

DISASTER MEDIATION: LESSONS IN CONFLICT COORDINATION AND COLLABORATION

*Mel Rubin*¹

All of us have been affected by disasters, either directly or indirectly. Although natural and manmade disasters have occurred throughout history, the size and scale of future disasters will surely reach regional, national and international proportions. Indeed, there is now and forevermore a disaster industry, in which Alternative Dispute Resolution (ADR) professionals will certainly play an important role. These roles include:

1. Facilitating decision-making among insureds and insurance carriers.
2. Mediating between various governmental agencies at different levels.
3. Creating new ADR models to fit the nature of the disaster.
4. Assisting in the utilization of available resources at different times both pre and post disaster.

Today, our attention is drawn to ADR's role in disaster management. Recent disasters such as Hurricane Katrina and 9/11 remind us that such tragedies can and do happen; and highlighted the nation's lack of preparation and coordination for addressing and resolving the conflicts and problems that inevitably follow in a disaster's wake as well as in its preparation.

While focusing on post-disaster ADR and its use in resolving insurance claims, both residential and commercial, other relevant issues will also be discussed. These include appropriate design of pre- and post-disaster ADR programs, that address administration,

¹ Melvin A. Rubin, an attorney for over thirty-five years, has served as an ADR consultant, trainer and practitioner for the past twenty-four years. He helped design and organize the hurricane Andrew mediation recovery program for the State of Florida and once again after the disastrous 2004 hurricane season. He and his family personally experienced these disasters, which gives him special insight in rebuilding communities after incredibly emotional and traumatic life altering events. He assisted in the writing of the State emergency rules; training the mediators and monitoring the program. Mr. Rubin has written and lectured extensively for over thirteen years on disaster conflict resolution for government officials, insurance industry representatives and conflict resolution professionals, both nationally and internationally. This article is written in connection with the Cardozo Journal of Conflict Resolution's 2007 Symposium, *ADR in the Aftermath: Post-Disaster Strategies*.

costs and appropriate services, which are all major concerns and challenge of regional and national disasters.

EMOTIONALLY CHARGED ENVIRONMENT

As a person who has experienced hurricanes in South Florida since 1951, and particularly Hurricane Andrew of 1992 and the awesome foursome of 2004 (Charley, Frances, Ivan, and Jeanne), I can bear witness not only to the physical and financial damage done,² but also to the psychological and emotional impact, which can be even more devastating.

I found it incredibly sad, after a days-long evacuation, to drive home through barriers of huge banyan trees that for years had provided a beautiful shady corridor. Seeing boats and debris strewn across the streets in our effort to return home brought tears to my wife. We each feared for how our own home fared after we were forced to evacuate. We finally arrived home and find our mango trees had fallen in such a way that protected the house. These events and emotions left an indelible imprint.

Our devastation and sadness was insignificant compared to the feelings experienced by people who returned to find no home at all. But under either experience, it is imperative that the hope of rebuilding must be immediate.

This mindset is presented here not as a sad personal reminiscence, but rather as preparation for the ADR professional who comes to assist after a disaster. An outsider who charges into a traumatized community to help, may not fully appreciate the disaster's effects on residents, whether the immediate shock or the accompanying post-traumatic-stress disorder (PTSD).

² See The Collins Center for Public Policy, www.collinscenter.org [hereinafter Collins Center].

Year	Hurricane	Gross Damage
2004	Charley	\$7.7 billion
2004	Frances	\$4.8 billion
2004	Ivan	\$7.4 billion
2004	Jeanne	\$3.6 billion
2005	Dennis	\$2.2 billion
2005	Wilma	\$10.3 billion

See Citizens Task Force on Claims, *Hurricane Mediation*, June 7, 2007, <http://taskforceoncitizensclaimshandling.org/images/TAB10CollinsCenterMediation.pdf> (presentation in Tallahassee, Florida)(last visited Apr. 17, 2008).

Disasters affect people differently – physically, emotionally and psychologically. While all conflict is associated with trauma and drama, each disaster is also unique, both in the details of the traumatic event and in the experiences of the individual person. Some of the factors that must be considered in the design of an appropriate conflict resolution system are:

1. The nature of the disaster (natural or man-made);
2. The scope in terms of area, populations and involved governments;
3. Demographics;
4. Assessment of readily available local resources;
5. Extent of existing systems and structures from which to work; and
6. Time frames, including the finiteness of the disaster or its recurrence (such as hurricane season).

VULNERABILITY OF INSURANCE COMPANIES

The lessons learned from Hurricane Andrew were restoration, rebuilding and resurrection (the three R's) within the affected communities. From these lessons come the overall policy considerations that apply to any disaster recovery.

First, individual rights and interests must be balanced with collective rights and interests. The needs of the individual homeowner or insured are part of a picture that includes the larger community of homeowners, commercial owners and other users of affected property. Industries are affected not just locally, but also statewide, regionally, and nationally. This balancing act among competing interests creates tension because demanding higher insurance payouts to individual insureds is not necessarily best for the community in the long term.

Disaster recovery must also create awareness of the limits, both financial and otherwise, that insurance companies face in these mass disasters. After Hurricane Andrew and again after the 2004 hurricane season, individual policyholders, viewed as disaster victims, were joined by insurance companies, which also became victims.³

³ *Florida Suing Poe Insurers for Claims Cost*, SOUTH FLORIDA BUS. J., Apr. 1, 2008, <http://tampabay.bizjournals.com/southflorida/stories/2008/03/31/daily15.html> (subsequent to the back-

In past disasters, insurance companies have been financially ruined by inappropriate or excessive insurance payments. As the pool of insurance companies grows smaller, the individual citizen will be faced with a less competitive marketplace, resulting in fewer choices and guaranteed higher premiums and deductibles and often more coverage exclusions.

This is not an unusual occurrence when several disaster seasons occur back-to-back. As the premiums continue to escalate, more homeowners choose to forego insurance altogether, leaving them exposed to the danger of catastrophic property losses, mortgage defaults and foreclosure. No ADR process or professional works in a vacuum without acknowledging this reality.

The difficulty is the awareness of the conflict resolver and the usual narrower considerations of the affected parties. Moreover, this can seriously affect the neutrality and impartiality of the mediator. The nature of the disaster itself brings forth some of the most heart wrenching stories that one can hear without personally being impacted.

It seems apparent that those insurance companies that are multistate, if not multinational, are the ones that can survive major state or regional calamities. The only alternative again appears to be the quasi-government carrier,⁴ allowing the cost of the damages to be spread not just among the policyholders but the citizens as a whole. Yet the obviousness of this does not appear to translate to the responsiveness or preparedness for these disasters.

ECONOMIC FALLOUT

The full economic extent of any disaster cannot be fully appreciated at the time of the disaster.⁵ The disaster can continue with further quakes, more hurricanes, multiple bombings, floods and more fires. While resources become that much more strained, the economic impact is immediate. A break in a fuel gas line can cause gas prices to soar within days. But much more occurs.

to-back hurricane seasons, Poe Insurance Company had to be put into liquidation and their claims are now being administered through FIGA, Florida Insurance Guaranty Association).

⁴ See Citizens Property Insurance Corporation, <https://www.citizensfla.com/index.cfm> (Citizens Property Insurance Corp. was a created in part by the Florida Legislature in response to the need for a carrier funded through the public citizenry).

⁵ See Collins Center, *supra* note 2.

Construction materials become scarce and prices zoom. Labor dries up, and what is left goes to the highest bidder.⁶ Living accommodations may be significantly reduced, driving up rental costs or causing major population relocations. Stable communities must take in considerable numbers, taxing their transportation arteries, schools and entire infrastructure.⁷ Cultural and ethnic issues arise and may add to already emotionally charged situations.

Destroyed homes combined with mortgage foreclosures may significantly change a healthy real estate market. Major commercial establishments may be gone. The rebuilding process is in great measure triaged by these economic considerations, for example, the gambling establishments of Biloxi or the Bourbon Street area of New Orleans. Perceptions by citizens as to how the resources are allocated may reinforce years of neglect and lack of concern by governments. Disasters have a habit of bringing out the brotherhood and generosity of people, and also showing where the gold coins first go.

Earthquakes, hurricanes, floods and other natural disasters, are no less devastating than open war. Yet all governments prepare, plan and mobilize for war. With some exceptions, such as the European Marshall Plan, rebuilding after wars or disasters is more complicated and often overlooked until it becomes a reality.

GOVERNMENT PREPAREDNESS

In addition to the public policy dynamic between the public and private sectors, there are policy dynamics within each sector that must be taken into account. There are many government

⁶ See Tomas E. Kosterman, *The Appraisal Process*, CLAIMS MAGAZINE, Nov. 2007, available at <http://www.claimsmag.com/cms/Claims/Monthly%20Issues/Issues/2007/11/Columns/COLUMN%20for%20the%20record?origin=Channels-Restoration-Reconstruction>(giving an inside observer's analysis of the post hurricane season in Florida and suggests that thousands of catastrophe adjusters were brought in and that the hurricanes themselves "fostered an inflated a nebulous material and labor pricing environment.").

⁷ See NAOMI KLEIN, *THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM* 416 (2007):

In 2006, the Red Cross signed a new disaster-response partnership with Wal-Mart. "It's all going to be private enterprise before it's over," said Billy Wagner, chief of emergency management for the Florida Keys. "They've got the expertise. They've got the resources." He was speaking at the National Hurricane Conference in Orlando, Florida, a fast-growing annual trade show for the companies selling everything that might come in handy during the next disaster.

Id.

agencies from different levels of government who must coordinate their efforts.⁸ Having limited resources is a basis for collaboration, not to competition.

These obstacles must be removed ahead of time, not during the disaster itself. Likewise, political turf wars, overlapping efforts and other impediments need to be addressed and resolved before the next disaster strikes, not during or after the crisis.

It is clear that disasters of all kinds do not confine themselves to the neatness of governmental boundaries. Regions are affected, not simply by the direct hit, but also from the fallout. Whether it is population relocation, resource redistribution or economic fallout, responses must be developed to handle larger and more complex problems. This lesson was learned in environmental issues with the creation of super-funds and multinational responses to international environmental questions.

This becomes even more evident when the same communities experience repeat visits from the same or subsequent disasters. Initial success does not guarantee later successes. There is really no excuse for failure to prepare for disasters that are clearly anticipated, hurricane seasons, fire seasons and other similar regular events.

Heroic handling by governmental officials can result in political chips, *a la* presidential candidates, or prove to be a national disgrace to be an albatross for the remainder of some politicians' lives. Victim states may reevaluate their loyalty to a political party after over a century of allegiance. Disaster incompetence is unacceptable.

⁸ For example, in Florida subsequent to both Hurricane Andrew and the 2004 hurricane season, public resources were used from the Department of Insurance, (subsequently the Department of Financial Services), the Attorney General's Office, and various other executive and regulatory agencies which had a vested interest in disaster aftermath. Interestingly, as the fallout from a disaster ages, the involvement of more governmental agencies and regulatory agencies becomes apparent. For instance, the Department of Condominiums and Land Sales quickly saw its involvement and became involved in banking and finance as a result of the impact of insurance funds expenditures, and other matters.

DESIGNING A PROGRAM

Early Assessment

In order to create an ADR/mediation program to assist in disaster management, early assessment of the disaster is critical. Needs and losses must be prioritized, and available resources, both immediate and long term, must be triaged. Based on this assessment, an appropriate ADR process can be selected that is tailored to the disaster, the community and available resources.

Facilitating the obvious players must be done quickly with full commitment to the process chosen. The responsible government bodies and agencies must be ready to step in with well drafted emergency rules to allow the implementation of the process with the full commitment of all the stakeholders, particularly the insurance companies, their adjusters, support staff and governmental regulatory bodies.⁹

Neutral Administrator

To ensure the program's credibility, a neutral administrator must be appointed to oversee, implement and maintain the program.¹⁰ Funding for any ADR/mediation program will probably come from the insurance industry and the companies issuing the policies in that area.¹¹

The independent administrator must have credibility and the respect of all the stakeholders in the process. The government regulatory agency or agencies, the insurance carriers and the insureds must have confidence in the program. A competent and user-friendly staff, coupled with carefully selected and trained mediators, is crucial.

⁹ See Department of Financial Services Emergency Rules, FLA. DFS Rule 69BER06-02 (2006). Emergency Executive Rule adopted by the Department of Financial Services on an emergency basis subsequent to the disaster [hereinafter "DFS Emergency Rule"].

¹⁰ The selection of neutral administrators varies from disaster to disaster. So in the Gulf situation, the American Arbitration Association was appointed as the neutral administrator. Subsequent to Hurricane Andrew, the American Arbitration Association was again appointed. Following the 2004 hurricane season as well as Wilma and Katrina in Florida, The Collins Center for Public Policy was selected as the neutral administrator for the states mediation program.

¹¹ See DFS Emergency Rule, *supra* note 9.

At each point of contact, whether with the public or providers, complete neutrality must be both real and perceived. Continuous monitoring will help ensure this. Even a slightly perceived prejudice by either the insured or the carrier must be examined and corrected where warranted.¹²

The administrator will also make major logistical decisions. Physical location of offices, support staff, public outreach and technological needs must all be satisfied.

The administrator chosen for this cannot work alone. The related governmental regulatory agency must provide immediate regulations that are the framework within the model established. Those regulations must again fulfill all the same criteria elsewhere discussed. The regulations must protect the rights of both the victims and all contractual obligations of the parties.¹³

Confidentiality

Although confidentiality is maintained, and even acknowledged by written agreement, intrusions are constant and media scrutiny challenges the achievement of privacy. Moreover, the insurance carriers automatically have information about their prior settlements in other matters. Likewise, the insureds, particularly with the increased use of the public adjuster, are commonly subject to shared information about companies and particular representatives. Strategies and negotiation tactics become well known to both sides as well as to the neutral.¹⁴

Local Mediators

An appropriate group of ADR professionals must be employed. Initially, trainers and a small cadre of experienced ADR

¹² An example from personal experience: A former state supreme court justice was accused of bias in favor of the homeowner by one of the insurance carriers. The result was the need for the neutral administrator's representative to talk to that mediator. Interestingly, the former justice felt sufficiently compelled for his actions and justification for same that he volunteered to remove himself from the roster.

¹³ See DFS Emergency Executive Rule, *supra* note 9.

¹⁴ After providing and observing mediations well into the hundreds, the author can attest to the repetition with which certain representatives of the insurance carriers and public adjusters appear on behalf of the insured. Each side well knows the other side's tactics, and often times the mediator can play out the moves of the "dance" with unbelievable accuracy.

professionals may have to be imported if the affected area does not have such resources already available. Ultimately, however, it is absolutely essential that local ADR professionals be used. Because of the tailoring of the ADR process to the situation, the neutral may not always be primarily an ADR professional. In disasters involving primarily huge property losses, construction and building experts, business loss experts and others may receive preference.

Mediation Skills Training

Ensuring that ADR professionals receive adequate training with the requisite experience is essential, because the mediation program will be judged by the frontline mediators or other ADR neutrals. Representatives from the state's insurance regulator and insurance carriers with policies in the affected region should be invited to attend and participate so that they are fully invested in the process. Local leaders should also be a part of the training along with FEMA and other relevant agencies.

Follow-up training is critical as well, along with periodic bulletins, debriefings and updates. If at all possible, a hotline should be maintained for emergency situations.¹⁵

*Psychological Training*¹⁶

The curriculum must also include the emotional component. The mediator must be alerted to post-traumatic-stress issues, both immediate and delayed. The natural assumption would be that such additional training would be for the people attending the ADR process. Greater understanding of their mental and emotional state would be an incredible asset for any neutral in resolving the controversy. But such training would also provide greater insight into the neutral's own emotional and psychological state in

¹⁵ The maintenance of a hotline provides not only relief to the mediators but an opportunity to gauge what is happening in the field and later to be used in group debriefings.

¹⁶ See Frank Zenere, *Hurricane Experiences Provide Lessons for the Future*, NATIONAL ASS'N SCHOOL PSYCHOL., Feb. 2005, available at <http://www.nasponline.org/publications/cq/cq335flhurricane.aspx>. (all disaster trainings should contain a component dedicated to the psychology of disaster and post trauma effects. Resources for this are available in many places including FEMA).

dealing with such situations and the personal baggage brought into it as well.

Such training helps ADR professionals assist policyholders. Many of these people have lost homes, businesses and employment opportunities. And these losses have devastated not only the individuals themselves, but also their families and their communities. Disasters also increase the incidence of divorce, domestic violence and depression.

My own wife's depression was immediate upon approaching the house and seeing the destruction. My personal depression was delayed. Weeks after the disaster, when I conducted mediations, flashbacks occurred.

Security

This emotional and psychological toll may also create a need for security at the mediation sites. Safety and security for program personnel cannot be overlooked. In training as well as program design, consideration should be given to security when dealing with those who have experienced the loss of homes, businesses and their own sense of security.

THE FLORIDA MODEL

The state-sponsored insurance mediation program used in Florida in 2004 truly proved the axiom that necessity is the mother of invention. That year, four major hurricanes made landfall in Florida.¹⁷ The Florida State Insurance Commissioner recognized that the large number of unresolved homeowner's insurance claims had the potential to inundate the judicial system, prompting creation of a highly successful insurance mediation program.

In the Florida program, the old concept of conflict resolution gave way to a broader concept of conflict collaboration. Due to the large number of cases in the Florida insurance mediation program in 2004¹⁸ and the need for program credibility and neutrality, both real and perceived, an independent administrator was se-

¹⁷ See Collins Center, *supra* note 2.

¹⁸ See *id.* (there have been 25,328 mediation requests since November 2004).

lected to run the program. The program for residential claims was so successful¹⁹ that a commercial component was added.²⁰

Funding

By emergency executive regulation, the insurance company writing the policy was required to pick up the entire cost of one mediation session. Thus, the insurer paid the administrative charges, the mediator's fee and any other ancillary costs. Because the insurance company paid for only one session, however, the opportunity for lengthy sessions or second sessions was significantly reduced, except in the higher-value commercial claims.²¹

Mediators usually were paid on a per-case rather than an hourly basis. Consequently, mediators often worked three and four cases a day, limiting the time per case. Traditional mediator techniques and processes were trimmed to address the immediate need for homeowners to begin the rebuilding process.

Notice

In the insurance company's response to a claim, it sent the policyholder a first notice of the right to mediation, which described the program's rules and regulations, including preparation, session informalities and available options. Oftentimes, the notice of a request for mediation was incentive enough for the parties to resolve the claim.

¹⁹ *Id.* Settlement Rates: All storms (2004 and 2005 seasons) 86% settled and 14% impasse; 2004 storms 90% settled and 10% impasse; 2005 storms 81% settled and 19% impasse settlement details: Average settlement: \$23,058; settlement range: \$50 to \$1.5 million; the estimated settlement amounts as of May 2007 totals \$374 million. Personal Interview with Mark Pritchett, Collins Center for Public Policy, Inc., Feb. 20, 2008 [hereinafter Pritchett Interview].

²⁰ See Pritchett Interview, *supra* note 19. There have been 400 commercial residential mediation requests of which 75% are closed, with a 70% settlement rate.

²¹ See DFS Emergency Rule, *supra* note 9. The DFS Emergency Rule sets out the goal of the mediation program as well as the specific procedures to be followed and consequences for failure to follow those regulations.

Mediation Format

The session, usually with no attorneys present, commenced with the usual description of the process. Again to streamline the process, a video was first watched by the participants. The parties could use either joint sessions or caucusing. The session could be brief or last two to three hours. The final agreement was executed on a form authored by the Department of Financial Services and included certain nonnegotiable rights to the insured, including a window of escape. Release language was specific rather than general.

Commercial claims were given greater attention as a consequence of a number of factors not present in the residential program. In many of the commercial cases, attorneys were present. In many other cases, public adjusters appeared on behalf of the insured or with the insured. In condominium cases, the insured appeared through members of the board with full authority to settle the claim. Claims had to meet a threshold amount. Information, pictures and estimates had to be exchanged prior to the meeting and all physical inspections were also to be completed prior to the meeting.

The neutrals were also selected by the administrator, with either party still having the right to object. Experts, ranging from engineers to architects to general contractors, could appear. Time constraints were removed allowing more time for the sessions and further allowing continuations and multiple sessions.

If no settlement was achieved, the ADR process moved into another phase, called appraisal. Appraisal, an informal process²² and a modified arbitration proceeding, involved selected appraisers from each side choosing an impartial third party, called an umpire. This process has limited jurisdiction and power.²³ Subsequent alterations to the process resulted in a roster of professional umpires from which one would be assigned to the case. This change at-

²² See *Allstate Ins. Co. v. Suarez*, 833 So. 2d 762 (Fla. 2002) (finding that an appraisal is an informal proceeding and not a formal arbitration hearing).

²³ *Johnson v. Nationwide Mutual Ins. Co.* 828 So. 2d 102 (Fla. 2002) (damage assessment does not include coverage questions for the umpire.).

tempted to remove some of the politics of the umpire²⁴ selection that had previously occurred.²⁵

Immediate Payment

Critically, payment was made immediately if the parties reached a settlement. The insurance representative was required to appear with a blank check in hand. If not immediate, payment would have to be made within just a few days. No formal appellate process was provided, although relief was afforded in those few and rare cases where errors occurred. The Florida program had an incredibly high success rate.

PROGRAM CHALLENGES

Typical problems confronting the disaster ADR specialist include:

Attendance, Scheduling and Settlement Authority

Because of the exigency of the time, insurance adjusters, often required in the field, were frequently unavailable to participate in the mediations. Outsourcing to adjusting companies were often used, allowing the specialists more time in the field to inspect and settle cases on the spot.²⁶

Incomplete Information

Although the emergency regulations required full preparation and information sharing, this was often more aspirational than re-

²⁴ See *Citizens Property Ins. Co. v. M.A. & F.H. Properties, Ltd.*, 948 So. 2d 1017 (Fla. 2007) (speaking to the issue of umpire competency).

²⁵ See Kosterman, *supra* note 6 (“Without mandated impartiality of the appraiser’s role in the process, politics enter into decisions and the carrier’s appraisers may decide to attend to their future employment opportunities rather than fulfill their fiduciary responsibility to the insured and the process.”).

²⁶ *Id.* (representing an inside observer’s analysis of the post hurricane season in Florida and suggesting that thousands of catastrophe adjusters were brought in and that the hurricanes themselves “fostered and inflated a nebulous material and labor pricing environment.”).

ality. For obvious reasons, many policyholders' documents had been destroyed in the disaster. Adjusters often did not have the complete file. Creative mediators used the only session to forge a plan of action agreement (POA) to accomplish a resolution.²⁷

The commercial cases were more flexible and allowed more time and additional sessions. Sworn statements could be taken and informal discovery conducted. In some cases, it was straight to litigation.

Increasing Damage Estimates

Because of significant delays between the damage and the mediation, damage estimates could change considerably in the meantime.²⁸ Mold and other consequential damages were common, as were increased material and labor costs.²⁹ Moreover, delays often exposed the home or commercial building to risk of further damage as the next hurricane season rolled around.

Even the possibility of another impending hurricane would send the costs and availability of labor into a further spin. These factors required no discussion at the mediation table, because everyone present either knew or had already experienced this reality.

Technology

The technology of the modern world allowed incredible speed in resolving claims. Appraisers and public adjusters were umbilically connected to their laptops. Within the covers of the hard drive laptop computer was software that used a bit of a mathematical genius, capable of measuring tall buildings, estimating costs of repair or replacement within fractions, and presenting charts and

²⁷ Because all information was sometimes not available at the mediation, continuances occurred under the label of a POA.

²⁸ The top issues in all mediation negotiations regarding damage to real property include roof repair versus replacement, documentation for ALE, pool cages (2004 storms), and Poe Company Bankruptcy (2005 storms).

²⁹ See Dianne P. Crocker, *Environmental Affects of Hurricanes Katrina & Rita*, WATER & WASTES DIG. (2005), available at <http://www.wwdmag.com/environmental-impacts-of-hurricanes-katrina-rita-article6554>. Damage from mold became very prevalent when repairs could not be consummated quickly and the subject property was not repaired. Subsequent policies would often exclude coverage for mold and mildew damage.

tables at superhuman speed.³⁰ The focus was no longer inconvenience or suffering, but was material used, number of squares, wind versus water damage or preexisting damages, and more. Lastly, it was manipulation of all this information so that settlements could be accomplished.

ETHICAL AND MORAL CONCERNS

It is difficult to apply all the traditional ethical concepts when the exact ADR process is not yet selected. Although it should be said that at this very time consideration is being given to core values that apply to all forms of ADR.³¹ Moreover, the nature and demands of disaster ADR are different. The traditional standards and ethics associated with mediation must be tailored and relevant to the used ADR process and the exigencies of that particular disaster.

Disaster mediation presents both opportunities and challenges in this regard. The new model of conflict collaboration is truly a way of dealing with the fundamental issue of distributable compensation. Some of the most obvious ethical policy issues are as follows:

Imbalance of Power, Knowledge and Information

This may be the greatest difficulty encountered by the mediator and the program designer. Combine lack of sophistication of the homeowner (and sometimes the commercial policyholder as well) with lack of preparation and loss of documents, add an emotionally charged dispute within an emotionally charged post-disaster environment, and a classic power imbalance between insured and insurer is created.

Depending upon resources and other factors, there are a number of possible ways to address this power imbalance. First, a regulatory representative or volunteer attorney could be available prior

³⁰ Various software was utilized and has become the norm if not primary authority on estimating costs and materials. One such program is called exactimate which was used by both the insurance carriers and the public adjusters.

³¹ The Florida Supreme Court Committee on Alternative Dispute Resolution Rules and Policy is now considering, through one of its sub-committees, a "core value" standard that would apply across the board to various ADR processes.

to the mediation to provide information in a variety of forms, such as videos, written information and personal counseling.³²

Second, the ADR professional may use pre-mediation conferences with the parties, particularly the policyholder, who may be nervous. The use of meetings before the actual ADR joint session is increasing in use and productiveness. These warm-ups accomplish a jump-start to the formal meeting and allow assessments by everyone of everyone. After each person has eyeballed the other there still remains the question of the dynamics between the parties. Risk analysis, personalities and negotiating techniques can be more easily determined in the private session. Trust can be built and suggestions planted at this early stage. Another growing technique is the use of coaching during these private sessions. The opportunity of staging, creating progressive and productive agendas, dealing with logistics and many other concerns can be addressed.³³

Third, the regulatory representative or attorney could be invited to participate in the mediation or be available by telephone to answer questions as they arise.³⁴

In Florida, the power-imbalance problem was addressed by including a government staff attorney in the mediation process. One wonders as to the effect on the mediation when the insurance regulator is present. However, for the most part, the industry welcomed the regulator's participation.³⁵

Of course, these approaches may not be applicable to more complex commercial claims, which still seem to follow the more traditional models of conflict resolution.

*Confidentiality*³⁶

During the mass media blitz of a national disaster, confidentiality of mediated settlements is almost impossible to maintain. In fact, whether the participants themselves sincerely believe in confidentiality is highly questionable.

Families, neighborhoods, communities and many others are involved. Material suppliers and laborers know almost immediately what the insurer paid, as well as the mortgage company and others.

³² See DFS Emergency Regulations, *supra* note 9.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*; see also Florida Rules for Certified and Court-Appointed Mediators, Rule 10.360.

Even the insurance company may want certain disclosures in order to add credibility to its payment schedules and to establish its honesty in dealing with all insureds in the same manner, without any prejudice to certain policyholders. At the same time, and because of so much transparency and the repeat players, “setting examples” becomes an obstacle to many otherwise easy cases. “Holding the line,” “sending a message,” and other similar catch phrases permeate all the ADR processes considered.

*Impartiality, Objectivity and Neutrality*³⁷

The integrity of the ADR professionals and the program is critical to the success of any ADR program of the magnitude of the Florida program, which has already handled several thousand cases and still continues today. Despite the intense emotions generated by such disasters, mediators must show empathy without allowing their personal emotions to interfere with their roles.

This neutrality is particularly important where the mediator, too, suffered injuries or damages similar to the claimant’s. Self-monitoring and program review may be helpful, but to some extent no one is sanitized of their feelings after hearing the personal stories of the claimants. Reinforcement of this point cannot be overstated.³⁸

Rethinking Mediation Processes

When the relevancy and practicality of enforcing confidentiality is considered in combination with the power-imbalance issues discussed above, the very foundations of mediation may need to be rethought when applied to the extreme conditions of post-disaster mediation. Confidentiality, which has been described as the foundation, keystone, bedrock and so on of mediation, may in fact require reexamination, if for no the reason than whether it retains any reality or credibility. In this regard, with companies, adjusters, regulatory bodies, administrators and many others keeping their

³⁷ See Florida Rules for Certified and Court-Appointed Mediators, Rule 10.340.

³⁸ Although every mediator was trained and attempted to maintain objectivity, neutrality and freedom of bias, it was not unusual to hear mediators discuss cases and grapple with their own feelings.

own scores and statistics, this subject may even be beyond debate at this point.

THE CREATION OF A DISASTER INDUSTRY AND CULTURE

The growth and importance of post disaster recovery can be measured now in the maturation of a cottage industry to “a disaster response industry” that provides employment to tens of thousands.³⁹ Recognize the public and private adjusting profession that has grown. Assessment experts, special insurance programs, ADR specialists and special governmental units are examples. Employment that is based on disaster and damages, a reality of life not unlike accidents, death and all the other vagaries of life.

Consider the growth of government regulation, major construction shifts in materials and codes and disaster preparation creations-hurricane proof windows, power generators and more. Insurance companies have created their own mediation and ADR programs for quick resolution of claims.

The question must be asked-are we willing to accept more of these disasters as it is weaved into our own fabric of society? Not a judgmental question but rather another facet of our lives.

LESSONS LEARNED AND SUGGESTIONS

My personal experiences with hurricanes in Florida and involvement in large-scale post-disaster mediation programs have changed my concept of security for myself, my family, and my community. ADR, and mediation in this context, will never be the same for me.

With the next disaster, the ADR community can build on this conflict-collaboration framework to meet the needs of disaster-affected individuals, businesses and communities, particularly in connection with insurance claims. Preparation by cooperating government entities, particularly regional and national, is an absolute necessity.

³⁹ See KLEIN, *supra* note 7 at 415 (“Signs of the future were already in evidence by the time hurricane season rolled around in 2006. In just one year, the disaster response industry has exploded, with a slew of new corporations entering the market, promising safety and security should the next Big One hit.”).

The loss of commitment in the rebuilding process will further diminish and weaken our already shaken confidence. Excuses and apologies are unacceptable. The public and private sectors have a mutuality that requires not only acknowledgement but commitment.

The private sector and the individual must accept responsibility for the risks incurred that set up the aftermath of the disaster. Issues must be openly discussed that where building occurs that must be readily aware of the dangers associated with that location, that the owner, homeowner or commercial, will pay for that privilege and risk. Throughout history, these areas – port cities, mountain retreats, volcano valleys, and low-lying flood plains – have been populated, destroyed and rebuilt.

National-level responses are required and should be in place before the disaster hits. These same national agencies or entities must have the capability of not only coordinating with local and state agencies but also international entities. Those international entities may not be confined to nations or other governments, but rather multinational companies, including insurance companies.

THE GROWTH OF THE UNINSURED CLASS

However, unlike those historical days, there is either a greater premium on life or the availability of insurance with significant premiums. Since the success, or at least the longevity, of the insurance industry should educate governments on risk analysis and being responsible for them. As certain governments secede from larger governmental entities to enjoy their own wealth or separateness,⁴⁰ and avoid sharing some of the social and moral responsibilities associated with modern day interdependencies, what should be the response of the greater governments? If a small municipality secedes from the county to create its own entity, particularly when it is in a high risk geographical area, how should the risk be distributed? Use of resources for disaster recovery should be without discrimination or preference, yet an examination of recovery,

⁴⁰ *See id.* (“At the same time, public infrastructure around the world is facing unprecedented stress, with hurricanes, cyclones, flood and forest fires all increasing in frequency and intensity. It’s easy to imagine a future in which growing numbers of cities have their frail and long-neglected infrastructures knocked out by disasters.”).

reimbursement and aid programs are perceived by many as in fact giving less to those who need it most.⁴¹

Moreover, if in fact property insurance follows the highway created by the health care insurance industry, then there will in fact be a sharp divide between those who have insurance or are capable of self insurance and those who cannot afford either. If lessons are to be learned they must include programs for the growing class of the uninsured, either through dedicated government assistance, joint ventures between the private and public sectors, or special private programs providing affordable insurance. Much like providing financing, the time of red lining is over. All have the right to purchase their own property and more importantly to be able to hold on to it!

ADR, in all its variations, can provide leadership and assistance in leadership. The various levels of the public sector require cooperation and communication and collaboration with the private sector is the only way to insure success. Conflict collaboration and cooperation is the answer for many of the obvious and not so obvious problems. What leader or citizen could truthfully say their neighbors' problems must be shared?

CONCLUSION

Disaster preparation and recovery is well within the job description of the ADR specialist. Whether it is in the context of mediator, arbitrator, facilitator or other forms, recognition clearly exists for conflict collaboration amongst all the interests involved. While a great deal of the suggestions relate to a larger approach, e.g. federal and regional, it is still the local community that controls. Even more potent is the individual who may create the very conditions conducive to the disaster.

We have the opportunity to make well-considered and competent contributions to our fellow citizens and to receive personal and professional fulfillment of extraordinary meaning. Our shared hope must include the restoration, rebuilding and resurrection of our way of life after any disaster.

⁴¹ *Id.* at 413 ("Not so long ago, disasters were periods of social leveling, rare moments when atomized communities put division aside and pulled together. Increasingly, however, disasters are the opposite: they provide windows into cruel and ruthlessly divided future in which money and race buys survival."). *But see Zenere, supra* note 16.