Model Parameters for Post-Disaster Insurance Claim Mediation Programs
Introduction

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

In the aftermath of the Northridge Earthquake and Hurricane Katrina, a number of state insurance regulatory agencies created mediation programs. The stated goal of these programs is to assist in the recovery process by quickly and inexpensively resolving property claim disputes. ADR mediation programs reduce litigation of claim disputes but do not remove it as an option for policyholders. Mediation is generally non-binding and voluntary. A policyholder can participate in mediation and still pursue litigation if the dispute does not settle, as long as they haven’t expressly waived that right. In theory, there is value to a state insurance regulatory agency administering a mediation program because they have relevant authority and expertise and because resolving claim disputes is part of their mission.

However, data from state-run post disaster claim dispute mediation programs suggests that to date they have been largely ineffective in achieving fair resolution of policyholder claims. In some states, mediation programs were little used; in other states, policyholders were extremely dissatisfied with the programs, complaining that the process was inadequate and the results unsatisfactory.

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

United Policyholders, a leading advocacy organization for insurance consumers, has made providing assistance to victims of disasters a priority of its efforts. (uphelp.org) It has created books, web-based information, and other materials that policyholders can use to prepare for and recover from disasters, including a “A Policyholders Guide to Mediation,” and it provides referrals through a network of experienced attorneys and public insurance adjusters.

UP also engages in research and advocacy for insurance consumers in litigation, legislative action, and at the National Association of Insurance Commissioners. That dimension of its work is the origin of this project. In the Spring of 2011, Anne K. Scott, a law student working under the supervision of UP Executive Director Amy Bach, prepared a report entitled “Disaster Relief Mediation Programs: A Desirable Option or an Unappealing Alternative for the California Insurance Consumer?” This report draws on and extends that research. It was prepared by Rutgers University School of Law students Oliver Barry and Abraham Tran under the supervision of Distinguished Professor of Law Jay Feinman and United Policyholders Executive Director Amy Bach, Esq.

This report examines past efforts and best practices in mediation and outlines a model for state-run post-disaster mediation programs. This includes a plan for a Model Mediation Program that will allow for the rapid resolution of a large number of property claim disputes, while balancing the potential needs of individuals and communities harmed by large-scale disasters against the costs of such a program and the interests of insurers.

The proposed Model Program aims to facilitate the quick resolution to disputed claims and to bridge the imbalance of power between policyholders and insurers. The first feature of the Model
Program is permanency – the Model Program should have infrastructure permanently in place to allow for quick and effective implementation when a disaster strikes. The Model Program further focuses on ensuring that it is well advertised and can actively place policyholders on notice of their right to mediate and how the program operates. Therefore, the Model Program facilitates the preparedness for mediation of participating parties. Finally, the Model Program requires the reporting of comprehensive data to allow for a meaningful evaluation of its functions.
Table of Contents

Brief History of Mediation in Disaster Scenarios ................................................................. 4
The Organization of Issues in a Mediation Program ............................................................. 5
Model Program Section 1.0 – Infrastructure and Promotion of the Program ....................... 6
  1.1 Permanent Program - The Model Program must be put in place permanently, rather than created or implemented in response to one specific disaster ......................... 6
  1.2 Well-Advertised - The Model Program must be passively advertised prior to its implementation and actively advertised upon its implementation to maximize policyholders’ awareness of the program ................................................................. 6
  1.3 Accessible Guidelines and Regulations – The Model Program’s guidelines must be readily available to policyholders ................................................................. 6
  1.4 Notice – Insurers must notify policyholders about the availability of mediation through the Model Program when policies are purchased, when the program is implemented, and when a claim is disputed ................................................................. 8
Model Program Section 2.0 - Eligibility and Participation .................................................. 9
  2.1 Good Faith Requirement – Insurance representatives must have knowledge of the claim and authority to settle for the full amount in controversy ........................................ 9
  2.2 Compensation Guidelines – Compensation for mediation must be fair to the mediator and must be related to the importance of the claims dispute ........................................ 9
  2.3 Funding – Insurers must bear the general costs of mediation ....................................... 10
  2.4 Triggering Event – The Model Program must be triggered by an event which meets criteria such that the program’s benefits outweigh its costs ........................................ 11
  2.5 Participation of Insurance Providers – Participation in the Model Program must be mandatory for insurers ................................................................. 11
  2.6 Eligibility for Mediation – State governments and program administrators should determine what requirements maximize the Model Program’s efficiency ............................... 12
Model Program Section 3.0 – Conduct of the Mediation .................................................... 12
  3.1 Obligations for the Parties Prior to Mediation – The Model Program must require parties to mediation to be educated and prepared for mediation and assist policyholders in fulfilling these duties ................................................................. 12
  3.2 Administration – The Model Program should ideally be administered by an independent ADR provider with experience in post-disaster scenarios ........................................ 13
  3.3 Availability of Advisors – The Model Program must provide advocates and experts to policyholders in preparation for, as well as during, mediation ........................................ 14
  3.4 Structure of Mediation – The Model Program’s structure should be established prior to implementation, and also allow for modification based on the triggering event, to meet the individual needs of different communities ................................................................. 15
  3.5 Rescission Period – The Model Program must have a rescission period during which policyholders can back out of settlements reached through mediation ........................................ 16
  3.6 Reporting Requirements – The Model Program must report enough information to allow for a meaningful analysis of the program’s success ................................................................. 16
Conclusion ............................................................................................................................... 18
Brief History of Mediation in Disaster Scenarios

In 1992, Hurricane Andrew struck Florida, prompting the creation of a Florida state program to mediate claims resulting from mass disasters. Since then, at least six other states have implemented mediation programs, including Alabama, California, Louisiana, Mississippi, Texas, and North Carolina. Following a series of 4 storms that struck Florida in 2005, 12,160 mediation requests were received. By December of 2005, roughly one-half had been settled prior to mediation, and a settlement rate of 92-93% was realized on the remainder. In 2008, Hurricane Ike struck the Gulf Coast region and, as of December the same year, more than 730,000 insurance claims were filed for damages sustained. Of these numerous claims, over a thousand were resulted in complaints to the Texas Department of Insurance. However, the largest example of mediation in post disaster scenarios are the programs created in the aftermath of Hurricane Katrina.

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

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

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

---

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

At the same time, the programs also failed to protect many vulnerable policyholders. Anecdotal accounts by participants relate stories of lowball offers, inadequate resources to prepare for and assist in the mediation proceeding, and failure by insurers to participate in good faith.9 Policyholders reported insurance representatives lacked authority to settle the claim for the full amount in dispute (despite safeguards supposed to ensure this),10 that they received lowball settlement offers, and described the mediation as a “waste of time.”11 All the while, policyholders mediating disputed claims were being housed in FEMA trailers, forced to deal with an unfamiliar claims dispute process, while suffering from psychological and emotional pressure. Their insurance representative counterparts did not suffer from these deficiencies.

Clearly, there is a large imbalance of power between policyholders and insurers. After a disaster, that imbalance becomes even greater. Despite the positive assessment by the government and the insurance industry of past programs, there are horror stories that must be acknowledged. When considering the information pertaining to the number of disputes that were resolved via the mediation programs post-Katrina, we found no qualitative data to assess the soundness or fairness of these resolutions, beyond the mere subjective feeling of the participants. Moving forward, a Model Program must do better.

The Organization of Issues in a Mediation Program

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

---

10 Compiled from interview with Doug Handshoe, *Slabbed*, available at http://slabbed.wordpress.com/
11 See A Trip, supra note 10.
Model Program Section 1.0 – Infrastructure and Promotion of the Program

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

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

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

Of the some 700,000 insurance claims filed in the aftermath of Katrina, the AAA settled roughly 80% of 17,000 mediated claims in Louisiana and Mississippi by 2007. This success rate indicates that policyholders were aware of the existence of the Katrina mediation program. However, the number of claims mediated and settlement rate do not paint a complete picture of how successful the program was or how much delay was caused because more data is necessary for a meaningful analysis. To the contrary, the months of delays resulting in emergency rulings suggest that a pre-established or permanent plan could have helped to avoid the need to rush a plan into action. As well, a permanent structure would allow for the accumulation of valuable practical and institutional knowledge.

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

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

The existence of a Post-Disaster Mediation Program should be well-advertised. This will maximize awareness of the program. Advertisement of a mediation program is important to

---

maximize the number of potential beneficiaries that will utilize the Model Program when the time comes.

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

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

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

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

\subsection*{1.3 Accessible Guidelines and Regulations – The Model Program’s guidelines must be readily available to policyholders.}

\textsuperscript{13}See Consumer Disaster Mediation, available at http://www.ncdoi.com/Consumer/Consumer_Disaster_Mediation.aspx
Guidelines and regulations administering the program must be accessible in a number of locations, including online, through brochures, and by telephone. Multiple mediums through which the program is advertised will promote accessibility before, during, and after a disaster.

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

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

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

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

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

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

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

Even critics of Katrina’s mediation program generally feel it adequately notified policyholders of their right to mediate disputed claims. A permanent program is situated to be even more successful. The model program should both require insurance companies to advertise to policyholders the existence of the mediation program and its functioning when they first purchase the claim, including guidelines for what may trigger the program’s implementation. Furthermore,

---

\(^ {15} \)See California Department of Insurance, *supra* n.14.

\(^ {16} \)See Lane, *supra* note 7.

\(^ {17} \)32 LA. REG. 60 (Jan. 20, 2006) (Emergency Rule 22).
insurers should provide notice when a disaster occurs and causes the program minimum damage requirements to be met. Lastly insurers should again give update notices to policyholders when the company is contacted about a claim, when a claim is filed, and when a claim is disputed. The notifications should follow all of the clarity, legibility, and informational guidelines the Katrina program used.

Accordingly, the Model Program should inform policyholders of the program’s triggering requirements ahead of time, should notice the policyholders when the program may be implemented, and should update the policyholders as to the progress of any requested mediation.

Model Program Section 2.0 - Eligibility and Participation

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

Parties are required to participate in mediation in good faith. The Florida program included in this requirement that insurance representative have knowledge of the claim and authority to settle for the full amount in controversy. This good faith requirement is important to the mediation process and other programs included it as well. The program should provide for harsh penalties should insurers fail to comply with this requirement as less than good faith participation will undermine the integrity of the Model Program.

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

Accordingly, the Model Program will include a Good Faith Requirement as an essential feature that includes guidelines where possible, particularly where easily assessed guidelines are included, but will allow mediators to determine when violations have occurred.

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

---

The Model Program’s costs will include payment to mediators and/or the costs of using neutral mediation facilities. The best practice for mediator compensation should be based on either an hourly or a daily rate. Rutgers School of Law ADR Professor Viniar notes that an hourly system of compensation will allow the parties involved, in conjunction with the professional mediator, to determine the importance of a specific claims dispute. Mediation involving a minor claim will not create as great an expense for those bearing the costs of mediation; similarly, when a large dispute is involved, the greater cost of paying a mediator for more hours will be offset by the greater benefit to be derived. The downside to an hourly rate is that there is a direct incentive to the mediator to drag out proceedings, and an indirect one on the insured to penalize the insurer who would most likely be bearing the cost of the mediation. Though unlikely to be a substantial issue in a statewide large mediation program, this issue should not be completely ignored. When the issues being disputed are small – and likely to be quickly resolved – an hourly rate is probably desirable. When matters are more complicated, a daily rate may be appropriate.

Specific hourly or daily wages cannot be specified within the Model Program, because of the differences in compensation by region and which mediators are used. Guidelines for compensation, however, should be included on a state-by-state basis, with a minimum and fair compensation level that will reflect the decreased cost of mediation as compared to litigation. Furthermore, determinations of compensation will naturally be linked to which mediation agencies are retained to carry out the Model Program, discussed in Section 3.2 below. The choice of which mediation organization to use, whether it is the AAA or a court’s list of approved mediators, will also vary on a state-by-state basis.

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

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

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

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

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

---

19 ADR Professor Viniar suggests that mediators should be compensated equivalently to equally qualified lawyers. Costs will be reduced, because a single mediator will still be less expensive for the cost bearer than a team of attorneys preparing for and arguing a claims dispute in court.
At all times, the mediator will be in the best position to determine if continued Alternative Dispute Resolution is likely to result in a positive outcome or if it is a wasteful endeavor. If the benefit of continued mediation does not carry a significant probability of outweighing the costs, then the parties or the mediator can decline to continue negotiation, provided that all good faith obligations to negotiate are met.

Accordingly, in the Model Program, Insurers will bear the majority of the costs of the program, though policyholders may elect to shoulder some additional costs and continue mediation, and mediators and the parties to mediation will have the power to determine when further mediation will be useless.

2.4 Triggering Event – The Model Program must be triggered by an event which meets criteria such that the program’s benefits outweigh its costs.

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

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

Accordingly, the Model Program will include a minimum damage or amount of claims requirement that triggers implementation of the program only when the program’s benefits will outweigh its costs.

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

Participation in the Model Program must be mandatory for insurers without whose participation the successful implementation of the program would be substantially compromised.

In the Post-Katrina programs, participation was mandatory for insurers and optional for insureds. To the contrary, only three insurance companies participated in Texas’s program: AAA Texas, Allstate, and Farmers. This lack of participation in Texas’s program was a critical flaw.

Mandatory participation for insurance companies who represent a sizeable portion of a particular state’s policyholders will allow the Model Program to benefit the maximum number of

---

20 See California Department of Insurance, supra n.14.
disaster victims. The triggering amount should be determined on a state-by-state basis and should be linked to how many different insurance companies are active in providing property insurance in the state. Alternatively, the requirement can be stated in the negative, in that insurers, who provide property insurance coverage for less than a nominal amount (1-5%) of the state’s policyholders or less than a nominal amount of the state’s property value, may be exempt from participating.

Accordingly, the Model Program will require insurers to participate provided the particular insurer covers more than only a nominal portion of the property in a particular state.

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

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

Accordingly, the Model Program will clearly establish a minimum claim amount in dispute based on the cost of mediation where the program is implemented.

Model Program Section 3.0 – Conduct of the Mediation

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

A Model Program must balance the objective of resolving a large number of claims quickly against the goal of adequately and fairly compensating disaster victims through a process that recognizes the inherent power gap that exists between insurers and policyholders. At the same time, the importance of quick resolution to disputes may mean that, even with the risk of abuse, mediation is still a preferable option to litigation. High settlement rates of previous programs do indicate that mediation has been an efficient means of ensuring that participants receive some payment on their policies. Requiring ADR participants to be well-prepared for mediation will further promote fair settlements, while possibly even increasing efficiency.

Understandably, fulfilling many obligations is not always possible in a post-disaster scenario. Insureds struggled in the aftermath of Katrina to produce relevant documents and claim

\[^{22}\text{See Lane, supra note 7.}\]
\[^{23}\text{Id.}\]
In Louisiana, some homeowners complained that they were not provided with sufficient instructions regarding what to bring to mediation. Furthermore, homeowners complained that claims adjusters failed to attend mediation with sufficient knowledge regarding the claims history or adjustments on the property. Similarly, some insurers complained that homeowners attending mediation failed to bring any documentation, receipts, or photographs to substantiate claims.

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

Therefore, to promote fairness to the insurer and improve the efficiency of mediation under the Model Program, insureds should fulfill several obligations prior to mediation, including securing documentation and/or proof of claims necessary for mediation, preparing for the mediation process through reading/viewing educational materials, and meeting with counselors or advisors in the pre-mediation process where necessary. Requiring both policyholders and insurers to prepare for claims is a proactive way to ensure that the mediation process is conducted as smoothly as possible.

Furthermore, the program can facilitate the fulfillment of policyholder’s duties, by active and passive advertisement of the program, notice from insurers, and the availability of advisors discussed in section 3.3. Advance guidelines will put policyholders on notice as to the need for preserving information, and can provide policyholders the opportunity to secure vital information or documentation in protected places, like on the internet.

Accordingly, the Model Program includes obligations for parties preparing for mediation.

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

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

Organizations experienced in ADR have successfully administered past programs. The Collins Center for Public Policy operated Florida’s program. The American Arbitration Association (AAA), the world’s largest not-for-profit alternative dispute resolution organization, operated the Louisiana and Mississippi post-Katrina programs and North Carolina’s program. The AAA

---

24 See Gross, supra n.12, at 363.
25 See Patterson, supra n.5.
26 http://www.collinscenter.org/.
successfully dealt with finding staff and facilities to use for mediation amidst the devastation Hurricane Katrina. The AAA operated Florida’s 1992 program in response to Hurricane Andrew, which left 30 people dead, 250,000 homeless, and caused an estimated $30 billion worth of damage. They later worked on similar programs in Hawaii responding to Hurricane Iniki; in California responding to the 1994 Northridge Earthquake; and in North Dakota responding to the 1998 Grand Forks flood.\footnote{Elizabeth Baker Murrill, Mass Disaster Mediation: Innovative ADR, or a Lion’s Den?, 7 Pepp. Disp. Resol. L.J. 401, 405-407 (2007).}

In Louisiana, based on a sample of 2,654 forms reviewing mediators who received more than five evaluations, 62% received an excellent rating and 2% received a poor rating (27% were very good, 7% were good, and 2% were fair). Mediators were complimented on their ability to explain the process, motivate the parties and to communicate, and provide homeowners with a sense of security. Complaints regarded various topics, including the lack of separate rooms for caucus purposes.\footnote{See Patterson, supra note 5.} AAA mediators were reported as competent and helpful in facilitating the program’s goals. The experience and resources of an independent ADR organization should maximize the effectiveness of the Model Program.

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

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

Accordingly, the Model Program will clearly establish what organizations will supply mediators to carry out the program, on a state-by-state basis.

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

Experts should also be available to policyholders directly through the program, in a way that promotes understanding without drastically increasing costs.

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

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

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

Accordingly, the Model Program will establish clear means of providing advice to policyholders preparing for and during mediation.

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

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

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

California’s program, as mentioned already (see section 1.3), has a clear structure. The program’s website further clarified what would be done or expected at each step. Similarly, an optimal program requires that a specific structure be established by state governments and/or administrators of the program prior to the program’s implementation. The structure may of course need to be modified upon implementation based on the nature of the triggering event. This should allow flexibility to address the particular needs of affected communities. Nonetheless, integral features must include 1) an application process, 2) an informal method of educating policyholders about the process, 3) a formal agreement to mediate by both parties, including an mutually agreeable time and place for mediation, 4) a pre-mediation process that includes review and approval of materials that form the foundation for the mediation, 5) a clearly defined mediation process, and 6) a settlement or agreement to discontinue mediation.

Accordingly, the Model Program should include a flexible structure for mediation that can account for the variety of claims disputes, but must include 1) an application process, 2) an informal method of educating policyholders about the process, 3) a formal agreement to mediate by both parties, including an mutually agreeable time and place for mediation, 4) a pre-mediation process that includes review and approval of materials that form the foundation for the mediation, 5) a clearly defined mediation process, and 6) a settlement or agreement to discontinue mediation.
3.5 Rescission Period – The Model Program must have a cooling off period during which policyholders can back out of settlements reached through mediation.

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

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

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

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

A successful mediation program must strive constantly improve. To determine where and how improvements are needed information about the mediation proceedings must be collected. Transparency will serve the three-fold purpose of increasing policyholders trust in the mediation process, help insure that the mediation process is not abused by either party, and allow for a meaningful analysis of the program’s success.

Lack of transparency has been a consistent flaw in past disaster mediation programs. Data to analyze past program’s results in any meaningful way does not exist. Information about the success of past mediation programs has not been reliable. In Louisiana, two evaluation forms were given to both parties following each mediation conference: one evaluated the mediator and one evaluated the program. California’s program contained mandatory reporting requirements regarding the AAA records settlement rates and other information. 30 However, California did not differentiate between settlements reached through mediated settlements and non-mediated

30C.I.C. § 10089.83(a).
settlements.\textsuperscript{31} Information about past mediation programs was limited to number of claims processed, settlement rates, and sometimes the total and mean amount of settlements. However, these figures alone do not lend themselves to a meaningful statistical analysis or demonstrate the value of the mediation to the policyholder.

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

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

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

Conclusion

Large scale disasters are an unfortunate reality of our world. The Northridge Earthquake and Hurricane Katrina demonstrated the need for improving the tools available for disaster recovery efforts. Past mediation programs have had their share of successes and failures. The Model Program outlined in this paper is an attempt to learn from the past and improve the tools available for recovery efforts.

Mediation can quickly settle claim disputes that policyholders desperately need resolved in the aftermath of disasters. However, mediation poses risks to policyholders in these circumstances. This paper proposes a Model Program designed to compensate for the risks inherent in any program designed to assist with disaster related claims. The objectives of the program are maximum utilization by policyholders, quick resolution of disputed claims, and fairness to both parties to mediation.

The Model Program’s Permanent infrastructure will allow for more efficiency and better promotion of the program. Permanent advertising and active notice to policyholders will increase awareness of the Model Program. Furthermore, the structure of the Model Program will increase the resources available to policyholders to bridge the gap in power between policyholders and insurers. Finally, the Model Program’s reporting requirements will ensure that the program can examine its functioning in order to continue to evolve and improve.

This report was prepared by Oliver Barry and Abraham Tran of the Rutgers University School of Law with contributions from Anne Scott (Hastings College of the Law), United Policyholders Executive Director Amy Bach. Special thanks to extern Pierre Vachon and attorney and mediator Douglas DeVries with Judicate West.