

**Massachusetts Insurance & Reinsurance
Bar Association's 11th Annual
Arbitrator Roundtable**

**“The Future of Mediation for
Insurance and Reinsurance Disputes”**

Wednesday, June 9, 2021, 12:30 p.m.



Future of Mediation for Insurance and Reinsurance Disputes

Panelists:

Lawrence Pollack, JAMS

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Moderator:

Robert A. Whitney

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Future of Mediation for Insurance and Reinsurance Disputes

➤ What is Mediation?

- A process of assisted negotiation in which a neutral person helps people reach agreement

➤ Forms of Mediation

- Voluntary/Involuntary
- Evaluative/Facilitative

Future of Mediation for Insurance and Reinsurance Disputes

- Role of the Mediator
 - Design a mediation process
 - Implement that process
 - Mold the process to forge agreement

Future of Mediation for Insurance and Reinsurance Disputes

- When is mediation appropriate in an insurance or reinsurance dispute?
- Why is mediation appropriate in an insurance or reinsurance dispute?

Future of Mediation for Insurance and Reinsurance Disputes

- How to Structure the Mediation Process
 - Joint Session
 - Breakout Sessions
 - ✓ Merits Review
 - ✓ Demand and Offer
 - ✓ Negotiation
 - Mediator Input
 - ✓ Case Assessment
 - ✓ Resolution Proposal

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- What Makes a Good Mediator?
 - Detailed Preparation
 - An Understanding of the Case Subject Matter
 - The Ability to Gather Information from the Adversary
 - Creativity
 - An Objective Case Assessment
 - Effective Communication with the Client
 - The Ability to Close the Deal

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- What Should The Parties Do to Help the Mediator?
 - A Clear, Concise Statement of Position
 - ✓ Hyperbole and Aggression are not helpful
 - A Setting of Expectations
 - ✓ What is the posture of the dispute?
 - ✓ What led the parties to mediation?
 - What the Parties Aim to Achieve from the Mediation Session
 - ✓ An independent view?
 - ✓ A foundation for resolution?

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➤ Questions for the Mediator

- What Would Be Most Helpful to the Mediator?
- Do I Argue My Case as I Would in Court?
- How Best Do I Send Signals?
- Do I Script My Negotiation Moves in Advance?
- Does it Help to Walk Out if it Looks Like Progress is Doubtful?

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- What Should be the Objectives of the Mediator?
 - Ideally, to resolve the dispute
 - To provide an independent view of the relative strengths and weaknesses of each party
 - To assist the parties in exploring the possibility of creative solutions
 - To assist the parties in translating the relative position strengths into dollars and cents

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- How to Achieve Success if the Case Does Not Settle at the Mediation Session
 - The Mediation Process Does Not End at the Conclusion of the Mediation Session
 - ✓ Subsequent Follow-Up by the Mediator
 - ✓ Concepts Sometimes Need Time to Sink In
 - ✓ “From Frustration Comes Opportunity”

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- Mediator Can Even be Accessed During Trial
- Mediator Can Even be Accessed During Appeal
- Settlement Enables Control over the Result; a Trial Verdict Does Not

Future of Mediation for Insurance and Reinsurance Disputes

- The Future of Insurance and Reinsurance Mediations in the Zoom Age
 - What are the differences between virtual and in-person?
 - Do certain techniques work better in person versus virtual?
 - Will the availability of virtual platforms make mediation more widespread? More successful?