June 1, 2006
Volume 2, Issue 2

WAMS Washington Arbitration & Mediation Service

ARBITRATION & MEDIATION NEWS

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Professionalism in Mediation

By: Michele Sales, Mediator/Arbitrator

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A lawyer's "stock in trade" is her reputation, which is more than just a win/loss record. Our reputations are built on our day by day actions and interactions with the courts, clients, opposing counsel and other professionals with whom we come into contact. Lawyers become known based on such things as whether we keep our word to opposing counsel (including co-defense counsel) and whether we behave with honesty to the extent allowed by our professional obligations. In essence, our reputations are indicative of how professionally we conduct ourselves in every aspect of our practice.

From my perspective as a professional mediator, your reputation as an advocate is built on how professional you are when you prepare for and attend a mediation.

Defense counsel often face this dilemma when the carrier does not provide as much authority as you recommended or thought you would get. In a worse situation, the carrier does not provide what you implied or suggested to the plaintiff's counsel or co-defense counsel that you would have at the mediation. Plaintiffs' counsel then routinely complain to the mediator, "I told them that if they couldn't get to $X, there was no reason to mediate," or "They said they valued the case in the six figures, so why did they only bring $Y?" Or a co-defendant is very unhappy to learn that you brought only "nuisance" value when all prior discussions implied a more equal split as to settlement.

So what to do? First, either don't make misleading comments or be very careful in what you say to opposing counsel or co-defense counsel. "I don't know" is a perfectly acceptable answer to the question, "What do you think the carrier is willing to pay on the case?" Or you can couch a statement as, "I've asked for (or valued the case at) $X but don't have a response back." Or simply say (if true), "The claims rep hasn't told me what authority she has on the case so I don't know if she agrees with my evaluation." Then, if the carrier does not come close to $X or suggests that only if a jury awards $X will the carrier get there, you have not misled opposing counsel or your co-defendant. When that occurs, let the other side or co-defendant know your situation **before** the mediation. While the mediation may not be successful, no one feels blindsided by your actions if it goes forward.

Better yet, don't schedule the mediation until you know the general range of what your carrier is willing to do. In the current world of defense work, that option may not be realistic if the claims representative

"From my perspective as a professional mediator, your reputation as an advocate is built on how professional you are when you prepare for and attend a mediation."

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Mediator Focus
Judy Massong

By: Catlin O'Halloran, WAMS Staff

The old adage, "you make your own luck" applies to Judy Massong. The type of "luck" that follows Judy Massong is created by her own confidence, vision, flexibility and determination. "You get as much as you give back, otherwise you would be drained," says Judy with a vibrant grin. In addition to teaching us about achieving her amazing endeavors, Judy's breadth and depth of experience make her an invaluable mediator.

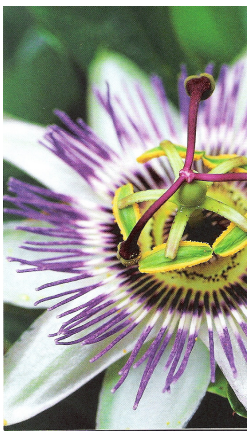
Since joining WAMS in 1999, Judy has mediated numerous personal injury, products liability, and medical malpractice cases. She is a veteran plaintiff's trial attorney with 22 years of experience and a partner at the Seattle law firm Peterson, Young and Putra. Prior to law, she served as a nurse on the cardiovascular surgery units in San Francisco. She bridged industries after law school while working as a Director of Government Relations for Washington State Nurses' Association (Seattle) and lobbied for them in Olympia. Most recently, she was named among Washington's "Most Amazing" attorneys in CEO magazine. In her "spare" time, she has also designed a gorgeous, inspired garden atop her Queen Anne home that was featured in Seattle Homes and Lifestyles. Some luck!

Judy chose to be a mediator because she supports the valuable service that dispute resolution provides. Specifically, she wanted to support giving clients more of a voice. "Our justice system has the flexibility to create something that would give clients more satisfaction." Just as not all cases are meant to go to trial, "clients are consumers of the justice system, so a variety of options should be made available to them," explains Judy.

As a mediator, Judy describes her role as helping the parties to "see" and "hear" each other's arguments. "Sometimes we don't see blind spots," says Judy. Her job is to help the parties brainstorm the case and to uncover its strengths and weaknesses. Confessing to have no "impulse control," the walk Judy makes between caucus rooms helps her to reflect upon each party's offers and counter-offers. The reason for this reflection is simple. As a mediator, she says, "you're packaging information you're told in a way to avoid the other side getting resentful or digging in their heels too soon." Importantly, Judy says, mediating a case is "not just about the number," it is about "facilitating a dialogue where both sides feel heard."

In fact, the toughest cases Judy has mediated are personal injury matters where the overall dollar amount is not very high. In these cases the parties "don't have very much room to move." However, the litigant perceives even the smallest move as significant. Because the scale is smaller, it is "crucial" to "treat every move with tremendous respect at all times," stresses Judy.

The advice Judy gives to attorneys mediating a case: "Know your case backwards and forwards. Picture it as you run the movie." "Have some realistic understanding of [the case's] strengths and weaknesses and how it would play out in front of a jury."



Photos taken from Seattle Homes & Lifestyles, May 2005

(Massong continued on page 4)

…WAMS Buzzz

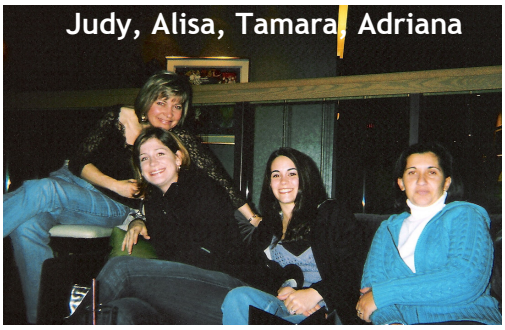
2006 marks the 25th anniversary of Washington Arbitration & Mediation Service!

We have two congratulations to announce. First, to Susan Keers Serko on her appointment to the Pierce County Superior Court bench. Second, to Riveka Crooms, Assistant Case Administrator, on her graduation from University of WA, Tacoma in June.

Alisa Bacon, Arbitration Program Director and Case Administrator, will be moving to Chicago in August. She will be working remotely for the remainder of the year while she transitions into her future job. Alisa has been with WAMS for 8 years.

STAFF RETREAT


Riveka, Adriana, Catlin, Penny


Judy, Alisa, Tamara, Adriana

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is not going to look at the file, much less get authority, until the mediation is imminent. But if you have done your evaluation sufficiently in advance of the mediation and have gotten that evaluation to the carrier, you may be able to get an idea of where the authority is likely to fall.

Finally, give the other parties the option to cancel the mediation if the authority you get is not where you suggested or where you think it is unlikely to be worthwhile. For example, if the authority you get does not cover the medical bills subrogation amount, notify plaintiff's counsel of that fact; it does not reveal your specific authority, but simply gives opposing counsel the informed option on whether to go forward with the mediation. ("My carrier sees this as only a nuisance value case and the authority likely to be offered won't cover the L&I lien.") Your client may have to bear the cancellation costs of the mediation if this occurs within the mediator's cancellation period, but you will likely have better relations with opposing counsel going forward. Ultimately, that will assist you in your settlement overtures.

From a plaintiff's perspective, the same situations occur and the same reasoning holds true. Have realistic discussions with your client as to the likely range of settlement **before** you schedule the mediation, preferably, but certainly before the mediation itself. Don't provide defense counsel with an opportunity to complain at the mediation that you suggested you could settle in the $X range, and then not be willing or able to get there with your client. Additionally, if a claims representative or insurance company has a reputation for not paying five figures in MIST cases, don't be offended when the offer is only $1,000.00 if you have been warned of the situation by defense counsel. While you may not want to be the bearer of what may be seen as bad news in discussing values with your client, defense counsel (and more importantly, claims representatives) will lose respect for counsel who either don't live up to prior conversations or don't seem to have a grasp on what juries are awarding in similar cases. Give defense counsel a "heads up" or suggest the mediation be postponed or cancelled, if appropriate.

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Mediators cannot force a carrier to come up with a "reasonable" amount of settlement money nor can they cajole a carrier **during** a mediation to double what it was prepared to pay in settlement of a case. Similarly, mediators usually cannot convince a plaintiff that she should accept one-tenth of what juries are typically awarding in similar cases when the plaintiff has never been prepared by counsel to question the liability in her case.

Have miracles occurred in mediation, i.e., settlements of cases with limited authority or new information disclosed at mediation? Sure, but is that common? No, and these situations often result in hard feelings between attorneys and become the basis for negative comments on the WSTLA Eagle Listserv or WDTL discussion. It's safe to say that all of us become more wary of an attorney about whom comments like this have been made in a public forum.

While the notion of "play fair and be nice" sounds like something we should have learned in kindergarten, it remains part of the broad definition of professionalism. If we did not repeatedly see this problem arising in mediation, I would not be writing about it. So, my advice is to be more professional in your work leading up to and in mediation and your reputation will reflect it.

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When asked what makes a good leader, Judy responded with reflection, "being involved." In addition to encouraging us to "sculpt change," she advocates that we spend time interacting with other colleagues. Judy's most challenging and fulfilling role was as President of the Washington State Trial Lawyers Association. However, she found serving as President for the WSBA-Litigation Section "great fun." "It was such a good group," she exclaims without hesitation. In fact, there were more attorneys from the defense bar than the plaintiff's bar. "As attorneys, it is our duty to represent our clients' best interests." But outside of that role, Judy believes, "we are all working together for a common goal."

Celebrating

WAMS

25th Anniversary

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