 28-29.

therefore remain voluntary. In summary, the outcome of the consensus between the stakeholders and DOES representatives will determine the direction of mediation in the adjudication process (emphasis added).⁵⁷

As stated above, external, statistically reliable evidence proves mediation in workers' compensation cases can expedite the resolution of claims in severely clogged systems while at the same time saving money. One of the first positive aspects experienced by many jurisdictions that have instituted mediation is the lessening of case backlogs. Experience in other jurisdictions also makes clear that mediation, which mirrors the culture of that jurisdiction, can be very effective when it is part of a formal adjudicatory process.

The discussion below is based on DOES' response as quoted by Inspector General Charles Willoughby that "... the feeling of the attorneys is that mediation should be a mandatory step in the formal hearing process. . ." within DOES' Administrative Hearings Division (AHD).⁵⁸ As should be the case in any jurisdiction, the latter assumption must be tested as exploration of the feasibility of a mediation program progresses. The DOES program can be designated Office of Mediation (OM).⁵⁹

The OM would be headed by a Program Director who reports directly to the Administrative Hearings Division's Chief Administrative Law Judge. In addition to the Program Director, the OM would rely on AHD ALJs to be mediators. The ALJs would mediate on a rotating basis. Minimal support staff would be necessary. The Program Director would serve as program supervisor and as a mediator. The mediation program can function along the following general lines:

1. The Scheduling Order issued to the parties after the filing of an Application for Formal Hearing (AFH) will, in addition

⁵⁷ *Id.* at 29.

⁵⁸ *Id.*

⁵⁹ The author is indebted to the Hon. E. Cooper Brown, former Chief Judge of the District's Compensation Review Board, and Vice Chairman and Deputy Chief Judge of the Administrative Review Board of the U.S. Department of Labor for his extensive input regarding these recommendations.

to its current functions, inform the parties of the availability and utility to be expected if they mediate their differences prior to the Formal Hearing.⁶⁰ The Scheduling Order will also schedule a date for the mediation *after* the close of discovery and *before* the assigned Formal Hearing date.⁶¹

2. Attached to the Scheduling Order or by way of an addendum will be notice to the parties (unless they are allowed to opt out of the mediation process),⁶² that advises them that they are required to attend the scheduled mediation either in person or through their designated representative and, if by representative, the representative must have full authority to enter into a binding settlement.⁶³ The notice will further inform the parties of the parameters, guidelines, and instructions for participation in the mediation, including the rights and duties of each party.⁶⁴ The Chief ALJ or the Mediation Program Director will assign from among the ALJs (other than the ALJ assigned to preside at the formal hearing in the case) an ALJ who has completed a designated course of training to act as mediator at the scheduled mediation session.⁶⁵

⁶⁰ *Admin. Hearings Div.*, DEP'T OF EMP'T SERVS., <http://www.does.dc.gov/does/CWP/view,a,1232,q,537904.asp>.

⁶¹ *Id.*

⁶² See below for a full discussion of voluntary versus mandatory mediation - an issue that has been resolved in all jurisdictions utilizing mediation and one that must be a primary subject of discussion with D.C. workers' compensation stakeholders as the D.C. Program is developed.

⁶³ Scheduling order for dispute, D.C. DEP'T OF EMP'T SERVS. ADMIN. HEARINGS DIV., http://www.does.dc.gov/does/lib/does/ahd_october_2008_pdf_/10-3-08%20garaya.pdf. This is a scheduling order for a 2008 dispute. *Id.* Although it does not include the recommended mediation language, it could be added to the list of orders.

⁶⁴ *Id.*

⁶⁵ See generally *Admin. Hearings Div.*, supra note 62. Because the ALJ assigned to conduct the Formal Hearing is required by law to issue a decision based upon the record, the Hearing ALJ may not serve as the mediator in the same case. Thus, the ALJ assigned to serve as the mediation ALJ will not preside over the formal hearing of a case in which they have been involved as mediator, and an ALJ to whom the case is assigned for formal hearing, or who has previously heard the

3. Upon notification from the ALJ assigned to conduct the Formal Hearing that discovery has been completed,⁶⁶ the Mediation Program Director will contact the parties to confirm the date, time, and place of the mediation session.
4. At the conclusion of the mediation, the mediator will file a statement with the presiding Formal Hearing ALJ informing them that the mediation has taken place and whether the parties have reached a settlement, in whole or in part.
5. Where the mediation is successful, regarding either the conflict as a whole or regarding particular issues, the assigned ALJ will reduce the parties' agreement to writing, secure the signatures of the parties, and present the settlement agreement to the presiding Formal Hearing ALJ who will either: (a) incorporate the settlement agreement into an AHD-issued compensation order or (b) enter an order remanding the case to OWC for entry of an order approving the settlement pursuant to existing procedures.⁶⁷
6. Where the Formal Hearing ALJ is informed the mediation was unsuccessful, the case will proceed to Formal Hearing, either on the case *in toto* or regarding those issues not resolved through the mediation.

case pursuant to a previous filing involving the same parties, will not be assigned to serve as the mediating ALJ.

⁶⁶ Because discovery deadlines may be extended notification by the presiding Formal Hearing ALJ of the completion of discovery should be required notwithstanding the previous scheduling of a mediation session date.

⁶⁷ OWC approval of all settlements is current practice. However, consideration should be given to affording the presiding Hearing ALJ the authority to approve the settlement (in the form of an abbreviated compensation order) where it is the result of the AHD mediation. This would not only expedite final resolution of the case, but would have the further laudable effect of preventing a subsequent challenge to the terms of the settlement by one of the parties who becomes dissatisfied with the settlement, while yet preserving the parties' respective rights to seek later modification. By reducing the settlement to a compensation order, the settlement might also avoid a subsequent challenge by a dissatisfied claimant that the settlement constituted an invalid assignment, release, or commutation of compensation benefits.

One of the keys to the effective operation of the program will be mediation training for current Administrative Hearings Division ALJs desiring to become mediators. Training of this nature was carried out in early 2006 for the judges of the D.C. Office of Administrative Hearings (OAH). OAH holds hearings and decides appeals involving all agencies other than the Department of Employment Services. The OAH agencies involved cover services from Children and Family Services through Consumer and Regulatory Affairs, the Environment, Housing and Community Development to the Department of Transportation.⁶⁸ All of the ALJs in OAH completed forty hours of mediation training four years ago. The training was offered by the Center for Dispute Resolution, which is affiliated with the University of Maryland School of Law (C-DRUM).

Assurance of best practices is important in carrying out this type of program. At the same time as the initiation of the process for selection of a mediation training firm, appropriate DOES parties can explore, define, and ultimately assure implementation of those aspects of best practices mediation programs that will serve the needs of the DOES workers' compensation adjudication program.⁶⁹ This will require close cooperation with all workers' compensation system stakeholders especially employers, the attorneys who practice before the agency and agency personnel who will be affected by the mediation program's introduction and operation. It is imperative stakeholders be kept informed at each stage of the process. Of equal importance is a guarantee the latter will be given every opportunity to provide meaningful input in the development and implementation of the program.⁷⁰ All too often proposals of this sort are looked upon as

⁶⁸ See generally Office of Administrative Hearings, <http://oah.dc.gov/oah/site/default.asp?oahNav=|32999|>

⁶⁹ For example, the agency will want to incorporate into its program the latest electronic statistical data collection and reporting systems and take steps to insure a program flexible enough to allow for ready adjustment to future agency needs.

⁷⁰ At this stage, consideration should be given to creating an advisory panel. It could consist of appropriate agency personnel, other stakeholders, DOES management representatives, mediation administrators from other jurisdictions, and professional staff of organizations such as the American Arbitration Association and the American Bar Association, Section of Dispute Resolution. The Panel would allow the program developers to take advantage of lessons learned the hard way in building of similar programs.

threatening to current agency personnel. When they do not have a hand in creating programs, they fear losing hard won grade and pay levels.⁷¹

As for program rules and regulations, while a minority argue a mediation program can operate without formally adopted rules of practice and procedure, it is clear from the programs reviewed above that at least a minimum set of regulations governing the conduct of the program needs to be adopted. It is further recommended that a two-step process of regulation adoption be pursued. If the same procedures are followed that DOES used in creating appellate review of AHD decisions (by setting up its Compensation Review Board (DOES/CRB) two steps should be taken: Step 1. the promulgation of emergency regulations (which, if initiated in a timely fashion, could be in effect coincident with the completion of ALJ mediation training) followed by Step 2. promulgation of final program regulations.⁷²

Finally, based on OAH's experience, the time lapse to be expected from the date the request for bids is published until mediation training is concluded would be approximately three to four months. A full calendar for initiating the process of appending a mediation component to the DOES system and having it in place might be expected to flow as follows:

⁷¹ The author has already had these fears made clear to him from a number of DOES OWC Claims Examiners. Their fears are real and must be considered and met head on and candidly.

⁷² See Oregon Workers' Compensation Board mediation program rules of practice and procedure as an example of the scope and content of the DOES/AHD rules of practice and procedure that will be required.

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| 1. Secure agency approval of proposed mediation program, at least in concept. | Month 1 |
| 2. Agency meetings with stakeholders to present proposed program and secure input. | Month 2 |
| 3. Publish notice requesting bids for ALJ mediation training | Month 2 |
| 4. Establish Office of Mediation within the Administrative Hearings Division; appoint (Acting) Program Director. | Month 2 |
| 5. Publish mediation program interim emergency regulations for public comment. | Month 3 |
| 6. Develop mediation program master plan; review with and secure program "sign-off" by D/DOES, draft budget. | Month 3/4 |
| 7. Review results of request for bids and select mediation training consulting firm. | Month 4 |
| 8. Second agency meeting with stakeholders to review program status and plans, solicit comments/input on proposed regulations. | Month 5 |
| 9. Mediation Program emergency regulations adopted and published. | Month 5/6 |
| 10. Conduct ALJ mediation training. | Month 5/6 |
| 11. Formally inaugurate mediation program with notice of initial mediation session case assignments (as part of AHD case scheduling orders). | Month 6 |
| 12. First AHD mediation sessions held. | Month 7 |

V. CONCLUSION

This consideration of mediation in workers' compensation cases began with a discussion of the conflicts ALJs must deal with every day. Mediating these conflicts can lead to a better life for the parties whether they be whole communities, regions or individuals. For working individuals, whether bus driver, electrician, doctor, lawyer, social service provider, teacher, or judge; workers' compensation systems were designed to provide a fiscally responsible way of compensation for on the job injuries.

It was posited that the closer these systems come to mirroring the political culture of the jurisdiction mandating them, the more effective they are. Next, a review was offered of how three systems revitalized themselves. That discussion was offered to make clear the merits of, and some of the challenges met, regarding mediation in workers' compensation programs. Doing so highlighted some of the characteristics of the three systems, which mirror their political culture effectively. It also demonstrated how doing so can work in favor of balancing the needs of states, their workers and other competing interests.

Finally, to bring all these elements together and stimulate readers to think creatively about the merits of mediation for their own jurisdictions, (and to offer a "how to"), a draft action plan was set out for a system under stress; a system some local practitioners feel could benefit greatly from a mediation component.⁷³

Maryland's Chief Appellate Judge Robert Bell has the final word. It is a reminder that it is the injured worker, whether service provider, bus driver or jurist, who should remain the focus of political systems striving for civility.

While cost and time savings are very important, it is important to note that the judiciary supports the use of mediation because of the less tangible benefits that arise in appropriate cases when people are empowered to resolve their own disputes productively and relatively. Mediation is one of the tools that can help transform our society from a culture of conflict to a culture of conflict resolution.⁷⁴

He is wise.

⁷³ Hopefully interested parties will respond to this draft action plan offering positive comments and criticisms. Comments are welcomed and can be sent as letters to the editor or directly to the author at hwcummins@esgicorp.com.

⁷⁴ Sally Rankin, *New Research Shows Mediation Saves Time & Money*, PRESS RELEASE (July 10, 2002), <http://www.court.state.md.us/press/2002/pr7-10-02.html>.

