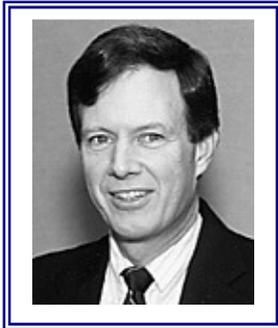


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## The Mediator and the Advocate: Tips to ensure a winning team

By: David M. "Mac" Shelton,  
Mediator, Arbitrator

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Mediators rarely "do magic" single-handedly behind closed doors. Teamwork is the key to mediation success. The team is the advocate and the mediator. As the mediator, I can help you, the advocate, only if you help me. Give me leverage for the negotiations, since I can't generate it out of thin air.

### The Roles of the Teammates

What settles cases? I see a common thread after two decades of mediating many different types of civil cases: meeting the subjective expectations of each party. My main challenge is to firmly, gently, but steadily alter the expectations of each party. This process begins quite early in the mediation hearing.

How can you help me? Before the mediation hearing, "soften up" the resolve of the other side with a concise, surgically drafted pre-hearing letter. I want to be greeting your opposing party in his or her caucus room anticipating that he/she has now become more sober/realistic on the eve of mediation than in the months leading up to it. During the hearing, your letter's compelling "selling points" (positives about your case and negatives about theirs) provide points for me to use with the other side. I can only be as effective as the arguments you hand me.

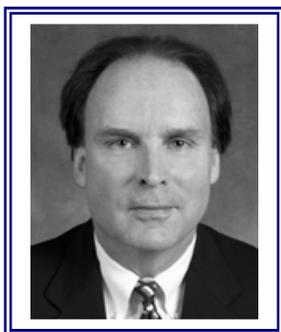
### Tips for Writing the Mediator's Pre-Hearing Letter

The letter serves three distinct purposes. First, its writing should crystallize in your mind the main selling points. Second, the other side will be more aware of your position after reading it; if well-written, the letter will alter the opposing party's expectations from the outset. Third, the letter provides a basis for my own talking points to alter those expectations even more.

### Address Your Letter to Me but Don't Write It for My Eyes

The reader you're trying to influence is the opposing party (and counsel), not me. Picture yourself as the wise old uncle/aunt dispensing needed advice. Put yourself in the opposing party's shoes and imagine the messages he/she needs to receive and how they're best packaged. Obviously, avoid being dismissive, condescending, patronizing, or inflammatory. Be as objective and detached as possible. A "confidential" letter to me is almost always a mistake, in my view, since it's a missed opportunity to influence the opposing party. In a separate letter put confidential comments for me only.

*...Continued on Page 3*



## Mediator Focus: Tom Harris

By: Penny Gans, WAMS Staff

Tom Harris is the newest member of the WAMS panel, but he's no ordinary rookie. Like the Mariners' "rookie" Ichiro a few years ago, Tom comes to WAMS with a highly successful past career, an extensive fan club, focus, discipline, and an infectious enthusiasm for this new stage of his life.

Tom has been a trial lawyer in Washington State for 33 years, representing thousands of plaintiffs and defendants. In 1995 he published *Washington Insurance*, a 60-chapter textbook, now in its second edition. His reputation as an expert in insurance law resulted in his appointment as mediator for the 2001 Anacortes refinery fire case and, shortly thereafter, the Olympic Pipeline explosion. After tenacious post-session follow-up, both cases settled. Tom's success with these complicated cases generated a steady stream of new ADR opportunities and led to conversations with his friend, WAMS panel member Larry Levy, about a career transition from litigator to full-time neutral. Tom hit the ground running at WAMS in January 2007.

Although he always enjoyed trial work, Tom feels that acting as a neutral is "the highest and best use of my experience so far." He understands trial lawyers and their clients, and his trial experience helps him to know how judges and juries are likely to react to a case. He enjoys getting into the issues with lawyers and having the opportunity to see both sides of the case. Tom likes "getting case materials that have been all worked up so that the issues are clear. The cases are generally interesting, and I like seeing a new case every day." He also believes that "people should consider mediating sooner, before lots of money is spent. The core of the case is usually the same from

the beginning, and mediating before a case is filed is better economically for the plaintiff." Preparation and follow-up are keys to Tom's success. He goes through the case materials at least twice, distilling the key issues for each side. If the initial mediation session doesn't result in settlement, Tom follows up with the parties as long as there is any possibility for agreement.

Born in Greenwich Village in New York City, Tom did his undergraduate work at Harvard and graduated from Cornell Law School. He fell in love with the idea of the Pacific Northwest via TV, while watching a UW football game one beautiful Seattle fall afternoon. Diploma in hand, Tom packed his bags and came West, joining Seattle firm Merrick Hofstedt & Lindsey as employee number six. "The partners were like three fathers to me," according to Tom, "and in those days the young guys actually got to try cases. The 70's and 80's were a golden age of trial work in Seattle, and I loved the lawyers and the story-telling." Tom met his wife, another transplanted Easterner (a "Maine-iac") in Seattle. Their 25-year-old son is a Wharton graduate and has recently begun a Wall Street career. Tom and his wife are about to begin building a summer house on family property in Maine, so they are frequent fliers to the east coast.

Tom loves his work as a neutral. "Lawyers are fun! I like all sizes of cases and get as much satisfaction from the small ones as from those involving many parties. In fact, I feel I can do more good for people in the smaller cases. Working with WAMS lets me have an impact on many more cases than was possible in my litigation practice." Luckily for WAMS and Tom's clients, Tom's daughter is just beginning law school in Boston, so he also has a financial incentive to keep making that impact for years to come.

***"Although he always enjoyed trial work, Tom feels that acting as a neutral is 'the highest and best use of my experience so far.'"***



## ...WAMS Buzzz

Michael Nigrey, Staff Attorney, left WAMS as of June 1 to accept an opportunity to join a litigation practice. Best wishes to Mike.

WAMS staffers Diane, Judy and Penny recently traveled to the Gulf Coast of Mississippi to lend their hands to the ongoing Hurricane Katrina recovery effort in the historic town of Bay St. Louis, which was devastated by the full force of the hurricane as it came on shore. In addition to utilizing their cooking, painting, caulking, yard work and listening skills, the WAMS team helped the volunteer group develop an administrative structure and conflict resolution process that will enable the leaders to better manage the allocation of their resources and responsibilities. There is still an overwhelming amount of rebuilding to be done, and volunteer groups are accounting for a significant portion of the progress being made. WAMS will stay involved with this venture and encourages other employees and interested friends to participate in this challenging and rewarding

project. For more information about how to help with a donation of time or money, contact Diane McGaha at WAMS ([dmcgaha@usamwa.com](mailto:dmcgaha@usamwa.com) or 206-467-0793).



## The Mediator and the Advocate continued from page 1...

### Send Your Letter Early

The first reaction of parties and counsel to your letter is normally defensive. Don't expect to hear, "I surrender, you're absolutely right", in response. But given more time to consider your points, the opposing party will likely become more receptive to them and will begin to consider more seriously the risks of trying the case. WAMS instructs you to send me your letter at least several days before the hearing, but I recommend sending it to opposing counsel at least 10 to 14 days before the hearing, whenever possible. I don't need your letter that early, but the other side does.

It is absolutely necessary for corporations, insurance companies, and government agencies to have your letter early because their decision-making is just too complex, time-consuming, and multi-leveled to expect a reasoned response in just a few days, let alone overnight. You'd be surprised how often an

adjuster gets a thick initial demand brochure for the first time only a day or two before mediation, which leaves no opportunity to get additional settlement authority. Individual parties, notably plaintiffs in tort and employment cases, also need the letter early, especially given the high expectations that their overly optimistic counsel may have created. He/she requires a few days for the "bad news" to sink in. It is vital for my work that individual parties get serious *before* mediation, not just *at* mediation.

Know, too, that in the other caucus room quite often there is a person associated with the opposing side who is actually fighting for what *you* want. In effect, you have an undisclosed third member of the team working for you. The best example is the insurance adjuster or HR manager who is eager to close a claim file by getting authority for an amount the plaintiff is thought likely to accept. But that third teammate's effort will be frustrated by the failure of the plaintiff's lawyer to get updated or necessary documentation

**...Continued on next page**

and provide it well *before* the mediation.

Another possible third teammate is the subrogation or lien holder. A reduction of the subrogated claim is often critical for settlement, but the lien holder must be educated *in advance* if you expect significant action on mediation day. The lien holder can help in other ways, too. I've seen how the L&I rep's insightful comments in both the defense and plaintiff's caucus rooms significantly altered a party's position and got everyone closer to settlement. That person can only be maximally effective if he/she is fully briefed about your case in advance of the mediation.

### Build Your Letter with Bullet Points

Overly detailed and long narrative letters are seldom helpful. A simple two page memo listing bullet points was one of the most effective submissions I've ever received. The memo didn't even have complete sentences. But it was easy to read, listed all selling points, and included references to attachments (copies of key portions of depositions, expert reports, etc.) which were yellow-highlighted for efficient reading.

Employ the following exercise before writing your letter: picture yourself with a colleague giving you just three minutes to summarize your case. You must be succinct, but comprehensive and compelling. After listing all of the points out loud, write them down – and only then – start writing the letter with the list as your outline.

### **The Bottom Line**

If you've done good pretrial work, you've performed 75% of your role in generating the leverage I/you need at mediation. But if you've neglected discovery or other aspects of your case, your team will be very limited in what it can accomplish for you at mediation. The other 25% of your role comes in preparation for the mediation itself, especially by crafting a good pre-hearing letter. Consider *every* possible member of your team when drafting your letter and give each teammate the information he/she needs *earlv* enough to help you settle your case.



**Judit Gebhardt**

*“This was my first opportunity to work with you as a mediator and I appreciated the skill, patience and good humor you brought to an admittedly difficult case. Thank you also for spending the extra time with us to get the case settled (even at the expense of missing your scheduled massage!). We all appreciate the extra effort.”*

- WAMS client

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