

Welcome to

Mediating Insurance Issues: Best Practices



Robert S. Gianelli, Esq.
Gianelli & Morris



Edwin A. Oster, Esq.
Judicate West



Eileen R. Ridley, Esq.
Foley & Lardner LLP



October 27, 2021
12:00 PM – 1:00 PM

Webinar Outline

- I. When to go to mediation
- II. Things to do before the mediation
- III. Content of the mediation brief
- IV. Preparing the client for mediation
- V. The mediation
- VI. Questions & Closing Comments



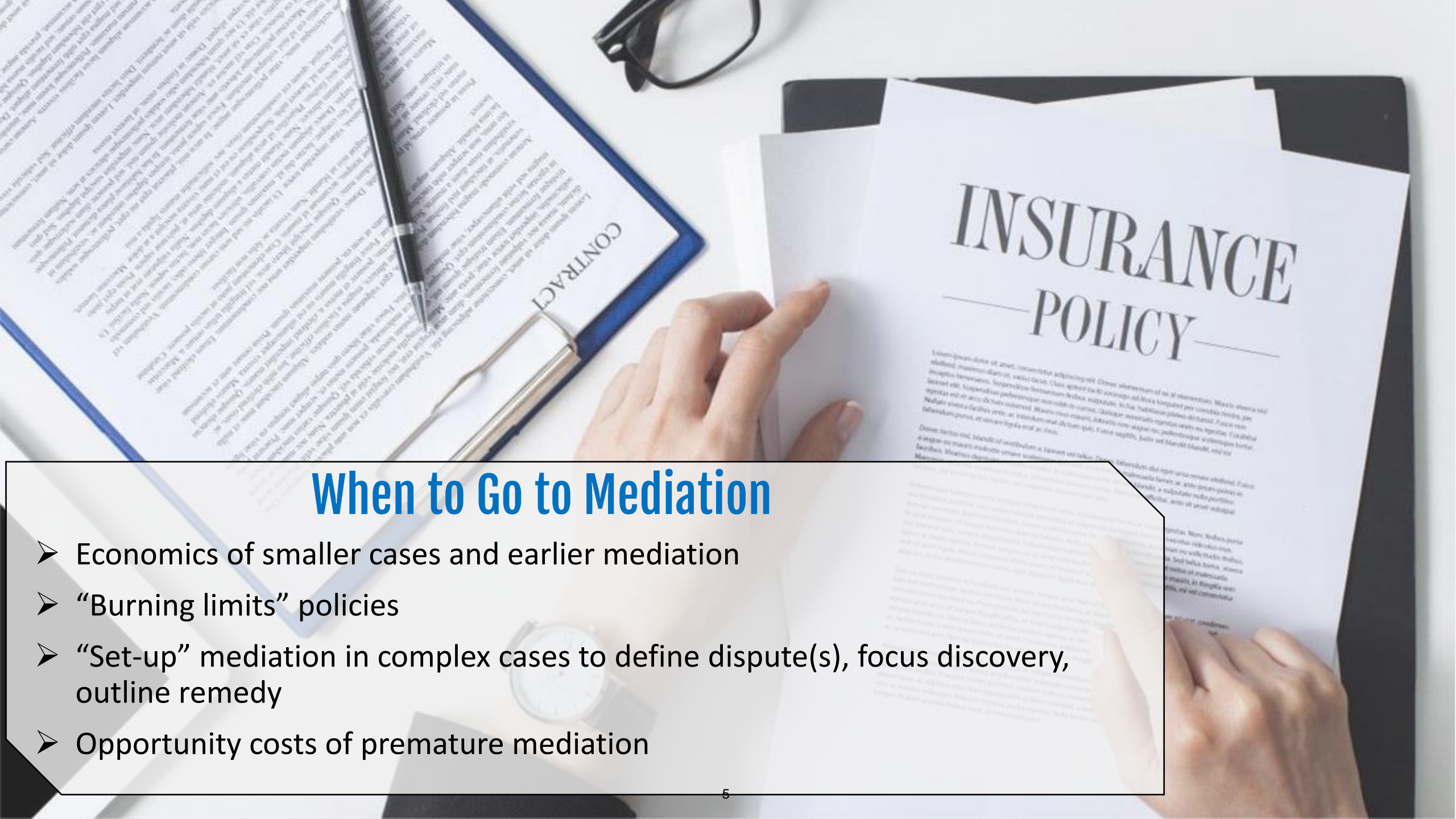
When to Go to Mediation

- Are the facts sufficiently developed?
- If not, will the parties agree to an informal exchange
- What issues may be conceded?



When to Go to Mediation

- Critical Decision Makers
- Concerns/Issues regarding parties expectations
- Internal Issues Present?
- Mediator Selection & Criteria



When to Go to Mediation

- Economics of smaller cases and earlier mediation
- “Burning limits” policies
- “Set-up” mediation in complex cases to define dispute(s), focus discovery, outline remedy
- Opportunity costs of premature mediation

Things to Do Before the Mediation

- Detailed Assessment/Reporting to Client
- Are there multiple parties who may affect settlement strategy?
- Are there multiple layers of insurance? If so, are all prepared to participate?
- Are there coverage issues?
- Determine whether all necessary parties are in the case and willing to participate in mediation





Things to Do Before the Mediation

- Multiple Parties? Considerations to make and plan ahead 1-2 months in advance
- Mediation Brief Considerations
- Discuss stalling points and mediation tactics with your client



Things to Do Before the Mediation

- Length of mediation session/Multi-sessions
- Preliminary session with select, aligned interests
- Avoiding last minute surprises
- Stakeholder/decision-maker attendance, limitations



Things to Do Before the Mediation

- Detailed discussion with client regarding case evaluation and approval of settlement demand/position.
- Determination of policy limits, etc. for any insured defendant
 - Strategies regarding policy limits demand
- Provide a damages brief/outline with a demand to the defense at least one month before the mediation.

Content of the Mediation Brief

- The six-page rule and critical exhibits
- Pros and Cons of Exchanging Mediation Briefs



Preparing the Client for the Mediation

- Explaining the process and potential bumps in the road
- Managing expectations
- Confidentiality provisions

The Mediation

- Opening Presentation – is it necessary?
- Settlement Staging Considerations
- Do certain parties need to have direct communication?
- Confidentiality and non-disparagement issues
- If you do not mean it, do not say it





The Mediation

- Managing the day/time to get to resolution
- Strategies for dealing with difficult damages issues, e.g., attorney fees and punitive damages
- Dealing with proposed brackets or mediator's proposal
- Not leaving anything unresolved (CCP §664.6 and timing of payment)

3945. Punitive Damages—Entity Defendant—Trial Not Bifurcated

If you decide that [name of defendant]'s conduct caused [name of plaintiff] harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

You may award punitive damages against [name of defendant] only if [name of plaintiff] proves that [name of defendant] engaged in that conduct with malice, oppression, or fraud. To do this, [name of plaintiff] must prove [one of] the following by clear and convincing evidence:

1. [That the conduct constituting malice, oppression, or fraud was committed by one or more officers, directors, or managing agents of [name of defendant], who acted on behalf of [name of defendant]; [or]]
2. [That the conduct constituting malice, oppression, or fraud was authorized by one or more officers, directors, or managing agents of [name of defendant]; [or]]
3. [That one or more officers, directors, or managing agents of [name of defendant] knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]

“Malice” means that [name of defendant] acted with intent to cause injury or that [name of defendant]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when the person is aware of the probable dangerous consequences of the person's conduct and deliberately fails to avoid those consequences.

“Oppression” means that [name of defendant]'s conduct was despicable and subjected [name of plaintiff] to cruel and unjust hardship in knowing disregard of [his/her/nonbinary pronoun] rights.

“Despicable conduct” is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

“Fraud” means that [name of defendant] intentionally misrepresented or concealed a material fact and did so intending to harm [name of plaintiff].

An employee is a “managing agent” if the employee exercises substantial independent authority and judgment in corporate decisionmaking such that the employee's decisions ultimately determine corporate policy.

There is no fixed formula for determining the amount of punitive

damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors in determining the amount:

- (a) How reprehensible was [name of defendant]'s conduct? In deciding how reprehensible [name of defendant]'s conduct was, you may consider, among other factors:
 1. Whether the conduct caused physical harm;
 2. Whether [name of defendant] disregarded the health or safety of others;
 3. Whether [name of plaintiff] was financially weak or vulnerable and [name of defendant] knew [name of plaintiff] was financially weak or vulnerable and took advantage of [him/her/nonbinary pronoun/it];
 4. Whether [name of defendant]'s conduct involved a pattern or practice; and
 5. Whether [name of defendant] acted with trickery or deceit.
- (b) Is there a reasonable relationship between the amount of punitive damages and [name of plaintiff]'s harm [or between the amount of punitive damages and potential harm to [name of plaintiff] that [name of defendant] knew was likely to occur because of [his/her/nonbinary pronoun/its] conduct]?
- (c) In view of [name of defendant]'s financial condition, what amount is necessary to punish [him/her/nonbinary pronoun/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [name of defendant] has substantial financial resources. [Any award you impose may not exceed [name of defendant]'s ability to pay.]

[Punitive damages may not be used to punish [name of defendant] for the impact of [his/her/nonbinary pronoun/its] alleged misconduct on persons other than [name of plaintiff].]

New September 2004; Revised April 2004, June 2004, December 2005, June 2006, April 2007, August 2007, October 2008, May 2020

Directions for Use

This instruction is intended for use when the plaintiff is seeking punitive damages against a corporation or other entity for the conduct of its directors, officers, or managing agents. When the plaintiff seeks to hold an employer or principal liable for the conduct of a specific employee or agent, use CACI No. 3943, *Punitive*



The Mediation

- Providing rationale(s), context for new demands, offers
- Overcoming wildly disparate opening demands, offers
- Brackets: are we speaking the same language?
- Should I tell the mediator our bottom line/top number?
- Dealing with “best and final;” advisability, alternatives
- Special, unique settlement terms

Thank You for Joining Us!



Robert S. Gianelli, Esq.
Gianelli & Morris



Edwin A. Oster, Esq.
Judicate West



Eileen R. Ridley, Esq.
Foley & Lardner LLP



Citations

1. Helfand v. National Union Fire Ins. Co. (1992) 10 Cal.App. 4th 869
2. “Why Can’t They Settle: The Psychology of Relational Disputes,” Munsinger & Philbin, *Cardozo Journal of Conflict Resolution*, 18:311
3. *Brandt v. Superior Court* (1985) 37 Cal.3d 813
4. *Nickerson v Stonebridge Life Ins. Co.* (2016) 5 Cal.App.5th 1
5. *Hedayati v. Interinsurance Exchange of the Automobile Club* (2021) 67 Cal.App.5th 833
6. *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809
7. *Communale v. Traders & General Ins. Co.*, (1958) 50 Cal.2d 654



Rob Gianelli has established himself as a leading California attorney in prosecuting insurance class actions and individual insurance “bad faith” cases. He has represented policyholders in a wide range of disputes: health insurance, life insurance, disability insurance, property insurance, and others.

In 2011 Mr. Gianelli was chosen as a Finalist for the Consumer Attorney of the Year in a case where he represented a class of 7,700 senior citizens who were sold deceptive annuities. *Stephens v. American Equity Investment Life Ins. Co.*, San Luis Obispo Superior Court Case No. CV040965. Mr.

Gianelli was successful in winning phase one of a trial in that matter for \$15.4 million which ultimately resulted in a total settlement of \$47,000,000.

Mr. Gianelli received one of *California Lawyer* magazine’s 2015 Attorney of the Year (CLAY) awards for his work as lead attorney in a class action against Kaiser for its refusal to provide certain types of treatment for autistic children. *Arce v. Kaiser Foundation Health Plan*, Los Angeles Superior Court No. BC 388689. For his work on this case, Mr. Gianelli was also chosen as a 2014 Finalist for the Consumer Attorney of the Year by the Consumer Attorneys of California.

In 2015 Mr. Gianelli won a class action trial against Kaiser for its violation of California’s reconstructive surgery law. *Gallimore v. Kaiser Foundation Health Plan, Inc.* Alameda County Superior Court No. RG12-616206. Thousands of Kaiser members will now be entitled to excess skin surgery following massive weight loss from successful bariatric surgery. This will result in a benefit of more than \$150 million for Kaiser members in the coming years.

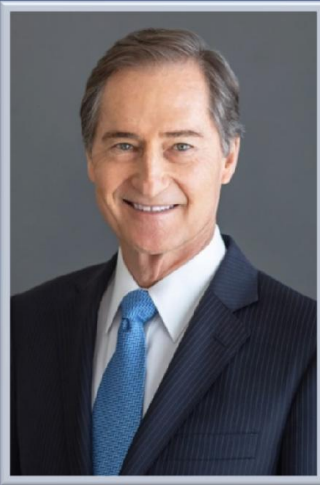
In 2017 Mr. Gianelli won a \$7.2 million jury verdict in a case against a managed care company over its failure to provide a Health Net member with a timely referral to a surgeon. *LaRue v. Health Net of California, Inc. et al.*, Los Angeles County Superior Court No. BC566095.

In 2020 Mr. Gianelli received the Consumer Attorneys of California’s “Street Fighter of the Year” award, along with Gianelli & Morris attorney Joshua Davis and co-counsel Conal Doyle, for their work in a case that led to amputees being able to get prosthetic limbs after being unlawfully denied by their insurer. *Trujillo, et al. v. United Healthcare Insurance Company* (C.D. Cal.) Case No.: 5:17-CV-2547 JFW.

Mr. Gianelli has been appointed lead counsel in a number of other significant insurance class actions, including: *Sanchez v. Allianz Life Insurance Company*, Los Angeles Superior Court, Case No. BC594715; *Dion v. Kaiser Foundation Health Plan, Inc.*, Alameda County Superior Court, Case No. RG14718903; *Bodner v. Blue Shield of California Life and Health Insurance Company*, Los Angeles Superior Court, Case No. BC516868; *Hill v. United HealthCare Insurance Company* (C.D. Cal) Case No. 8:15-CV-00526 DOC; *Vaccarino v. Midland National Life Insurance Company* (C.D. Cal.) Case No. 11-CV-5858 CAS; *Escalante v. California Physicians' Service* (C.D. Cal.) Case No. 14-CV-3021; *Peterman v. North American Co. for Life & Health*, Los Angeles Superior Court Case No. BC 357194; *Iorio v. Allianz Life Ins. Co. of N. America* (S.D. Cal.) Case No. 05-CV-0633 IEG; *Chastain v. Union Security Life Ins. Co.* (C.D. Cal.) Case No. 06-CV-5885 ABC; and *Kavruck v. Blue Cross of California*, Los Angeles Superior Court Case No. BC 160180.

Mr. Gianelli has also been the attorney for the policyholder in a number of published decisions relating to class actions and insurance matters. These cases include: *Escalante v. Blue Shield of California* (C.D. Cal. 2015) 309 F.R.D. 612; *Rodriguez v. Blue Cross of Calif.* (2008) 162 Cal.App.4th 330; *Kavruck v. Blue Cross of California* (2003) 108 Cal.App.4th 773; *IT Corp. v. General American* (9th Cir. 1997) 107 F.3d 1415; *American States Ins. Co. v. Borbor* (9th Cir. 1987) 826 F.2d 888.

Mr. Gianelli is a Contributing Editor to the Rutter Group California Practice Guide *Insurance Litigation*, California's leading insurance practice guide. He has also acted as an Adjunct Professor teaching Insurance Law at Whittier Law School and La Verne University School of Law.



EDWIN A. OSTER, ESQ.

After 38 years as a litigator, Ed Oster moved out of the courtroom and became a full-time mediator. As a trial lawyer, Ed handled complex insurance coverage, bad faith, commercial and real estate litigation at the highest levels. He tried cases throughout all eleven major counties in Northern and Southern California, in both state and federal court. During that time, he gained a lifetime of experience in all phases of civil litigation as well as an insider's knowledge of the insurance industry, all the while earning the trust and confidence of both co-counsel and adversaries who are now amongst his biggest supporters.

Ed passionately believes that the best settlements are those where everyone has achieved value, and that is what he delivers. His skill as a mediator spring from his natural ability to develop genuine relationships built on mutual respect. A top plaintiff's lawyer in Los Angeles says simply, "Extremely smart. Tough. Fair." A New York partner in a national defense firm observed: "He established almost instant rapport all around, and painlessly got the job done for all of us." A frequent mediation participant put it this way: "If you could go into a laboratory and put together in one person everything you want in a mediator - experience, integrity, intelligence, creativity and personality - you would have Ed Oster."

This neutral is available only for cases involving Mediation.

MEDIATION

LEGAL CAREER & PRIOR EXPERIENCE

- Mediator, Judicate West (Present)
- Partner, Barger & Wolen, specializing in insurance and commercial cases (1990-2013)
- Partner, Cummins & White (1988-1990)
- Partner, Kranz & Oster, subsequently Oster, Schubert & Rutten (1983-1988)
- Partner, Bruck, Kranz & Perry (1980-1983)
- Associate, Cummins, White & Breidenbach, Breidenbach et al (1976-1980)
- Court-appointed arbitrator, Orange County Superior Court
- Judge Pro Tem, Orange County Superior Court

EDUCATION & PROFESSIONAL AFFILIATIONS

- Stanford University, B.A., (1972)
- University of California at Davis, King Hall, J.D. (1976)
- Straus Institute for Dispute Resolution, "Mediating the Litigated Case" (6-day, 2013)
- Negotiation Institute, Advanced Negotiations for Complex Litigation (2-day, 1988)
- Mediation Panel, Orange County Superior Court
- Member, Orange County Bar Association
- Member, State Bar of California
- Member, Southern California Mediation Association

ADR EXPERIENCE & SPECIALTIES

Insurance coverage, Insurance Bad Faith, ERISA, Personal Injury, Commercial, Real Estate, Partnership Disputes, Professional Liability.

ACHIEVEMENTS & AWARDS

- College of Claims Mediation, Instructor, Philadelphia, PA (September 9-12, 2015)
- American Conference Institute, "Alternative Dispute Resolution and Bad Faith Claims", San Francisco, (July 2014)
- California State Bar Approved MCLE Provider, "Practice Tips for Better Mediation Results: What Works and Why"

HOBBIES & INTERESTS

Mr. Oster spends as much of his spare time as he can with family, is an avid hiker and amateur astronomer, and enjoys reading history, Mark Twain and Sherlock Holmes.

LOCATIONS

Nationwide



Results Beyond Dispute™

Eileen R. Ridley, Esq.



Eileen R. Ridley is a partner and litigation lawyer with Foley & Lardner LLP. Ms. Ridley has tried over 40 cases (both bench and jury matters) and arbitrated in excess of 200 cases. Her experience includes handling complex commercial matters for a variety of industries including the high-tech, oil and gas, telecommunications, construction, insurance and health care industries. She is the firm's Chief Diversity & Inclusion Partner, a role in which she is a catalyst for and leader

in carrying out the firm's commitment to diversity. Ms. Ridley is formerly a member of the firm's national Management Committee and is vice chair of the Litigation Department. She is co-chair of the Privacy, Security & Information Management Practice and is former managing partner of the firm's San Francisco office. Ms. Ridley is a member of the Insurance & Reinsurance Litigation; Construction; Appellate; Intellectual Property Litigation; Business Litigation & Dispute Resolution; Trademark, Copyright & Advertising; Labor & Employment; and Privacy, Security & Information Management Practices, as well as the Insurance & Reinsurance Industry and Food & Beverage Industry Teams.

Ms. Ridley's work has involved anti-trust and class actions (including multi-district and joint jurisdiction actions), unfair competition, trade secret and copyright matters, product liability claims, environmental claims (including CERCLA and CEQA), insurance coverage litigation, ERISA litigation, commercial disputes, and employment issues. She also has a vast knowledge base in insurance coverage and litigation issues regarding a wide variety of insurance programs. Through Ms. Ridley's appellate practice, she has briefed and/or appeared before California's State Appellate Courts, the California Supreme Court, the 9th Circuit and the 7th Circuit.

Recognition

Ms. Ridley has been Peer Review Rated as AV® Preeminent™, the highest performance rating in Martindale-Hubbell's peer review rating system and in 2005 was named as one of the "Bay Area's Best Lawyers in Appellate Practice" by *Bay Area Lawyer Magazine*. She was also selected for inclusion in the *Northern*

California Super Lawyers® lists in 2008-2016. In 2012 and 2016, she was recognized by the *Legal 500* for her work in insurance: advice to insurers.

Education

Ms. Ridley is a graduate of Santa Clara University Law School and is a former Emery Law Scholar. Ms. Ridley earned her B.A. degree from the University of Notre Dame.

Certifications

Ms. Ridley holds the Certified Information Privacy Professional/United States (CIPP/US) and the Certified Information Privacy Professionals/European (CIPP/E) credentials, a global gold standard and key industry benchmark accredited by the International Association of Privacy Professionals (IAPP).

Admissions

Ms. Ridley is admitted to all federal, state and appellate courts in California and Hawaii, the 7th Circuit Court of Appeals, the United States District Court for the Northern, Southern, Eastern, and Western Districts of Texas, the United States District Court – Northern District of Ohio, the United States District Court – Western District of Oklahoma, the District of Columbia, and the U.S. Supreme Court.

Presentations

- 2004 Business Litigation Conference – jointly sponsored with *Corporate Legal Times* and Martindale-Hubbell – "Maximizing the Protection of Privileged Communications"
- Mealey's, Inc. Coverage Disputes Concerning Construction Defects Conference– "Contractual Liability Coverage" (October 2004)
- California State Bar Convention – "Fifty Years After Brown: Examining Bias in the Legal Profession" (October 2004)
- The Daily Practice of Attorney-Client Privilege – Web Conference Series for Corporate Counsel (September 15, 2005)
- Information, Security and Privacy – The Rutter Group (November 2007)
- Privacy & Nondiscrimination in Genetic Testing – Webcast with West's Publishing (August 2008)
- Data Privacy and Security Best Practices for High Tech Companies, Manufacturers and Franchisors – Presentation at Foley's Drive Your

Business Forward: Distribution and Franchise Law Update (September 2008)

- Foley NewsFeed: Foley Quarterly Food & Beverage Industry Web Conference Series (March 2009)

Articles

- "Construction's Four-Letter Word," *The Recorder* (April 30, 2004)
- "AB758: The Evolving Relationship Between Builder and Subcontractor," *California Real Estate Journal* (January 23, 2006)
- "Managing The Risk of Employee Blogs," *Midwest In-House Magazine* (February 1, 2007)
- "Unmasking the Anonymous Internet User," *The Recorder* (April 16, 2008)
- "Workplace Privacy and Employer Monitoring," *BNA's Privacy & Security Law Report* (July 2008)
- "Unresolved Questions: When Are Actual Damages Required in Stored Communications Act Cases?" – *BNA's Privacy & Security Law Report* (April 13, 2009)

Published Cases

- Kendall v. Visa U.S.A., Inc., et al., 518 F.3d 1042 (9th Cir. 2008)
- Reyn's Pasta Bella, LLC, et al. v. VISA, U.S.A., Inc., et. al. 442 F.3d 741 (9th Cir., March 27, 2006)
- Reyn's Pasta Bella, LLC v. VISA, U.S.A., Inc., et al. 259 F. Supp.2d 992 (N.D. Ca. 2003)
- Somerset Marine, Inc. v. Forespar Products Corp., 876 F.Supp. 1114 (C.D. Ca 1994)