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**ADVANCED MEDIATION WORKSHOP:  
POST-CASE EVALUATED MEDIATION**

**For Experienced Mediators**

As approved by the  
Michigan Supreme Court Administrative Office

By: Christopher J. Webb, J. D.

Our training materials consist of a series of hypothetical cases and vignette exercises designed to provide non-attorney mediators with an intense training experience within a facilitative mediation context in which the parties are represented by attorneys. The materials are suitable for a wide range of experienced mediators such as volunteer mediators at a community dispute resolution center mediating under a court-sponsored program or compensated mediators working within a small or large firm.

For training purposes, we have developed two types of hypothetical cases -- a tort personal injury insurance case entitled *Jackson v. Abe Insurance Company* and a civil business lawsuit entitled *Boss Construction Company v. Fast et al.* These materials are not designed to provide you with any kind of specific legal training or instruction. The materials are exclusively geared to the improvement of your practice skills as a facilitative non-attorney mediator handling complex matters in which attorneys are acting as advocates for their respective clients.

The first hypothetical case is a personal injury matter relating to an uninsured motorist in which the plaintiff is suing her insurance company for compensation relating to an accident in which she was allegedly injured. The plaintiff is represented by a contingent fee attorney with a well-known reputation. The insurance company is the defendant in this case and is represented by a law firm that routinely defends these types of cases. The insurance policy in question has a rider of a maximum uninsured motorist coverage amount of \$20,000.

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The second hypothetical involves the breakup of a business partnership. The plaintiff is one of the partners in the business and has alleged that the defendant stole money from the firm and diverted work from the business for the defendant's personal gain. The plaintiff is demanding a recovery of \$500,000 in damages. The defendant is the plaintiff's business partner and denied these allegations countering that the plaintiff approved all monetary transactions and the transfer of work to the defendant's wholly-owned company.

As a general matter, mediations with represented parties have various levels of conflict that may not be apparent to a skilled non-attorney mediator at the time of the scheduling of the mediation or its commencement. Here are typical background themes relating to these types of cases:

1. The case may have been pending for some time with a high level of resulting frustration on each side.
2. Attorneys' fees and litigation-related expenses may have been incurred raising the stakes for any mediated settlement.
3. There will likely be a wide difference between the demands of the parties due in part to the fact that the matter has been evaluated through the case evaluation process and that there may exist a disparity in economic power between the parties.
4. Depending upon the specific case and judge, a firm trial date may or may not be determined or subject to adjournment by the court to a later date.
5. Discovery may have not been completed in these types of cases even though the cases have been evaluated.
6. Motions to dispose of the cases may still be pending before the court leaving unresolved significant issues bearing directly upon the monetary outcome of the case and how it is perceived by the parties.
7. An attorney representing a litigant may be paid on an hourly basis, retained under a fixed-hourly contract or as a percentage of an award on a contingency basis. The attorney may be practicing as a sole practitioner or with a small or large firm. All of these factors may play an important role in the dynamics of the mediation.

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8. Expenses relating to litigation such expert witnesses or exhibits may be sizable and comparable to the amount of attorneys' fees expended in the case.
9. If a party has rejected an evaluation made by a Case Evaluation Panel and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. A verdict is considered more favorable to the defendant if it is more than 10% below the evaluation and is considered more favorable to the plaintiff if it is more than 10% above the evaluation.
10. Never underestimate the potential for miscommunication or lack of communication between the attorney and client in litigation.

Your hypothetical training materials for each of the two cases under consideration consist of the following: (1) a Common Background Fact Sheet to be shared with all parties and their respective attorneys at the beginning of the mediation role playing, (2) a Fact Sheet for each plaintiff, (3) a Fact Sheet for the plaintiff's attorney, (4) a Fact Sheet for each defendant, (5) a Fact Sheet for the defendant's attorney. It is preferred that the Common Background Fact Sheet *not* be shared with the selected mediator unless time restraints require otherwise. Let the chosen "mediator" work for a living during our training! Participants in the role playing are specifically asked *not* to disclose their specific Fact Sheet with anyone until the conclusion of the role playing although information contained on a participant's Fact Sheet may be shared verbally during the course of the mediation as the participant may deem appropriate.

At the conclusion of the two hypothetical cases, our materials include an Appendix "A" consisting of a series of fifteen vignettes between fictional attorneys and mediators. Each of the vignettes contains space for you as the mediator to insert your own thoughts as to how, if it all, you would deal with the specific subject at hand. If our training time is sufficient we will work through these vignettes on an interactive basis with you. If not, we suggest that you do so on our own and then feel free to discuss any of the vignettes with us at your convenience. Do keep in mind that there are no right or wrong answers -- just an opportunity to learn.

*Jackson v. Abe Insurance Company*

Common Fact Sheet

Elizabeth Jackson, the plaintiff, is a 30-year old computer programmer with a local software supply firm. She graduated from Wayne State University with a B.S. degree in 2001 after putting herself through school while working part-time.

On December 31, 2004 at approximately 11:30 PM while driving alone on I-275, the Plaintiff was hit by an unknown motorist merging onto the expressway. The plaintiff lost control of her vehicle and skidded onto a grassy median separating the lanes of travel. The state police were called to scene by the plaintiff using her cell phone and a report was filed showing damage to the plaintiff's vehicle at its right passenger front fender. The other motorist was not located and Ms. Jackson could not provide any description of the car that struck her vehicle. There was no evidence of any drug or alcohol use by the plaintiff at the time of the accident. The plaintiff has no traffic record.

According to the investigating officer's report, Ms. Jackson was shaken up but did not request to be taken to a local medical facility for examination or treatment. Some days later she visited her family physician complaining of severe lower back pain and sought treatment. She is currently under her doctor's continuing care and taking pain medicine. Her doctor will testify that the pain is due to the trauma of the accident.

The plaintiff through her attorney wrote to the defendant insurance company and requested payment under her insurance policy noting that the plaintiff had been insured with the defendant for many years. This request was denied by the carrier on the grounds that there had been no showing of an objective manifestation of an injury to the plaintiff triggering legal liability under her policy and Michigan law. Suit was commenced in February 2005 demanding a jury trial and the full amount of the uninsured motorist insurance rider coverage of \$20,000.

No depositions have occurred in the case. The defendant has outstanding a motion to dismiss the case that has not yet been decided by the Court. Case Evaluation occurred in the matter and the case has been referred to mediation. The case has been set for trial in 60 days.

*Boss Construction Company v. Fast et al.*

Common Fact Sheet

The Boss Construction Company was started by Frank Boss and his son-in-law Ted Fast after Ted married Frank's daughter at a construction site wedding ceremony in 1985. Frank and Ted became partners on the basis of a handshake agreement that each would trust the other. Soon the business grew building upon a solid reputation of outstanding work.

In 2002, Ted divorced his wife and remarried another causing some strain on the business relationship between Frank and Ted. After the divorce, the business started to decline. Frank was in charge of performing the work booked by Boss Construction and Ted was responsible for marketing. Due to health issues with Frank, the business could not perform as many orders as it had done in the past. Critical to the prior success of the firm was the fact that Frank engaged in "hands on" management at each of the firm's construction sites. Ted started to try to fill the void due to Frank's physical absence and often would purchase materials for the various job sites using one of the business credit cards or writing company checks payable to cash for equipment and other supplies.

In 2004, it became clear that Boss Construction could not handle any significant new work and Ted started his own firm to conduct this work. For orders above \$10,000, Ted would accept customer orders under his new firm named Fast Construction Company and perform the work through his own company. Ted provided Frank with a monthly report of orders taken by Boss Construction and Fast Construction. These reports were mailed to Frank's residence routinely since Frank and Ted were no longer on speaking terms.

In January, 2005, Frank was confronted with an accounting report regarding Boss Construction that showed it had suffered a dramatic decline in sales and was losing money in part due to increased expenses incurred in the performance of past work. Frank through Boss Construction commenced an action against Ted Fast in February, 2005 for fraudulent conversion of corporate funds for Ted's personal gain and the diversion of customer orders from Boss Construction to Fast Construction demanding damages in the sum of \$500,000. Fast denied the allegations asserting that everything had been approved with the full knowledge and consent of Frank.

Case Evaluation occurred in the matter and the case has been referred to mediation. The case has been set for trial in 60 days.