

Disaster Mediation

Lessons in Conflict Coordination

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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 ADR professionals will certainly play an important role facilitating decision-making among insureds, insurance carriers and government agencies.

Today, our attention is drawn to ADR's role in disaster management not only because recent disasters such as Hurricane Katrina reminded us that such tragedies can and do happen, but also because those events 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.

This article will focus on post-disaster ADR and its use in resolving insurance claims, both residential and commercial. Specifically, it will discuss appropriate design of a post-disaster ADR program, in which administration, costs and appropriate services are all major concerns.

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, Jeanne and Ivan), I can bear witness not only to the physical and financial damage done, 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. And suffering nightmares of how our own home fared after we were forced to evacuate, then finally arriving home and finding our mango trees fallen in a way that protected the house, 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).

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.

Insurance companies vulnerable

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 longterm.

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, also victims.

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.

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 agencies from different levels of government, for example, who must coordinate their efforts. Limited resources are a basis to help and collaborate, not to compete.

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.

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 longer 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 their 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 and support staff.

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

The independent administrator must have the respect and credibility from 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.

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.

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

Confidentiality - Although confidentiality is maintained, and even acknowledged by written agreement, intrusions are constant and media scrutiny challenges the achievement of privacy. Moreover, since the insurance carriers automatically have information about their prior settlements in other cases, homeowners and other insureds commonly compare notes and recoveries.

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

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. 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 and updates. If at all possible, a hotline should be maintained for emergency situations.

Psychological training - The curriculum must also include the emotional component. The mediator must be alerted to post-traumatic-stress issues, both immediate and delayed.

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. 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 2004 and the need for program credibility and neutrality, both real and perceived, an independent administrator was selected to run the program. The program for residential claims was so successful that a commercial component was added.

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.

Mediators usually were paid on a per-case rather than 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.

Mediation format - The session, usually with no attorneys present, commenced with the usual description of the process. 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.

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 mediator included:

Attendance, scheduling and settlement authority. Because of the exigency of the time, insurance adjusters were often unavailable to participate in the mediations. Adjusting companies were often used, allowing the specialists more time in the field to inspect and settle cases on the spot.

Incomplete information. Although the emergency regulations required full preparation and information sharing, this was often more aspirational than reality. 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, called a POA, to accomplish a resolution.

Increasing damage estimates. Because of significant delays between the damage and the mediation, damage estimates could change considerably in the meantime. Mold and other consequential damages were common, as were increased material and labor costs. 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.

Ethical concerns

It is difficult to apply all the traditional ethical concepts when the exact ADR process is not yet selected. Moreover, the nature and demands of disaster mediation are different. The traditional standards and ethics associated with mediation must be tailored and relevant.

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

Second, the ADR professional may use pre-mediation conferences with the parties, particularly the policyholder, who may be nervous. 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.

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.

Of course, these approaches may not be applicable to more complex commercial claims.

Confidentiality. 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. 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.

Impartiality, objectivity and neutrality. The integrity of the mediators and the program is critical to the success of any mediation 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 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.

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.

Lessons learned

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.

The loss of commitment in the rebuilding process will further diminish and weaken our already shaken confidence. Excuses and apologies are unacceptable.

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.