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PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Mass Disaster Mediation: Innovative ADR, or a Lion's Den?

Elizabeth Baker Murrill¹

Imagine the following scene. An insurance company representative who has years of experience evaluating claims and negotiating claims is sitting across the table from a nice, elderly lady from the Lower Ninth Ward in New Orleans.² According to neighbors who stayed until the water rose, her roof was torn off of her house by wind before taking on 23 feet of water. It was a complete loss. Her insurance company is denying coverage due to the water damage – the classic wind or water coverage dispute. She has no education beyond high school and knows nothing about mediation or formal negotiations, but various people suggested she might be able to settle her claims with her insurance company if she came to this meeting. She is currently living alone in a FEMA trailer park because she has lost everything, including her spouse who died of a heart attack several months after the storm. She is in limbo regarding her future. Her ability to act depends on obtaining money to rebuild her life.

The insurance claims representative, meanwhile, is skilled in the field of negotiations and knows immediately upon meeting her that this lady is naïve in the mediation and negotiations process and the law, desperate for money, and trusts her insurance company to take care of her. Additionally, as a veteran of many claims negotiations, the insurance representative knows that the law largely allows many kinds of misleading comments to be made during negotiations.³

What do you think the outcome is? The main premise of this article is that this naively unaware lady just walked into the proverbial Lion's Den.

1. Elizabeth Baker Murrill is an Assistant Professor of Professional Practice at Louisiana State University Paul M. Hebert Law Center, and a mediator. She is currently on leave while working at the Federal Judicial Center in Washington, D.C., as a United States Supreme Court Judicial Fellow.

2. This is a fictional anecdote based on a hybrid of real individuals' cases. The author volunteers in a legal aid clinic at a FEMA trailer park where many residents fit this description.

3. See Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219 (1991); James White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiations*, 1980 AM. B. FOUND. RESOL. J. 926 (1980).

Mass torts and other mass claims are becoming an ever more popular forum for the use of alternative dispute resolution to resolve parties' claims in the wake of events that produce thousands of conflicts overnight.⁴ Mediation, in particular, has been used in several high-profile mass disaster events in an effort to resolve individual claims efficiently and quickly.⁵ This paper evaluates special risks posed in this kind of mediation that can go to the heart and the integrity of the mediation process. The thesis of this paper is that the potential imbalance in the parties' experience, education, and individual situation can contribute to a power imbalance which creates the risk of coercion and lack of informed consent. Moreover, external factors, like politics, culture, and the economy can affect how power is distributed at the bargaining table.⁶ Factors that are internal to the victims of the disaster can affect an individual's cognitive functioning after being involved in a mass disaster, potentially affecting consent to an agreement.⁷

The way to resolve those problems may be to think more carefully about the process design so that safeguards are in place that will protect process integrity, decrease the imbalance of power between bargaining parties, and increase mediator awareness of special risks posed by mass disaster

4. See Cindy Fazzi, *Disaster: When It Strikes, ADR Can Come to the Rescue in Resolving Mass Tort Claims*, 53 DISP. RESOL. J. 16 (1998), available at <http://www.adr.org/si.asp?id=4281>. The American Arbitration Association has created a separate section to administer mass mediation programs. See www.adr.org (last visited April 11, 2007).

5. Among the disasters are the Northridge Earthquake, and Hurricanes Andrew, Iniki, Katrina, and Rita. These programs are discussed in detail throughout this paper.

6. P.H. GULLIVER, *DISPUTES AND NEGOTIATIONS: A CROSS-CULTURAL PERSPECTIVE* (1979). Social science researchers state that negotiating power is based on the possession of tangible and intangible resources, as well as macrosocietal conditions such as prevailing ideologies and norms. See generally MORTON DEUTCH, *THE RESOLUTION OF CONFLICT* (1973).

7. Some academic commentary has addressed the issue of informed consent in the general mediation context. See Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decision Making*, 74 NOTRE DAME L. REV. 775 (1999) [hereinafter Nolan-Haley, *Informed Consent in Mediation*]; NANCY ROGERS & CRAIG MCEWEN, *MEDIATION: LAW, POLICY, AND PRACTICE* §2:02 (2d ed. 1994) (recognizing informed consent as an aspect of the fairness debate in mediation); Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, 1994 J. DISP. RESOL. 1 (1994) [hereinafter Baruch-Bush, *The Dilemmas of Mediation Practice*]. Baruch-Bush identifies nine specific dilemmas mediators can encounter in an ordinary mediation context: keeping within the limits of competency, preserving impartiality, maintaining confidentiality, ensuring informed consent, preserving self-determination/maintaining non-directiveness, separating mediation from counseling and legal advice, avoiding party exposure to harm as a result of mediation, preventing party abuse of the mediation process, and handling conflicts of interest. Baruch-Bush, *The Dilemmas of Mediation Practice*, at 9. As is discussed further in this paper, all of these risks can take on greater proportions in the context of a mass mediation program following a disaster. See *infra* text and accompanying notes, especially sources cited in note 70.

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situations.⁸ Such changes would increase the usefulness of mediation in this context.

This article first discusses several mass disaster mediation programs: the programs for hurricanes Andrew and Iniki, the Northridge Earthquake Mediation Program, and currently active programs administered by American Arbitration Association for insurance disputes arising from Hurricanes Katrina and Rita in Louisiana and Hurricane Katrina in Mississippi.⁹ The second part discusses external pressures, such as political, cultural, and economic factors, which create the external context for a mass mediation program.¹⁰ The third part discusses psychological responses, cognitive processing, and the impact a mass disaster can have on an individual's ability to process information and make educated, sound decisions, which create an internal context in any particular mediation.¹¹ The fourth part discusses implications and recommendations for both system designers and for mediators.¹²

The conclusion of this article is that mass insurance mediation programs can provide property owners with a quicker, more efficient way to resolve their insurance claims and move on with their lives. But they can also carry other consequences. Sponsors of such programs must ask whether any such system has been designed to foster competent decision making, whether it is inherently more favorable to insurers, and whether the program creates an environment that serves only to take advantage of people who already have been victimized and may be desperate and vulnerable. Mass mediation programs are a new and innovative form of mediation on the horizon, but it is time we gave more thought to the context in which they are used and the

8. PAUL WEHR, *Limiting Conflict: The Gandhian Style*, in CONFLICT REGULATION 26, 37-38 (1997). This is ultimately consistent with an "empowerment model" of conflict regulation, which recognizes balance of power is desirable to prevent unrestrained behavior by the more powerful or desperation in the weaker party, a model discussed by Wehr.

One of the propositions of this article is that process design for mass mediation needs a metacognitive approach. "Metacognition is thinking about the kind of thinking that a task requires." Kip Smith, James Shanteau, & Paul Johnson, *Introduction: What Does It Mean to be Competent?* in DECISION MAKING 1, 2 (2004).

9. See *infra* Part I.

10. See *infra* Part II. See also John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839 (1997) (examining internal and external factors affecting the quality of consent in a general mediation context).

11. See *infra* Part III.

12. See *infra* Part IV.

protections that need to be in place to effectively contribute to recovery from the disaster.

THE EXPANSION OF MASS DISASTER MEDIATION

Mass mediation programs have been popping up in the aftermath of natural disasters primarily to deal with hundreds of thousands of insurance property claims. Those claims usually have individual dimensions and shared commonalities – each person's damages are different, but coverage issues may be shared by thousands, even hundreds of thousands, of people.¹³ The prospect of litigation, then, poses a very real problem of conflicting rulings on coverage and a long process of fighting those issues for years through appeal courts.¹⁴

Facing this situation, the American Arbitration Association blazed the early path into mass disaster mediation with a claims resolution program launched after Hurricane Andrew hit southern Florida on August 24, 1992, leaving 30 people dead and 250,000 homeless. Damage was estimated to be \$30 billion.¹⁵ At the time, Hurricane Andrew was one of the worst natural disasters to hit the United States and it generated about 25,000 insurance-related claims.¹⁶ The AAA program was established at the request of Florida's Department of Insurance due to the massive number of pending claims.¹⁷ The program processed some 2,400 claims, 92% of which were settled within one year.¹⁸

This ADR experience has been promoted as and has become a template for programs in other states. This model has been used to settle claims arising out of damage caused by Hurricane Iniki in Hawaii and the 1994

13. Jonathan R.T. Davidson & Alexander C. McFarlane, *The Extent and Impact of Mental Health Problems After Disaster*, 67 J. CLIN. PSYCHIATRY 9, 11 (2006) [hereinafter Davidson & McFarlane, *Extent and Impact*]. A "disaster" can be distinguished from other types of traumatic events by its scale and widespread impact. According to Davidson & McFarlane, "disasters have in common a collective social suffering that requires a supreme effort by individuals, communities and even entire societies to overcome." Disasters are events with predictable long-term consequences. *Id.*

14. The litigation process, of course, takes a great deal more time. Parties have procedurally mandated time periods within which to answer pleadings and conduct discovery before a trial is held. Parties may file writs of certiorari on particular rulings, and ultimately can appeal any final judgment. The insurance litigation in Mississippi and Louisiana demonstrates how time-consuming, expensive, and complicated the litigation process can be in the wake of disaster.

15. Fazzi, *supra* note 4.

16. *Id.*

17. *Id.*

18. See AAA Brochure, www.adr.com (last visited March 22, 2007); Mississippi Insurance Department, www.doi.state.ms.us (last visited March 22, 2007); Louisiana Department of Insurance, <http://www.lidi.la.gov/> (last visited March 22, 2007); see also Fazzi, *supra* note 4.

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California Northridge earthquake.¹⁹ Its success spawned permanent insurance mediation programs in New York, Florida, and California.²⁰ From the perspective of the Florida Department of Insurance, the program was a "resounding success" and prevented a great deal of litigation.²¹

On Sept. 11, 1992, less than a month after Hurricane Andrew, Hurricane Iniki hit Hawaii, leaving 3 dead and causing an estimated \$1.6 billion in damage.²² Facing a situation similar to Florida, the State of Hawaii responded by establishing a mediation program jointly with the state's Department of Commerce and Consumer Affairs and the state's Center for Alternative Dispute Resolution.²³ AAA handled numerous claims filed by victims.²⁴ Under the Hurricane Iniki program, town meetings were held throughout Kauai to address concerns of the victims and to educate them about the mediation program.²⁵

In 1995, AAA handled a voluntary ADR program for the California Department of Insurance to resolve insurance claims arising from the 1994 Northridge earthquake, which damaged or destroyed hundreds of thousands of homes.²⁶ Unlike the initial programs arising from Andrew and Iniki, the Northridge mediation program offered more choices: dispute evaluation and assessment, mediation, binding arbitration, and non-binding arbitration.²⁷

In 1998, AAA, in cooperation with the University of North Dakota's Conflict Resolution Center, set up a program for the victims of a flood in Grand Forks, N.D., caused when several dikes failed and left the city under water.²⁸ The flood triggered a fire downtown, which affected most of the 50,000 residents of Grand Forks.²⁹ AAA, the Conflict Resolution Center, and the Red River Valley Community Action Center jointly introduced a grassroots ADR program to handle family and landlord-tenant claims, buy-

19. Fazzi, *supra* note 4.

20. *Id.*

21. *Id.* at 18.

22. *Id.* See also *Hurricane Iniki Ranked 3rd Costliest Disaster in U.S.*, THE MIAMI HERALD, Sept. 25, 1992 (estimating that the hurricane would produce about 50,000 insurance claims).

23. Fazzi, *supra* note 4.

24. *Id.*

25. *Id.*

26. Press Release, American Arbitration Association, AAA Responds to Gulf Coast Tragedy With New Program to Manage Dispute Resolution Following Disasters (Oct. 7, 2005), <http://www.adr.org/sp.asp?id=26856> [hereinafter AAA Responds].

27. Fazzi, *supra* note 4.

28. *Id.*; see also AAA Responds, *supra* note 26.

29. *Id.*; AAA Responds, *supra* note 26.

out disputes with claims under \$10,000, construction, insurance, financial and mortgage cases, and buy-out cases with claims exceeding \$10,000.³⁰ Civic organizations contacted and educated flood victims about their ADR options.³¹

AAA has also participated in other mass claim ADR initiatives, including using ADR to streamline bankruptcy litigation, settlement of claims arising out of the Greyhound Lines Inc.'s reorganization in 1990, tort claims filed against the St. Johnsbury Trucking Company in 1993, the R.H. Macy reorganization in 1995, and the Pine Top liquidation program.³² AAA is working with major insurance companies such as New York Life and General American Life to resolve individual policyholder claims.³³

There is need and value in these programs, which offer alternatives to litigation that allow people who are victims of disasters to move on with their lives. In theory, these programs also allow victims some control over process and outcome, which can contribute to their psychological recovery.³⁴ But not all of these programs are the same. Some have a significant educational component and many have mediator training and claims evaluation components.³⁵ Protective legislation in some states allows insureds a "cooling-off" period away from the negotiations during which they can confirm they made the right decision.³⁶ Florida now permanently provides funding and a structure for mediation for indigents.³⁷ As discussed below, the most recent programs, arising from Hurricanes Katrina and Rita, differ in a number of ways related to the disasters and the program design. It is these program design differences, however, that can be critical to the success of the program.

30. Fazzi, *supra* note 4.

31. *See generally id.*

32. Fazzi, *supra* note 4; *see also, Insurance Issues Mobilize the ADR Community in the Wake of the Gulf Coast Hurricanes*, 23 ALTERNATIVES TO HIGH COST LITIG. 171 (2005) [hereinafter *Insurance Issues Mobilize*].

33. *See* AAA Brochure, *supra* note 18.

34. S.C. Thompson, *Will It Hurt Less If I Can Control It? A Complex Answer to a Simple Question*, PSYCH. BULLETIN 89-101 (1981) (discussing how people tend to experience less stress in a situation in which they believe they have some degree of control over the threatening event).

35. *See* Fazzi, *supra* note 4.

36. *See, e.g.,* CAL. INS. CODE § 10089.82 (2007).

37. *See* FLA. ST. ANN. § 44:1011 (2007). In one year, Florida was struck by three consecutive hurricanes in different areas of the state and resulting in 1.7 million insurance claims. *See Insurance Issues Mobilize, supra* note 32. Florida permanently established Citizen Dispute Settlement Centers to administrate these insurance claims and a wider variety of claims. *Id.* Similarly, the governor of California recently signed into law a permanent earthquake and catastrophe insurance mediation program. *Id.* The governor of Alabama created a task force to examine the permanent community center model. *Id.*

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KATRINA-RITA MEDIATION

Hurricane Katrina struck the gulf coast of Louisiana and Mississippi on August 29, 2005, bringing with it more devastation caused by natural disaster than has ever been experienced before in the United States.³⁸ Total economic losses solely from Katrina are estimated by economists at \$100-125 billion.³⁹ The hurricane caused large-scale flooding that left 80% of the city submerged.⁴⁰ Post-hurricane, less than two-thirds of its original population has returned and many who did are on the brink of leaving.⁴¹ In Mississippi, slabs were the only thing left where neighborhoods used to be. A year and a half later, thousands of people still live in temporary housing provided by the federal government.⁴²

Less than three weeks after Katrina, Hurricane Rita struck the Gulf Coast on the Texas-Louisiana border. Together, the two Hurricanes decimated the entire Gulf Coast of Mississippi and Louisiana, and also caused widespread damage in Alabama and Texas. Both Mississippi and Louisiana, following the lead of Florida, Hawaii, California, and Minnesota have adopted mass disaster insurance mediation programs.⁴³

EXTERNAL FACTORS CREATING IMBALANCES IN POWER AND INCENTIVE TO BARGAIN

Many Katrina and Rita insureds share common legal problems regarding insurance coverage. In both states, the problem of whether homeowners'

38. Robert J. Samuelson, *Hitting the Economy*, NEWSWEEK, Sept. 12, 2005 (discussing the economic impact of Katrina).

39. See Robert P. Hartwig, *Ins. Info. Inst. Hurricane Season of 2005: Impacts on US P/C Ins. Markets in 2006 and Beyond* (Dec. 7, 2005), http://server.iii.org/yy_obj_data/binary/744130_1_0/katrina.pdf.

40. Bill Walsh, Katherine Lewis, & John McQuaid, *Will New Orleans Ever be the Same?* Sept. 1, 2005, available at http://www.nola.com/newslogs/tporleans/index.ssf?/mtlogs/nola_tporleans/archives/2005_09_01.html.

41. For extensive coverage of efforts to rebuild and repopulate New Orleans, see www.nola.com. See also Gwen Filosa, *The Lonely Lower Nine*, THE TIMES PICAYUNE (New Orleans, La.), Dec. 18, 2006 ("Sixteen months after Katrina, hope is as rare as people on the streets of the Lower 9th Ward.").

42. See Editorial, *Katrina's Purgatory*, N.Y. TIMES, Nov. 18, 2006.

43. See <http://www.ldi.state.la.us/hurricanekatrina.htm#mediation>, <http://www.doi.state.ms.us/katrina.htm>; <http://www.adr.org/>. North Carolina has also recently established a program. See <http://www.ncdoi.com>.

insurance provides coverage has already entered the litigation process.⁴⁴ Generally speaking, uncertainty surrounding the resolution of a legal issue provides incentive to both sides to settle in mediation rather than to risk complete loss at trial.⁴⁵ Here, however, the threat of losing in the courts weighs heavily on the minds of many.⁴⁶ Lack of movement in the courts and legislatures on this issue also weighs heavily, although some effort is evident on the legislative front.⁴⁷

Another risk to insureds lies in their problems of proof. If they win on the issue of coverage, they face tremendous problems of proof.⁴⁸ Many residents were not allowed to even view their homes until months after the damage occurred, and many lost documents and other proof of ownership and value of their property. As a result of these problems, homeowners in both states fear minuscule compensation and face lengthy, expensive court battles.⁴⁹

What of the insurance companies? An estimated 700,000 insurance claims were filed along the Gulf Coast after Katrina, though not all were property damage claims.⁵⁰ Until the coverage issue is decided, the insurance

44. Mississippi's Attorney General Jim Hood filed suit less than a month after Hurricane Katrina struck the Mississippi Gulf Coast accusing insurers of selling confusing policies that fell short of homeowner's reasonable expectations of coverage. Hood v. Miss. Farm Bureau Ins. Co., No. 3:05-CV-00572-TSL-AGN (S.D. Miss. 2005). See also Jennifer Bayot, *Mississippi Sues Insurers Over Damage from Storm*, N.Y. TIMES, Sept. 16, 2005. Well-known plaintiff attorney Dickie Scruggs subsequently joined the fray filing a class action lawsuit on behalf of thousands of policy-holders. In Louisiana, several class actions have been filed and thousands of individual claims are pending, most of which have been consolidated into the *In Re Katrina Canal Breaches* case before Judge Stanwood Duval in the Eastern District Court.

45. Robert H. Gertner, *Asymmetric Information, Uncertainty, and Selection Bias in Litigation*, 1993 U. CHI. L. SCH. ROUNDTABLE 75 [hereinafter Gertner, *Asymmetric Information*]; Joseph A. Grundfest and Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267 (2006) (discussing how predictions concerning the effects of increased uncertainty are based on the assumption that parties are risk neutral. Further, if parties are risk averse, greater uncertainty pushes them toward settlement.); see also Douglas Yarn, *Evaluative Dispute Resolution Under Uncertainty: An Empirical Look at Bayes Theorem and the Expected Value of Perfect Information*, 2003 J. DISP. RESOL. 427.

46. Editorial, *An Unequal Battle*, THE TIMES PICAYUNE (New Orleans, La.), Nov. 3, 2006 [hereinafter "*An Unequal Battle*"].

47. The Louisiana legislature considered bills to prevent insurers from denying coverage solely based on evidence of flood damage. *Legislature Takes Aims at Insurance Claim Denials*, THE ADVOCATE (Baton Rouge, La.), Feb. 8, 2006. The Louisiana Supreme Court recently upheld hurricane legislation extending to two years the time period allowed by law to file damage claims with an insured's insurance company. *State v. All Property and Insurance Carriers Authorized to do Business in the State of Louisiana*, No. 2006-CD-2030 (La. 8/25/06). Mississippi residents have three years to file.

48. *Insurance Issues Mobilize*, supra note 32.

49. *Insurance Issues Mobilize*, supra note 32.

50. *An Unequal Battle*, supra note 46.

companies facing hundreds of billions of dollars in claims and would likely fare better in litigation.⁵¹ Thus, in weighing the cost of failing to settle and the risk faced by insured and insurer, the insurer has less incentive to bargain. The insured has much greater risk if the parties fail to settle creating asymmetrical costs between the parties.⁵²

In addition, the insurance companies have the luxuries of time and money – if they engage in mediation now, they pay on claims for which they may owe nothing if the litigation resolves coverage in their favor.⁵³ If they litigate, they hold on to more funds longer.⁵⁴ If they lose on the coverage issue in the litigation, they have been able to hold on to the bulk of the funds longer and still have the opportunity to reduce the payment on a claim due to the problems of proof through negotiations with their insured.⁵⁵ From the perspective of the insurance company, settling is not that attractive unless it is for a very low price. The imbalance in incentives to negotiate creates a significant power advantage for the insurance company in mediation.⁵⁶

Another external factor that can affect parties' behavior at the bargaining table is each state's response to the coverage issue.⁵⁷ Mississippi and Louisiana have responded very differently. On Sept. 15, 2005, Mississippi Attorney General Jim Hood filed suit to void property casualty insurance policies, and invalidate provisions, that would be used to exclude Katrina-related coverage.⁵⁸ The suit awaits action in federal court, but it includes a request for a temporary restraining order to stop insurers from asking property owners to sign documents stating that their loss was caused by flood or water, as opposed to wind, and to stop using water exclusions to

51. A number of newspaper articles have discussed the predicted insurance losses. *See, e.g.*, Anita Lee, *Wind or Water: The Debate Rages, But Who Will Pay?*, SUN HERALD (Biloxi, Ms.), Dec. 21, 2005; Rebecca Mowbray, *Flooding Poses Insurance Puzzle*, THE TIMES PICAYUNE (New Orleans, La.), Sept. 10, 2005.

52. Gertner, *Asymmetric Information*, *supra* note 45.

53. H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* (1970); *see also* CLINTON E. MILLER, THOMAS MCGREAL, & DAVID FRANGIAMORE, *HOW INSURANCE COMPANIES SETTLE CASES* (2006).

54. ROSS, *supra* note 53.

55. ROSS, *supra* note 53.

56. As the litigation matures, rulings are beginning to be issued in some cases with mixed reactions from the parties. *See, e.g.*, *Judge Rejects Claim for Katrina Flood Damage*, <http://www.cnn.com/2006/LAW/08/15/katrina.lawsuit/index.html>, posted August 15, 2006, 9:45 p.m. EDT; *but see* discussion *infra* notes 57-58.

57. *See* GULLIVER, *DISPUTES AND NEGOTIATIONS*, *supra* note 6.

58. *Insurance Companies Mobilize*, *supra* note 32.

deny or reduce coverage for hurricane damage or loss.⁵⁹ This state action sends a message to insurance companies that the state will support, and in fact represent, insureds in fighting the wind/flood battle.

In Louisiana, private lawsuits pose the insurance coverage question.⁶⁰ The consequences of this litigation remain unclear.⁶¹ Private litigation, to the extent it remains scattered, is likely to produce conflicting decisions that will be fought through the appellate courts.⁶²

Thus, while the two mediation programs in Louisiana and Mississippi are structured the same, administered the same (through AAA), and arise from the same or similar disaster(s), they occur in different legal and political environments. These environments have a significant effect on the bargaining environment in which insureds find themselves during mediation and will likely produce widely different outcomes. Moreover, neither Louisiana or Mississippi have "cooling-off" period legislation to protect unrepresented insureds, although the literature from both insurance departments states that parties *do* have three days to rescind the agreement.⁶³ Neither Louisiana nor Mississippi has any publicly available, free education

59. *Id.*

60. These cases are beginning to make their way through the court system. See *In Re Katrina Canal Breaches Consol. Litig.*, Nos. 05-0623, 06-516, 06-1673, and 06-1674, Kelly A. Humphries v. Encompass Ins. Co., 05-4182, 06-0169, 2006 WL 3421012 (E.D. La. 2006) and Joseph B. Treaster, *Judge Upholds Policyholders' Katrina Flood Claims*, N.Y. TIMES, Nov. 29, 2006 (discussing Judge Duval's ruling denying numerous insurers' motions for summary judgment on their flood exclusions in their homeowner's policies); see also *Tuepker v. State Farm Fire & Cas. Co.*, No. 1:05CV559 LTS-JMR, 2006 WL 1442489 (S.D. Miss. 2006) (Judge Senter's ruling granting summary judgment in favor of insurers on the issue of whether storm surge was an excluded peril, but denying summary judgment on other wind/water exclusion claims). The Fifth Circuit, however, in August reversed Judge Duval on the flood exclusion issue. See *In Re Katrina Canal Breaches*, No. 07-30119, 2007 WL 2200004 (5th Cir. 2007).

Numerous initial skirmishes in the Katrina litigation in Louisiana have been about federal jurisdiction. Suits filed against insurers have been removed from state court to federal court on the basis of diversity, the Class Action Fairness Act, and the Multi-Party, Multi-Forum Trial Jurisdiction Act. The specter of losing the state forum for adjudicating these disputes is another external factor contributing to the context. See, e.g., *Southall v. St. Paul Travelers Ins. Co.*, 2006 WL 2385365 (E.D. La. Aug. 16, 2006) and *Berry v. Allstate*, 2006 WL 2710588 (E.D. La. Sept. 19, 2006)

61. The litigation also poses a number of legal problems, including estoppel and res judicata, to name two. If a court rules against the insureds in an action that has been certified as a class action, hundreds of thousands of insureds may be exposed to claims of res judicata. If the lawyers for hundreds of insureds fail to handle the action correctly and it is subsequently dismissed for pleading defects or other procedural defects, the suit could be dismissed with prejudice – again precluding relief for hundreds maybe thousands of people. A *defendant* class would probably be a better approach to this problem, though this form of class action is little used and to date not considered as a remedy by these parties.

62. *Id.*; see also discussion *supra* notes 60-61.

63. See <http://www.la.state.la.us/hurricanekatrina.htm#mediation>, <http://www.doi.state.ms.us/katrina.htm>.

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programs other than department of insurance brochures to explain the process of mediation and what to expect during the negotiations.⁶⁴

The components of power at the bargaining table are many, and they matter in negotiations. Power, as Professor Korobkin has described it, can be viewed "as the ability to bend the opponent to your will."⁶⁵ Korobkin further proposes that "the basis of power is the threat that you will not give the opponent what she wants."⁶⁶ In the present context, the insurer has all the power, but especially that of time, experience, money, knowledge (i.e., education on process and issues).⁶⁷ In addition, there is financial incentive *not* to settle claims.

INTERNAL FACTORS: THE PSYCHOLOGICAL IMPACT OF A CATASTROPHE

In the literature concentrated on mediation and negotiations, little attention is given to the cognitive thought processes involved in making a decision and impediments to that process. Consequently, even less attention has been focused on the complex psychological impact a natural disaster can have on the decision-making capacity of a person impacted by such an event.

Disasters causing severe, lasting, and pervasive psychological effects are characterized by at least two of the following: a high prevalence of injury; threat to or actual loss of life; extreme and widespread property damage; serious, ongoing financial problems for the affected community; and involvement of human carelessness or intent.⁶⁸ Perception of life threat,

64. See AAA brochures, *supra* note 18. Although their programs are structured to allow a three-day cooling-off period, no legislation mandates it. Presumably, parties could be asked to waive the three-day period, or claim it was waived, during the mediation and that issue could arise in subsequent litigation to rescind or enforce the settlement agreement.

65. RUSSEL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* ch. 5 (2002). Morton Duetch equates power with the ability of one party to influence another to behave according to the first party's preferences. MORTON DUECH, *THE RESOLUTION OF CONFLICT: CONSTRUCTIVE AND DESTRUCTIVE PROCESSES* (1973). See also GULLIVER, *supra* note 6, positing that negotiating power is based on the possession of resources and other external conditions.

66. KOROBKIN, *supra* note 65.

67. Race may also be a factor. See *An Unequal Battle*, *supra* note 46. The context will also likely produce secondary reactions from lawyers, which in turn will influence the potential participants attitudes and openness to trying mediation. This has happened in Mississippi, where trial lawyer Dickie Scruggs has openly criticized the state's mediation program. See Anita Lee, *Scruggs Challenges Mediation Program*, SUN HERALD (Biloxi, Miss.), Dec. 23, 2005. None of the lawyers in Louisiana have openly attacked its state program.

68. Davidson & McFarlane, *Extent and Impact*, *supra* note 13.

injuries to the individual or family members, bereavement, destruction of the family home, loss of possessions, and associated loss of sense of identity and social integration are risk factors for increased psychological problems, determined in part by the degree of exposure.⁶⁹ A catastrophic event can have a significant impact on an individual's state of mind and decision-making capacity.⁷⁰

A. Signs of Impaired Capacity

An individual who is experiencing a conflict that requires third-party intervention is likely to experience a range of emotions that may impair his or her capacity to make considered decisions about options. Any conflict has the capacity to challenge one's perception of the future and his or her perceptions of identity and place in the world.⁷¹ In most individual conflicts, however, the party still has multiple levels of coping mechanisms and support structures.⁷² In contrast, a catastrophic natural disaster, such as a hurricane, earthquake, or tsunami, breaks the entire fabric of a community apart. It destroys churches, businesses, houses, and infrastructure like sewage, water, and electricity. It takes lives and wreaks widespread and total devastation. The magnitude of such devastation brings with it the potential for a more complex psychological response by victims in both the long and short term. Dr. Dori Reissman notes that Hurricanes Katrina and Rita highlighted the importance of social networks and social support to

69. Disasters have also been distinguished from other types of potentially traumatic events by identifying the event as "massive collective stress" or "violent encounters with nature, technology, or humankind." W. Kinston & R. Rosser, *Disaster: Effect on Medical and Physical State*, 18 J. OF PSYCHOSOM. RES. 437 (1974). The common thread is the "collective social suffering that requires a supreme effort by individuals, communities, and even entire societies to overcome." Davidson & McFarlane, *Extent and Impact*, *supra* note 13.

70. Davidson & McFarlane, *Extent and Impact*, *supra* note 13; see also Patrick J. Bracken, Joan Giller, & Derek Summerfield, *Psychological Responses to War and Atrocity: The Limitations of Current Concepts*, 40 Soc. Sci. Med. 1073-82 (1975); Robert J. Ursano, M.D., Frederick P. Cerise, M.D., M.P.H., Robert DeMartino, M.D., Dori B. Reissman, M.D., M.P.H., & M. Katherine Shear, M.D., *The Impact of Disasters and Their Aftermath in Mental Health*, 67 J. CLIN. PSYCHIATRY 1 (2006) [hereinafter Ursano, Cerise, et.al, *The Impact of Disasters*]; Michael A. Crabbs & Edward Heffron, *Loss Associated With a Natural Disaster*, THE PERSONNEL & GUIDANCE J. 378 (February 1991) [hereinafter Crabbs & Heffron, *Loss Associated With a Natural Disaster*]; Shayna Murdoch & Tyler Childs Cymet, *Treating the Victims After Disaster: Physical and Psychological Effects*, 32 COMPREHENSIVE THERAPY 39 (Mar. 2006) [hereinafter Murdoch & Cymet, *Treating the Victims*].

71. See Crabbs & Heffron, *Loss Associated With a Natural Disaster*, *supra* note 70; Murdoch & Cymet, *Treating the Victims*, *supra* note 70.

72. Ursano, Cerise, et.al, *The Impact of Disasters*, *supra* note 70; Murdoch & Cymet, *Treating the Victims*, *supra* note 70.

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communities, families and individuals.⁷³ When victims lose their community, more and more layers of distress are added, including the loss of coping skills and other ways to calm down.⁷⁴

Some documented short-term responses can include recurrent and intrusive memories of the event, reminders of the event evoking psychological distress, avoiding thoughts of feelings associated with the trauma, avoiding activities or situations that are reminders of the trauma, loss of usual interests, feeling detached or estranged from others, have a sense of a foreshortened future, insomnia, irritability or angry outbursts, difficulty concentrating, and an exaggerated startle response.⁷⁵ Other short-term effects include demoralization, disorientation, and loss of connections.⁷⁶ Trauma causes survivors to feel drained of energy, conviction, and direction; dazed and stunned, unable to locate themselves in time and space; to feel a sense of isolation from other people; and to have difficulty in establishing and maintaining warm relationships.⁷⁷ A study of flood survivors in Buffalo Creek, West Virginia, showed residents were capable of acts of generosity during difficult times, but found it difficult both to relate to others as separate individuals and to mobilize the energy to care.⁷⁸ The sudden and severe shock of a natural disaster breaks through one's defenses with such force that many survivors cannot respond effectively.⁷⁹ Some individuals will experience intense anxiety, despondency, confusion, absence of emotion, inhibition of activity, docility, indecisiveness, and lack of responsiveness, which Anthony Wallace labeled "disaster syndrome."⁸⁰

For many individuals, these symptoms gradually diminish as their lives return to normal.⁸¹ However, when an entire community has been unraveled

73. Ursano, Cerise, et.al, *The Impact of Disasters*, *supra* note 70.

74. Crabbs & Heffon, *Loss Associated With a Natural Disaster*, *supra* note 70.

75. *Id.* at 378-79.

76. *Id.* at 379.

77. Crabbs & Heffon, *Loss Associated With a Natural Disaster*, *supra* note 70, at 379.

78. *Id.*; see also Davidson & McFarlane, *The Extent and Impact*, *supra* note 13 (discussing additional studies of the kinds and longevity of dysfunction following other disasters).

79. Crabbs & Heffon, *Loss Associated With a Natural Disaster*, *supra* note 70, at 379.

80. Anthony Wallace, *Tornado in Worcester: An Exploratory Study of Individual and Community Behavior in an Extreme Situation*, *Disaster Studies*, No. 3, Washington, D.C.: Committee on Disaster Studies, National Academy of Sciences—National Research Council (1956).

81. Crabbs & Heffron, *Loss Associated With a Natural Disaster*, *supra* note 70. From the onset of the disaster, people try to assess the disaster and comprehend its magnitude. Most people attempt to and make progress in establishing a mental equilibrium. *Id.*

people lose structures in the community that would ordinarily serve to mediate and help them cope with their short-term distress.⁸² Other factors such as age, health, personal loss in the event and personal trauma from the event can also exaggerate these responses and one's evaluation of their own capacity to process what has happened to them.⁸³ People are forced to relocate, often many miles from home, to live with a neighbor or relative, or to live in government-created trailer parks where they are thrown together with other victims in a high-stress living environment.⁸⁴ Loss caused by the calamity is often intensified by these settlement attempts, which, in turn, often lead to interpersonal problems.⁸⁵

The long-term effects of a disaster include anxiety, fear, apathy, depression,⁸⁶ hysteria, anger, fantasy, and delusions.⁸⁷ Many victims will evidence disappointment, disillusionment, depression, anger, and resentment and these feelings can be directed toward government agencies, contractors, and other disaster-related resources that may not have fulfilled the victim's expectations.⁸⁸ In the aftermath of a natural disaster, coverage disputes number in the hundreds of thousands making insurance companies and even mediators in government-sponsored programs prime targets for these emotions.⁸⁹

Long-term effects on survivor's mental health have been explored by a number of investigators. "Psychic numbing" is one outgrowth and intensification of "disaster syndrome."⁹⁰ Researchers who observed flood victims two years after the event concluded that "psychic numbing" was a universal response to the disaster, manifesting itself with such symptoms as

82. Crabbs & Heffron, *Loss Associated With a Natural Disaster*, *supra* note 70, at 379-80.

83. *Id.*

84. Crabbs & Heffron, *Loss Associated With a Natural Disaster*, *supra* note 70, at 379-80.

85. *Id.*

86. Davidson & McFarlane suggest that the focus of PTSD has led some an underestimate of the importance of depression as a source of psychological dysfunction, particularly in populations in which there are major levels of loss that have an enduring effect. Demoralization in the wake of prolonged hardships after the disaster is an important contributor to vulnerability to depression. Davidson & McFarlane, *Extent and Impact*, *supra* note 13, at 10-11. John H. Ehrenreich discusses the risks and benefits of using the term "post-traumatic stress disorder" broadly to apply to widely differing events and to describe widely divergent psychological responses to these events. Ehrenreich, *Understanding PTSD: Forgetting "Trauma"*, 3 ANALYSES SOC. ISS. & PUB. POL'Y 15, 15-28 (2003).

87. Crabbs & Heffron, *Loss Associated With a Natural Disaster*, *supra* note 70, at 379.

88. *Id.*

89. *Id.*

90. *Id.* See also F.H.Norris, et al., *Post-disaster PTSD Over Four Waves of a Panel Study of Mexico's 1999 Flood*, 17 J. OF TRAUMA. STRESS 283 (2004) (a study of the disaster victims after Mexico's 1999 flood documenting PTSD one year later at 24% and two years later at 11%).

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memory problems, inability to concentrate, unwanted thoughts and ideas, blank spells, and indecisiveness.⁹¹

The loss of social relationships is very traumatic. Loss of social ties or support systems includes loss of a spouse, loss of children, and loss of other relatives through death or relocation.⁹² Destruction of the neighborhood, loss of a home and prized personal possessions, combined with family members and friends, may so shock survivors that they withdraw and make few attempts to establish new relationships or rekindle old ones.⁹³ Social support is such an important buffer that without it communities and individuals may experience increases in robbery, juvenile delinquency, and consumption of drugs and alcohol.⁹⁴ Financial problems, feelings of being cheated by others, unemployment, and the hard physical work required rebuilding – all have an impact on interpersonal relationships.⁹⁵

For the mediation context, these complex psychological responses create a situation in which multiple stressors at varying levels of occurrence and intensity may impact individuals who are targeted for participation in mass mediation programs.⁹⁶

B. Cognition and Decision Making Capacity

These multiple stressors on the psyche are linked to cognition and capacity for decision making. Cognitive effects of stress are significant and include narrowing of attention or perceptual tunneling,⁹⁷ reduced working memory,⁹⁸ and rigidity.⁹⁹ For complex tasks, this narrowing can result in

91. Crabbs & Heffon, *Loss Associated With a Natural Disaster*, *supra* note 70, at 379.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. Psychiatrists have confirmed that the rates of mental health problems in the New Orleans area are staggering and resources to help are critically low. Sharon Schmickle, *Mental Health Problems Abound a Year After Katrina*, SUN HERALD (Biloxi, Miss.), Aug. 19, 2006. One victim said, "I've got a hurting thing. . . I lost more than I can handle. It's like someone cut off your arm. You keep looking for it, and you can't find it." *Id.*

97. J.A. Easterbrook, *The Effect of Emotion on Cue Utilization and the Organization of Behavior*, 66 PSYCHOL. REV. 183-201 (1959); Christopher D. Wickens, *Designing for Stress, in STRESS AND HUMAN PERFORMANCE*, 279-95 (Driskell & Salas eds., 1996).

98. WORKLOAD TRANSITION: IMPLICATIONS FOR INDIVIDUALS AND TEAM PERFORMANCE (B.M. Huey & C.D. Wickens eds., 1993).

the elimination of relevant task information and task performance can suffer.¹⁰⁰ In addition to the reduction of working memory, stress can restrict information retrieved from long-term memory to that which is most dominant or well-learned.¹⁰¹

One notable stressor that also impacts decision-making capacity is time pressure, which is significant in the context of mass mediation programs since the mediations are usually designed to last approximately two hours.¹⁰² Research suggests that time pressure degrades performance because of the demands of information overload and the need to process information in a limited amount of time.¹⁰³ One of the strategies an individual may adopt under time pressure is to filter information that needs to be processed and another is to consider all alternatives based on a single criterion rather than considering each alternative sequentially.¹⁰⁴ As a consequence of these coping mechanisms, research indicates that decision-making accuracy declines.¹⁰⁵

99. See R.M. Staw, L.E. Sandelands & J.E. Dutton, *Threat-Rigidity Effects in Organizational Behavior: A Multi-Level Analysis*, 26 ADMIN. SCI. Q. 501 (1981). Rigidity results in an individual clinging to a set method of problem-solving even when it ceases to provide a direct task solution. *Id.*

100. James E. Drikell, Eduardo Salas, & Joan H. Johnston, *Decision Making and Performance Under Stress*, in MILITARY PERFORMANCE (Thomas W. Britt, Amy B. Adler & Carl A. Castro eds., 2005). See also David M. Warburton, *Stress and the Processing of Information*, in HUMAN STRESS AND COGNITION: AN INFORMATION PROCESSING APPROACH 469-75 (David M. Warburton & Vernon Hamilton eds., 1979); George Mandler, *Thought Processes, Consciousness and Stress*, in HUMAN STRESS AND COGNITION: AN INFORMATION PROCESSING APPROACH, *supra*, at 179-201; PSYCHOLOGICAL INVESTIGATIONS OF COMPETENCE IN DECISION MAKING (Kip Smith et al. eds., 2004).

101. See M.W. EYSENCK, A HANDBOOK OF COGNITIVE PSYCHOLOGY (1984); E.L. Cohen, *The Influence of Varying Degrees of Psychological Stress on Problem-Solving Rigidity*, 47 J. OF ABNORMAL & SOC. PSYCHOL. 512-19 (1952).

102. Psychologists have begun to study the impact of various stressors in the context of mediated and non-mediated negotiations. See, e.g., Peter J. Carnevale et al., *Time Pressure in Negotiation and Mediation*, in TIME PRESSURE AND STRESS IN HUMAN JUDGMENT AND DECISION MAKING 117-27 (Ola Svenson, et al. eds., 1993) [hereinafter *Time Pressure in Negotiation and Mediation*]; Eric J. Johnson et al., *Adapting to Time Constraints*, in TIME PRESSURE & STRESS IN HUMAN JUDGMENT AND DECISION MAKING, *supra*, at 103-16; Jeryl L. Mumpower, *The Judgment Policies of Negotiators and the Structure of Negotiation Problems*, in JUDGMENT & DECISION MAKING: AN INTERDISCIPLINARY READER, 423-41 (Terry Connolly et al. eds., 2000); Max H. Bazerman et al., *The Effect of Agents and Mediators on Negotiation Outcomes*, in JUDGMENT & DECISION MAKING, *supra*, at 442-59.

103. P. Wright, *The Harassed Decision-Maker: Time Pressures, Distractions, and the Use of Evidence*, 44 J. OF MARKETING RES. 429-43 (1974); see also *Time Pressure in Negotiation and Mediation*, *supra* note 102.

104. See Wright, *supra* note 103; see also *supra* note 102 and accompanying text.

105. See I.L. JANIS & L. MANN, DECISION MAKING: A PSYCHOLOGICAL ANALYSIS OF CONFLICT, CHOICE, AND COMMITMENT (1977), (presenting a model of decision-making in which they distinguished between "vigilant and hypervigilant decision-making"). Hypervigilant decision-making is characterized by selective information search, consideration of limited alternatives, rapid

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More specifically, time pressure in negotiations and in the mediation context has been documented to result in lower demands, faster concessions, and faster agreements, generally reducing the level of outcome negotiators wanted to achieve.¹⁰⁶ Barnes' and Komarita's 1969 study demonstrated that when both parties have equal pressure to reach agreement and experience high costs by continuing the negotiations, concession making was greater and the number of trials to reach agreement were fewer.¹⁰⁷ In contrast, when pressure is asymmetric, i.e., when one party bears a higher cost if negotiations fail, the party with the greater costs made more concessions and settled for a lower outcome than the party without the costs.¹⁰⁸ No similar studies have been performed on the participants of mass mediation programs, but it is clear that the policy-holder in a property insurance mediation bears the greatest costs of failing to reach an agreement.¹⁰⁹ The typical policyholder will need the funds to rebuild or relocate. In contrast, the insurance company saves money by not reaching agreement.

IMPLICATIONS FOR SYSTEM DESIGNERS & MEDIATORS

Because both individual and collective trauma can have an impact on decision-making capacity and cognition, mass mediation system designers need to take these psychological factors into account when creating a

evaluation of data, and selection of a solution without extensive review or reappraisal. It is viewed as an impulsive, disorganized process generally resulting in poor quality judgments. *Id.* See also HUMAN STRESS AND COGNITION: AN INFORMATION PROCESSING APPROACH, *supra* note 100; KENNETH R. HAMMOND, JUDGMENTS UNDER STRESS (2000); and JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982).

106. See D. Brookmire & F. Sistrunk, *The Effects of Perceived Ability and Impartiality of Mediators and Time Pressure on Negotiation*, 24 J. OF CONFLICT RESOL. 311 (1980); S. Komarita & M. Barnes, *Effects of Pressures to Reach Agreement in Bargaining*, 13 J. OF PERSONALITY AND SOC. PSYCHOL. 245 (1969) [hereinafter Komarita & Barnes, *Effects of Pressures to Reach Agreement*]; D. G. Pruitt and J. L. Drews, *The Effect of Time Pressure, Time Elapsed, and the Opponent's Concession Rate on Behavior in Negotiation*, 5 J. OF EXPERIMENTAL PSYCHOL. 43 (1969).

107. The notion that time pressure influences concessions has become an elementary concept in negotiation strategy. See, e.g., D. PRUITT, *NEGOTIATION BEHAVIOR* 30-31 (1981); Gary Goodpaster, *A Primer on Competitive Bargaining*, 1996 J. DISP. RESOL. 325, 361-62; Charles B. Craver, *Effective Legal Negotiation and Settlement*, C586 ALI-ABA 1 (1990).

108. Komarita & Barnes, *Effects of Pressures to Reach Agreement*, *supra* note 106; see also Gertner, *Asymmetric Information*, *supra* note 45.

109. One mediator from Florida has acknowledged these potential asymmetries between the parties in reflection on his own participation in mass insurance mediation. See Mel Rubin, *Disaster Mediation: Lessons in Conflict Coordination*, 2006 DISP. RESOL. MAG. 17.

process in which these victims are invited to participate. The system must be designed with more than a focus on resolving a large number of claims quickly. A fair process must also be designed for competent decision-making.¹¹⁰ Designing for competence, then, requires envisioning an environment of optimal performance, taking into consideration the user population, the external environment, the tasks and procedures involved.¹¹¹ All of these factors must be designed to support both *communication competence* and *cognitive competence*.¹¹²

The impetus for mass insurance mediation programs has been the sheer and overwhelming numbers of claims that arise after events causing widespread property damage. Designing with an end-goal of providing alternatives to litigation and a process by which people can participate and control outcomes while also clearing larger numbers of claims quickly is a good end goal. But if this is the only consideration, important aspects of the process design will be overlooked and one of the outcomes will be a process that is inherently unfair to the victims of the disaster.

Andrew Scherer, a lawyer with Legal Services of New York, has identified a "five-part test for equitable process" in ADR system design:¹¹³

- (1) Representation Equity. Do both sides have balanced representation? A significant factor here is the relative experience of the parties in the mediation process. Both parties may be unrepresented giving the appearance of representational equity, when in fact the disparity of experience with the process or the substance of the dispute can create a representation gap.
- (2) Knowledge Equity. Are all participants, including the mediator, balanced with regard to their knowledge of the process and the subject of the dispute, and the law?
- (3) Language Equity. In increasing numbers, people do not have adequate skills in spoken or written English to understand what occurs in a mediation session. This gap in understanding may also include cultural and other culturally-related cognitive gaps that prevent a party from even understanding the other party's point of view.¹¹⁴

110. Patricia M. Jones, *Designing for Competence*, in *PSYCHOLOGICAL INVESTIGATIONS OF COMPETENCE IN DECISION MAKING*, 149-60 (Kip Smith et al. eds., 2004).

111. See Jones, *supra* note 110, at 152. Jones contrasts competence-driven design with design philosophies that are technology-driven, theory-driven, or user-centered. *Id.*

112. *Id.* Both communication competence and cognitive competence overlap. Jones states, "[c]ognitive competence implies the study of expertise, the development of rules and knowledge." *Id.* at 151. Communication competence adopts a cooperative principled approach to language shared by participants who orient themselves to each other and rely on these principles as aids in inferences. *Id.* at 151-52.

113. Fern Schair, Chair, Ferrick Center for Social Justice and Dispute Resolution, Fern A. Fischer, New York Supreme Court Justice, Beth Schwartz, Professor, Fordham University School of Law & Andrew Scherer, Executive Director, Legal Services for New York City, remarks from a panel discussion at the Fordham University Symposium: *Using ADR for Achieving Social Justice: Can the Promise of ADR Deliver Justice to Those in Need?* (Oct. 13, 2006) (published with permission of Andrew Scherer).

114. This category could encompass additional cultural factors.

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(4) Social Power Equity. Power relationships between parties is a factor that process designers must consider. Unevenly distributed social power between the parties at the table will lead to results that may not truly be consensual.

(5) Political Equity. Fueled by powerful economic incentive and will, some groups have large and powerful lobbyists who can go to Congress and to state elected officials, whereas a single individual typically has no such political power. The relative political power of the parties, therefore, is another consideration if a process designer is concerned with developing a balanced, fair process.¹¹⁵

A competence-driven design, then, is not exclusively user-driven.¹¹⁶ It is concerned with context and can have multiple end goals and relevant outcomes.¹¹⁷ One of these end goals should be to constructively contribute to the recovery process in the larger community and at the individual user level.¹¹⁸ After a catastrophic event, individuals already will be coping with multiple situations in which they may feel victimized. If they leave the mediation feeling like the mediation process victimized them further, then the process design has failed to contribute to recovery and failed the individual user.¹¹⁹

115. As with many fundamental issues relative to the duties and responsibilities of mediators, there is no uniform agreement that the mediator has a duty to ensure a fair agreement is reached. See Robert A. Baruch-Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253 (1989). Baruch-Bush has opined that there is an element of paternalism inconsistent with the principle of free choice underlying the value of consent whenever a mediator intervenes to "protect" one party from coercion by another. Baruch-Bush, *The Dilemmas of Mediation Practice*, *supra* note 7, at 18. Joseph L. Stulberg argues the mediator should not have the responsibility for policing fairness. Joseph L. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Sussskind*, 6 VT. L. REV. 85 (1981). Some concepts of mediation, however, suggest that the mediator owes a duty to protect the parties' interests and to gauge fairness of the outcome to each of the parties. See Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers Responsibilities*, 38 TEX. L. REV. 407 (1997).

116. Jones, *supra* note 110.

117. *Id.*

118. I suggest this as an end goal because I assume there should be reasons for establishing the program in the first place and those reasons should provide benefits to both parties who participate: insurer and insured. If the program inherently favors one or the other party, it will not be neutral, will be likely to invite criticism from attorneys on one side or the other, and will ultimately discourage many from participating.

119. My conclusion here is based in part on the assumption that a state-sponsored mass mediation program is established at least in part with the goal of providing people with a quicker more efficient path toward settling insurance disputes than traditional litigation, thereby allowing them to get on with re-establishing their lives. It would seem that victimizing people further would be inimical to that goal. Traditional litigation does not provide efficient or quick solutions, but rather has a focus on achieving justice through a lengthy process with greater procedural protections and rights to appeal, which can act as barriers to victimization of participants. Moreover, traditional

IMPLICATIONS FOR MEDIATORS

The complex state of mind of an individual participant also has immediate ground-floor implications for mediations. Mediators need to: (1) be able to recognize when a participant's cognitive faculties are compromised by trauma; (2) know the consequences of impeded judgment; and (3) have considered options for handling the situation, which will better prepare them to face situations when they arise.

Being able to recognize when an individual's capacity to make decisions is compromised is not necessarily an easy task and may require special training in the context of mass mediation programs that follow a catastrophe.

¹²⁰ The consequences of impeded judgment are significant. From a contractual standpoint, duress is a recognized vice of consent in contract law. Thus, an agreement reached when an individual is experiencing extreme duress can be vitiated for lack of consent.¹²¹ If thousands of

litigation has no particular end goal other than providing parties with a neutral, procedurally fair forum to resolve differences.

It is the informality of mediation that can potentially be problematic. Examples of informality in dispute resolution working to the advantage of the more powerful can be found in the juvenile justice system, divorce situations, housing disputes, and historically in the employer-employee relationship. See, e.g., JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? RESOLVING DISPUTES WITHOUT LAWYERS 127 (1983); RICHARD L. ABEL, THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE (1982); Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 446 (1992) (arguing that mediator intervention does not protect the less empowered wife from disadvantageous outcomes). Professor Mnookin recognizes that unequal bargaining power between spouses justifies some limitations on private ordering in the divorce context. Robert Mnookin, *Divorce Bargaining: The Limits on Private Ordering*, 18 U. MICH. L.J. REF. 1015, 1024-31 (1985).

120. See Baruch-Bush, *The Dilemmas of Mediation Practice*, *supra* note 7, at 10 (observing that one skill many mediators are not trained in is recognizing certain situations or conditions that may negate the consensual assumptions on which mediation is conducted).

121. See 17A C.J.S. *Contracts* §176 (1999) (discussing the elements of duress). Ordinarily, duress cannot be a creature of one's own mind. *King v. Lewis*, 4 S.E. 2d 464 (1939). However, more recent courts have recognized a form of "circumstantial duress." In one case involving pre-death releases of survival and death claims, a court observed that family members "may feel extreme emotional pressure" and "the ability of those involved to intelligently and rationally execute a release of their future rights under such circumstances is far from ideal." *Daigle v. Clemco Indus.*, 593 So.2d 1282 (La. App. 1st Cir. 1991); see also *Standard Coffee Serv. Co. v. Elliot Constr. Co.*, 363 So.2d 671 (La. 1978) (rescinding an agreement for circumstantial duress).

However, note that domains of legal competence, the capacity to make autonomous decisions, and the ability to provide informed consent are closely related but distinct from each other. P. S. APPELBAUM AND J. W. BERG, *INFORMED CONSENT: LEGAL THEORY AND CLINICAL PRACTICE* (2nd ed. 2001). Legally a person is determined competent or incompetent, whereas in psychological assessment decision-making capacity varies along a continuum from incapacitated to fully capacitated. Donald Rosenstein, *Decision-Making Capacity and Disaster Research*, 17 J. TRAUMATIC STRESS 373-81 (Oct. 2004) [hereinafter Rosenstein, *Decision-Making Capacity and Disaster Research*].

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individuals are vulnerable to the distress wrought by catastrophe, then their agreements are potentially vulnerable to attack based on duress or unconscionability.¹²² If one of the end-goals is to provide a more efficient process through which individuals can participate and own their outcomes and avoid protracted litigation, then the creation of thousands of agreements that are vulnerable to attack would seem to conflict with that goal. Mediators need to be trained to recognize the signs of impeded judgment so that they can consider their immediate options.

One of those options is to allow ventilation.¹²³ People need to ventilate.¹²⁴ To deal effectively with a crisis, an individual must first accept the reality of the situation.¹²⁵ Victims may need help assessing and handling the reality of the present situation, as well as the long term effects.¹²⁶ In the mediation setting, they may need the opportunity and encouragement to talk about their losses and ventilate their inner thoughts and feelings, either in caucus or directly to the insurer's representative at the mediation. Mediators who participate in mass mediation programs following a catastrophic event should receive some additional training on empathetic listening and the importance of allowing a party to ventilate. However, most lawyer-mediators are *not* psychologists and may not be equipped to deal with an individual whose "venting" deteriorates into an unstable, unproductive mental state or who is directing *all* anger and frustration arising from the totality of the situation at whoever is in the room.¹²⁷

122. See *Wolf v. La. State Racing Comm'n*, 545 So.2d 976 (La. 1989), where the Louisiana Supreme Court rescinded a disputed agreement not on grounds of circumstantial duress, but on grounds that the defendant's improper threats and superior bargaining position had coerced plaintiff's consent; Larry A. DiMatteo, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U.L. REV. 1067 (2006) (studying cases alleging unconscionability as a basis to rescind agreements); and Leo Katz, *Choice, Consent, and Cycling: The Hidden Limitations of Consent*, 104 MICH. L. REV. 627 (2006).

123. Crabbs & Heffron, *Loss Association With a Natural Disaster*, *supra* note 70, at 381.

124. *Id.* This concept has been addressed in the general mediation context. See KEN CLOKE & JOAN GOLDSMITH, *RESOLVING PERSONAL AND ORGANIZATIONAL CONFLICT: STORIES OF TRANSFORMATION AND FORGIVENESS* (2000); JOHN WINSLADE & GERALD MONK, *NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION* (2001); Steven L. Schwartz, *The Mediated Settlement: Is It Always Just About the Money? Rarely!*, 4 PEPP. DISP. RESOL. L.J. 309 (2004); Toran Hansen, *The Narrative Approach to Mediation*, 4 PEPP. DISP. RESOL. L.J. 297 (2004).

125. Crabbs & Heffron, *Loss Associated With a Natural Disaster*, *supra* note 70, at 378-79.

126. This is, arguably, outside the role of a mediator. And yet, the mediator may be faced with this situation. This prospect merely highlights the need for additional training with regard to handling such a situation.

127. Rosenstein acknowledges that even in psychological research, little practical guidance is offered with respect to the kinds of safeguards that can be employed to protect decisionally-impaired

One of the most likely and most problematic dilemmas a mediator will face is that a person whose judgment is impeded may come to rely more heavily on the judgment and advice of the mediator.¹²⁸ An individual who has experienced catastrophic loss and then faced additional ongoing tragedy and loss in the months subsequent to the disaster may not trust their own judgment or may be suffering from "psychic numbing", causing the party to seek and to rely more heavily on advice of the mediator.¹²⁹ This will potentially place the mediator in a very awkward position that could compromise the mediator's neutrality or, at a minimum, compromise the parties' perceptions of the mediator's neutrality.¹³⁰ It also could expose the mediator to subsequent litigation if the participant misconstrues the mediator's role or relies heavily on what he or she perceives to be the "advice" of the mediator.¹³¹

Mediators need to be especially cognizant of how the participant views the mediator's role and how much the participant is seeking advice on what to do from the mediator. One option a mediator should have is to

individuals in the context of participating in research studies. Rosenstein, *Decision-Making Capacity and Disaster Research*, *supra* note 121. The same issue arises in the context of mediation programs. Regulations apply to federally-funded research which attempt to protect vulnerable subjects from exploitation for the sake of scientific progress. *Id.* at 375. No such limits have ever been discussed or examined in the context of mass mediation programs even though research confirms poor cognitive performance in the wake of disaster.

128. Marjorie Corman Aaron acknowledges that evaluation poses the risk of appearance that the mediator is allied with the "winning" side. Aaron, *Evaluation in Mediation*, in DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES* (1996).

129. Robert Jay Lifton and Eric Olson, *The Human Meaning of Total Disaster: The Buffalo Creek Disaster*, 39 *PSYCHIATRY* 1-18 (1976).

130. Mediators vary greatly in how actively they are willing to intervene in a dispute. See *MEDIATING LEGAL DISPUTES* §1.1.1, at 17 (Dwight Golan ed., 1996). The debate over whether a mediator should evaluate or only facilitate is a raging one. Professor Stark has commented that the most difficult ethical issues in mediation are caused by the tendency of mediators to give parties "stunted" legal advice about the weaknesses and not the strengths of a case, but Stark also observes that the principal purpose of evaluation in mediation is promoting the parties self-determination through informed consent. James Stark, *The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals, From an Evaluative Lawyer-Mediator*, 38 *TEX. L. REV.* 769, 771-72 (1997) [hereinafter Stark, *The Ethics of Mediation*].

131. Professor Stark has opined that "what passes for 'information' in mediation is often just inexplicit 'advice' and distinguishing between the two in the midst of a heated, fast-moving mediation is problematic." Stark, *The Ethics of Mediation*, *supra* note 130, at 784, n.35. Though it is difficult to sue mediators for mediation conduct, it is not impossible and new theories are being tested all the time. See Authur Chaykin, *Mediator Liability: A New Role for Fiduciary Duties*, 53 *CINN. L. REV.* 731 (1984); and Michael Moffitt, *Suing Mediators*, 83 *B.U.L. REV.* 147, 170, n.83 (2003) (a mediator who evaluates almost certainly increases exposure to malpractice liability because the process of evaluation almost certainly falls within the parameters of the practice of law). See also Lela P. Love, *The Top 10 Reasons Why Mediators Should Not Evaluate*, 24 *FLA. ST. U.L. REV.* 937 (1997).

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recommend rescheduling the mediation. An option the party should have is to attend at the rescheduled time with an advocate who can actively assist the individual at no-cost. Any individual can hire a lawyer and some states allow "public adjusters" to assist parties in negotiating their insurance claims during mediation. Because of the context in which mass mediation arises, I am advocating designing a program that provides advocacy assistance at no cost. Advocacy assistance has not been an element of any of the previously designed mass insurance mediation programs. Law Schools, a state office for dispute resolution, or non-profit organizations are valuable resources to include in the designing stage to deal with this deficiency.¹³²

CONCLUSION

Hurricane Katrina demonstrates that a catastrophe of massive proportions rips the threads of society apart. It pushes people to the furthest ends of their cognitive capacity and has both short- and long-term effects on a victim's ability to make decisions. Research on judgments under stress is useful in evaluating the impact of such an event on one's cognitive capacity and has implications for both system designers and mediators. System designers, in particular, need to consider their end goals and design for competence. This will include processes that ensure fairness to the parties and provide balance of power at the negotiating table. System designers need to consider providing specialized training for mediators and providing training and advocacy assistance for victims of the catastrophe. These participants need to be better educated in the process of mediation before they arrive for the actual mediation and also need to be aware of their own potential for impeded judgment under the stress of the situation.¹³³

Law schools are a potential resource in this capacity. Law students could gain useful experience in client relations and negotiations, while at the same time assisting an individual as a personal advocate. The schools also can provide neutral territory where mediators and participants in mediation can receive training prior to entering the room. None of the mass mediation programs to date have incorporated this resource in the system design.

132. These services could be funded with recovery grants.

133. See Chris Guthrie & James Levin, *A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute*, 13 OHIO ST. J. ON DISP. RESOL. 885, 900 (1998) (calling for courts to provide pre-mediation education).

There has been little, if any, critical post-mortem examination of these mass disaster mediation programs. They uniformly appear to have positive results in that they settle a great number of claims. Settling great numbers of claims, however, is not the only measure of success. Party satisfaction is also a measure of success. Self-determination is at the heart of the process as well. Contributing to recovery in the larger sense and at the individual level is a valid and significant goal.

No studies have been published studying how the participants in mass insurance mediation programs feel about their agreements one or two years down the line. Nevertheless, these programs do show great promise and perhaps vision for the future. The potential for imbalance of power is a problem, but there may be some solutions to guard against it. Educating insureds is one solution. Toward that end, bar associations and law schools in could form cooperative programs to provide: (1) free seminars to educate insureds before they go to the bargaining table; (2) early claims evaluation regarding the suitability of the case for mediation; and (3) free representation and/or assistance at the bargaining table. Some of the factors contributing to one's ability to exercise self-determination we cannot change. But educating people before they engage in mediation and helping them as they participate in the mediation itself are also likely to create a better climate for mediation and to produce a higher rate of settlement with greater party satisfaction.