THE VIEW

MINNESOTA LAWYERS MUTUAL
INSURANCE COMPANY

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MLM ANNOUNCES 28TH YEAR OF CONSECUTIVE DIVIDEND TO POLICYHOLDERS

By Paul Ablan, President and CEO

Minnesota Lawyers Mutual Insurance Company is proud to announce that we have returned $2.2 million to our policyholders as dividends. Dividend checks were mailed in February and shared among law firms that had policies in force with MLM on December 31, 2015.

Our operating results in 2015 were greatly improved over the prior year. We are proud to report not only a 46% increase in the dividend over 2014, but also a growth in policyholder surplus of more than 3%. We are very pleased to reward our policyholders and to grow our surplus in the same year.

Although no insurance company can guarantee a dividend from year to year, MLM has paid more than $49.5 million in policyholder dividends since 1988. All of us at MLM pledge to do our best to continue this fine tradition.

Paul Ablan
President and CEO

Elsewhere in this issue of The View, you will read about the growing trend towards alternative dispute resolution.

I hope you enjoy the issue, and I wish you and your practice great success in 2016. ▪

Mediator Liability Risk Grows as More Lawyers Become Neutrals

By Todd C. Scott, VP Risk Management

For more than two decades the number of civil, commercial and family law matters involving a mediator has steadily been on the rise as courts have sought relief for their backlog of filed cases, and litigants seek cost-saving strategies. Even in times of economic recovery, the price of litigation continues to rise, adding further incentive for parties to seek cost-effective and flexible ways to resolve disputes through alternative dispute resolution.

Now, another wave is coming, adding to the trend of readily available, highly experienced third-party neutrals: retiring baby boomer lawyers retooling their practice and becoming mediators.

The retooling for retirement trend is understandable. Lawyers responding to economic surveys have generally indicated in significant numbers that they plan to work beyond traditional retirement age, taking on less time-consuming work and adding more flexibility into a part-time work schedule. Retiring lawyers tend to view their legal career as sufficient training for what is perceived to be the less rigorous challenges of assisting parties in dispute.

But becoming a third-party neutral does not come without challenges, or the risk of liability. Although the chances of being sued as a mediator have traditionally been low, that may be changing too.

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Featured:

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CAN A MEDIATOR BE SUED?

"Can I sue a mediator for malpractice?" That was the question recently posted to the legal services website Avvo from an anonymous person who described themselves simply as "divorced from Indiana."

For those that are not familiar with the website, Avvo Q&A is an online forum where consumers can get their legal questions answered for free by more than 250,000 participating lawyers, or search more than 8 million previously asked questions and attorney-provided answers. In theory, lawyers who are answering the questions are experienced and "Avvo-rated" in order to make sure consumers are getting correct legal advice. For the record, risk management and insurance professionals have long advised lawyers to stay away from all opportunities to answer legal questions from complete strangers who are not their client.

But the question generated several responses from lawyers that regular readers of the forum would immediately identify as unusual. In short, the attorney responses informed the divorced person from Indiana that not only did the mediator not commit malpractice, but several lawyers went on to opine that suing a mediator for malpractice is almost never done and rarely successful.

There are secondary authorities that support the attorneys' responses to the divorced reader in Indiana. In a 2003 article published by Boston University Law Review titled, "Suing Mediators," author Michael Moffit points out in the first chapter titled, "Suing Mediators is Difficult," that at that time there was only one published case in which a mediator was found liable to a party for mediation conduct. And in that case, the mediator successfully appealed the jury award and the judgment was reversed.

The Boston University Law Review goes on to cite several reasons why the author believes mediator liability has traditionally been considered rare and hard to establish. Among the reasons cited:

- Clear standards of practice for mediators are often difficult to identify and liability is difficult to prove. The plaintiff has the burden of demonstrating both that the mediator had a duty to conform to certain standards of conduct and the mediator engaged in conduct that breached those standards.
- A party can generally leave a mediation at any time, making claims such as intentional infliction of emotional distress and false imprisonment only applicable in outrageous circumstances.
- Mediations generally take place in a context where no contractual relationship between the parties exist, making it a challenge to assert that a mediator tortuously interfered with a party's contractual rights.
- The subject matter of most mediations is typically insufficient to support an invasion of privacy action against a mediator who revealed confidential information during the mediation process.
- Unfavorable settlement terms cited as injury by the mediator to the plaintiff create situations where damages would be difficult to demonstrate.

Adding to the difficulty in establishing mediator liability, some states have carved out quasi-judicial immunity for mediators involved in resolution activities for third-party disputes. No mediator should assume such immunity exists without first researching the applicable statutes involving third-party neutrals, arbitrators and mediators in their local jurisdiction.

THE HIGHLY NUANCED ROLE OF A LAWYER MEDIATOR

Despite all the circumstances that traditionally have made it difficult for a party to sue a mediator or arbitrator, today's society is more litigious than ever. Civil actions to set aside a settlement are more common and a petitioner looking to back out of a settlement may allege that the mediator engaged in fraudulent inducement, fraudulent misrepresentation, duress, or that the petitioner was of diminished capacity in an attempt to quash the settlement agreement.

Malpractice claims against lawyer mediators are generally brought under the theory that the mediator breached his or her contract to a party in the dispute, or that the mediator failed to adhere to his or her fiduciary duties owed to one or more of the parties.

Allegations of breach of contract are the most frequently cited. A mediator who presents himself or herself to the parties as a neutral facilitator but later is perceived to have neglected his or her duty to be impartial or objective may find themselves facing allegations of having breached express or implied promises to the party's detriment. In those matters, the mediator will be held to reasonable standards of diligence, care or competence.

Allegations involving a breach of fiduciary duty by the mediator are more difficult to prove, but are also commonly cited by a petitioner seeking to quash a mediated settlement.

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By agreeing to mediate a dispute involving parties who may be divulging confidential and sensitive information, a mediator has impliedly agreed to be bound to duties of fidelity and loyalty. As a fiduciary, the mediator has a duty to keep the parties fully informed about the mediation and its progress, and to keep confidential sensitive information learned during the course of the mediation.

Claims against mediators can involve several allegations of misconduct. Among the conduct alleged:

- The mediator was not authorized to disclose certain confidential information;
- The mediator miscommunicated to a party information that made the conflict worse;
- The mediator's conduct constituted fraud or misrepresentation;
- The mediator's conduct amounted to a breach of neutrality;
- The mediator's conduct during the mediation was a breach of contract;
- The mediator coerced a party to settle the matter;
- The mediator conspired with a party involved in the dispute;
- The mediator failed to disclose prior dealings with a party to the dispute;
- The mediator failed to disclose threats of violence where later an assault occurred.

Conflicts of interest are of particular concern for a lawyer mediator. A mediator who fails to properly assess the appropriateness of his or her involvement in an upcoming mediation and fails to identify or disclose prior dealings with one or more of the parties will be seen as having breached a fiduciary duty to be loyal and candid with the parties.

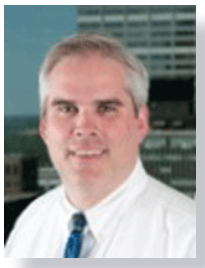
A lawyer mediator is also bound to any rules of professional conduct that address the ethical obligations of lawyers acting as a third-party neutral. There is an affirmative duty for lawyer mediators to inform unrepresented parties that, although the mediator is working on their behalf, the mediator is not solely looking out for their interests. The rule adopted in most jurisdictions is modeled after ABA Rule 2.4 Lawyer Serving as Third-Party Neutral. The relevant part concerning unrepresented individuals reads:

ABA Model Rule 2.4 Lawyer Serving as Third-Party Neutral

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that the party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

This concept can sometimes be difficult for unrepresented parties to understand. Good use of written communications by the lawyer that explicitly sets forth the role of the mediator and the nature of mediation services at the outset of the matter can potentially alleviate significant and troublesome misunderstandings by unrepresented parties.

Perhaps the most difficult adjustment for lawyers transitioning to the role of a mediator is embracing the idea that they no longer go into a mediation as zealous advocates for a single party. Lawyer mediators must work diligently, competently and with a sense of loyalty toward all parties involved in the dispute. That's not always easy to do while avoiding the perception that the outcome is guaranteed, the lawyer mediator has provided legal advice or favored one of the parties, or has set up impossible expectations. Specialized mediation training is a must even for the most experienced lawyer or judge who decides to perform mediation services, and it may be the best way for the lawyer to ensure he or she will continue to benefit the public and understand the highly-nuanced role of a third-party neutral. ▪



Todd C. Scott
VP Risk Management

The Emotional Aspects of Dispute Resolution

By Alice M. Sherren, MLM Claim Attorney

It used to be that lawyers were advised to eliminate emotion from their work. After all, lawyering is about facts and being right, not about trying to see where the other side is coming from…right? In reality, removing emotion from dispute resolution is both impossible and ill

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advised. Lawyers who ignore the role of emotion in their cases do themselves and their clients a major disservice.

ABA Model Rule of Professional Conduct 2.1 Advisor indicates attorneys may, when rendering advice, refer to moral, economic, social and political factors that are relevant to the client's situation. In exercising independent professional judgment and rendering candid advice, it is important to be aware of how emotion affects legal representation, and especially dispute resolution.

Understanding that emotion fuels disputes can often allow resolution. Rather than ignore the power emotions have over people trying to resolve a dispute, the trick is to empathize with all parties involved in a negotiation and enlist positive emotions to come to a mutually agreeable resolution.

PARTY V. PARTY

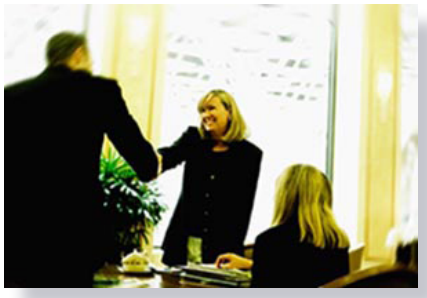
Before beginning to negotiate a dispute, it is important to understand what is truly at issue. Sometimes, a contract dispute is simply about party A breaching the contract and party B wanting compensation. But often, other factors have far greater influence over the parties' ability to reach a resolution. For example, a dispute over property might not really be about the land at all but rather about wounded pride going back generations. Family law disputes are notoriously fraught with understandable emotional issues that cannot be compensated in the law. Disputes over distribution of an estate can involve deep-seated emotions that have brewed and intensified over a lifetime. Some parties cannot even be in the same room together without visible animosity if not actual violence erupting.

As lawyers, we are not miracle workers. We cannot heal the wounds of former business partners, spouses or family members in the course of resolving a legal dispute. But we can be cognizant of the "human" or emotional aspect of conflict resolution, and make an effort to understand what really drives each party. Sometimes, an apology along with a check would allow a resolution that otherwise seemed impossible (because deep down it wasn't about the money). Sometimes, an offer to return grandma's urn allows an heir to stop challenging certain distributions under the will.

A determination of what is really at issue in a dispute can involve asking deeper questions of your client, and seeking deeper answers from the other side. When doing so, it is important to keep in mind the parameters of ABA Model Rule 1.6 Confidentiality of Information and Rule 3.4 Fairness to Opposing Party and Counsel. In some circumstances, it may make sense to obtain your client's consent to disclose certain information or motivation to bring to light a potential resolution, and it may make sense to ask opposing counsel to do the same.

CLIENT V. LAWYER

As lawyers, we tend to have better control managing the expectations of our clients if we understand what motivates them. As contemplated by ABA Model Rule 2.1 Advisor, we should find out what is really important to our clients in a dispute, which issues are beyond compromise, and which issues are true bargaining chips. As soon as possible, we should endeavor to determine the same for opposing parties. Talking candidly with opposing counsel can reduce friction among parties and streamline the negotiation process. Getting to the root of the dispute as soon as possible allows "petty" issues to all but disappear so effort can be focused on the issues that will make or break the negotiation.



Managing your relationship with your client is vital to successful negotiation. The comments to ABA Model Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer provide excellent guidance in allocating authority between yourself as lawyer and your client. While the client has the ultimate say in how the representation should be accomplished, the lawyer should provide significant legal guidance, while contemplating the additional parameters addressed in Rule 2.1.

Once you understand the heart of the dispute, it's important to be honest with your client if he or she has unreasonable expectations or is allowing emotions to impede resolution. The comments to ABA Model Rule 1.4 Communication direct attorneys to be in regular communication with clients and to be certain to explain the ramifications of various actions or inactions. Talk with your clients about how their demeanor can affect the opposition's reaction to proposed resolutions. Be clear about which issues are deal breakers, which are somewhat negotiable, and which can be easily conceded by your client. While a lawyer is not a therapist, sometimes being direct with a client about emotions could allow a resolution that otherwise seemed impossible.

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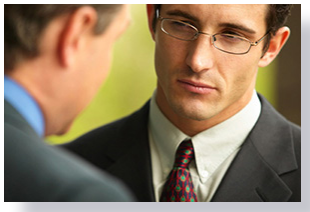
LAWYER V. LAWYER

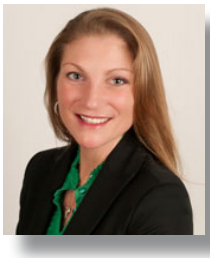
Especially as we mature in our practice, lawyers get to know other lawyers on a professional and sometimes personal level – for better and for worse. Be careful to not let friendships or animosities impede resolution of the case at hand. The comments to ABA Model Rule 3.4 Fairness to Opposing Party and Counsel provide some guidance on what conduct is specifically prohibited. You will likely find going above and beyond what the rules require in terms of interaction with opposing parties and counsel will serve your client well (not to mention make your work life more pleasant). A confrontational demeanor may prevent an otherwise acceptable proposal from being heard. It may lead the other side to believe you are trying to manipulate or trick them somehow, and therefore not trust you or your client. Professional courtesy goes a long way in dispute resolution. Even when you might want to use a condescending tone, recognize that this tactic may "work" in the short term but over time will lose you respect in the legal community and can affect your ability to advocate for your clients.



LAWYER V. MEDIATOR

A skilled mediator can resolve disputes that seemed impossible. But not all mediators are the right fit for all cases, parties or lawyers. When choosing a mediator, keep in mind the emotional state of your client and of yourself. For example, if your client is prone to tears and likely to disengage if pushed, steer clear of hard hitting mediators, if possible. Likewise, if your client drives a hard bargain, seek out a mediator who will be able to work with the client and get them to see where their position may have weaknesses.

At the end of the day, we are all human beings with complex reasons for our actions and desires. Pretending that emotion plays no role in dispute resolution is likely to backfire. Using emotion to your advantage is a skill that will help make your practice more fulfilling and hopefully result in better results for your clients. ▪



Alice M. Sherren
MLM Claim Attorney

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