How Can NC's Mediation Programs Address the Needs of an Aging Population?

Continuing Legal Education Webinar (Sponsor 315, Course 74)

12:00 p.m. – 1:00 p.m. on Tuesday, October 19, 2017

Course Description

The "silver tsunami" is upon us. The population of NC is aging and increasing numbers of seniors are migrating here from other states to retire. How will our courts cope with what is expected to be a significant rise in litigation involving seniors? The Clerk Mediation Program has not been heavily utilized to date. Is there potential for that to change? What particular challenges will mediators face in working with seniors? What strategies can mediators employ to help seniors have a positive and productive experience in mediation?

Presented by

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N.C. Dispute Resolution Commission
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Resources

- NC Supreme Court's Standards of Professional Conduct for Mediators
- Rules Implementing Mediation in Matters Before the Clerk of Superior Court
- Article: How Can NC's Mediation Programs Address the Needs of an Aging Population?

How Can NC's Mediation Programs Address the Needs of an Aging Population?[1]

Clinical Professor of Law Kate Mewhinney[2]

What is the Challenge?

Increasing numbers of older adults in our state means more litigants with physical or mental limitations. This article will prepare you to better mediate cases for these parties. Fast-paced, ten-hour marathon mediation sessions are not suitable for some elderly litigants. Let's first review some best practices for mediating with older parties and then learn about our legal obligations to accommodate disabled parties. Lastly, we will briefly touch on cases in which parties challenged settlement agreements they had entered into, alleging that they lacked mental capacity to enter into these agreements.

How Can We Best Serve the Impaired Elderly Party?

Being prepared for a party's limitations does not, of course, mean we should assume that all elderly litigants are disabled. The mediator herself must be free of bias.[3] Parties will not have a fair opportunity if the mediator tends to discount the

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[1] A condensed version of this article appears in two parts, in the NCBA Dispute Resolution Section newsletter, The Peacemaker. (Part 1: October 2017; Part 2 in Spring 2018)

[2] Wake Forest University School of Law, Managing Attorney, Elder Law Clinic, http://elder-clinic.law.wfu.edu. Certified Specialist in Elder Law by the N.C. State Bar and the National Elder Law Foundation, and Certified N.C. Superior Court Mediator with Additional Certification for Clerk Mediation.

[3] "A mediator shall, in word and action, maintain impartiality toward the parties and on the issues in dispute." Revised Standards of Professional Conduct for Mediators, Standard II. "Impartiality means

views and opinions of an elderly or disabled person. This mediator might lack the patience or skills needed to give an impaired elder the chance to express himself and make decisions.

In our state, 12% of working age people (ages 21 to 64) have a disability.[4] Among those between age 65 and 74 the disability rate rises to 27%, and the most common disability is ambulatory. Among those age 75 and older, 51% had a disability. Again, the most common limitation was ambulation and, after that, hearing. This information can help us, as mediators, consider adapting our practice to meet the needs of those with ambulation and hearing limitations.

For effective mediation, the parties have to be able to understand what is happening and what is being discussed, and be able to speak on their own behalf. This is sometimes a concern with elderly parties, though not with all or even most older individuals.

The Standards of Professional Conduct for Mediators provide clear guidance for mediators:

> If a party appears to have difficulty comprehending the process, issues or settlement options or difficulty participating in a mediation, the mediator shall explore the circumstances and potential accommodations, modifications or adjustments that would facilitate the party's capacity to comprehend, participate and exercise self-determination. If the mediator then determines that the party cannot meaningfully participate in the mediation, the mediator shall recess or discontinue the mediation. Before discontinuing the mediation, the mediator shall consider the context and circumstances of the mediation, including subject matter of the dispute, availability of support persons for the party and whether the party is represented by counsel.[5]

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absence of prejudice or bias in word and action." Standard II(A). http://www.nccourts.org/Courts/CRS/Councils/DRC/Standards/Conduct.asp

[4] "2015 Disability Status Report: N.C." – Cornell University (2016), http://www.disabilitystatistics.org/reports/2015/English/HTML/report2015.cfm?fips=2037000&html_year=2015&subButton=Get+HTML.

[5] Revised Standards of Professional Conduct for Mediators, Standard IV(C). http://www.nccourts.org/Courts/CRS/Councils/DRC/Standards/Conduct.asp.

A mediator must evaluate whether a participant – of any age - is unable to participate due to the influence of drugs, alcohol, or a physical or mental condition, or a combination of several of these factors. Sometimes the party is only mildly impaired and could effectively participate if the mediator helps to create an environment that allows such participation.

When a party to the mediation has a mental impairment, it creates a challenge for us. As mediators, we are not *adjudicating* capacity, but we do have to know that a party understands and can participate meaningfully. So, you might observe:

- Does the person seem able to follow a line of thinking?
- Can she answer questions with relevant answers?
- Can she express her own wishes?
- Is the person able to regulate his emotional response?
- Can the person engage with the other party without appearing intimidated?

Some mediators have already learned ways to handle cases in which mental capacity is a central issue. These are typically guardianship and estate disputes, over which the Clerk of Court has jurisdiction. To be certified by the N.C. Dispute Resolution Commission to mediate guardianship and estate disputes, a ten-hour training is required.[6] It includes such topics as medical aspects of aging, and community services for older people. This training, which is offered periodically by various providers, would be helpful for any mediator who sees increasing numbers of elderly parties in their cases.

Regardless of the age of the parties in a case, you should ask in advance about the need for accommodations, such as a need for a late start (for those with mobility limitations), for hearing assistive devices, and so on. Always ask the parties to bring any medications or snacks they might need.

Consider whether the mediation location is comfortable for older individuals, who might need additional lighting, seating with arms (which are easier to get in and out of), and adjustable office temperature. Your office could even buy a lightweight "transport" wheelchair for about $100, if parking is far from the mediation location. Another option is to offer to park the car of a party with

[6] Clerk Rule 9. http://www.nccourts.org/Courts/CRS/Councils/DRC/Clerks/Default.asp
For a list of the topics covered, see the Resource section at the end of this article.

mobility limitations. You can, as I have, hold a mediation in a long-term care facility, if that is where the client lives.

With the needs of older litigants in mind, consider:

- Using shorter mediation sessions;
- Asking the impaired party if he wants to have an advisor or support person with him, if you determine there is no undue influence or pressure[7];
- Speaking slower than usual and using non-technical language; and
- Asking if visual aids, such as a chart, would be helpful.

In some cases, you will determine that the elderly party is not able to participate effectively, even with accommodations and a support person. It might be possible to allow a surrogate to "represent" the elder, but with input from the elder. Consider this recommendation from a national working group convened at Cardozo School of Law:

> If, despite support, a party lacks capacity to participate in the mediation, mediation should not proceed unless a surrogate participates in the process to represent the interests of the party and make the mediation decisions in place of the party. Surrogates are defined according to state law, and might be agents under durable and health care powers of attorney, guardians, or family members. The surrogate and the person represented by the surrogate should be present and participate when possible. The mediator should encourage the surrogate to express the party's interests, values and preferences.[8]

These are just a few of the ways that mediators can help assure a fair and successful process when there are older or impaired parties in the case. Next we

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[7] The assistant should be told the necessity for confidentiality and can be asked to sign a confidentiality agreement. Questions and Answers for Mediation Providers: Mediation and the Americans with Disabilities Act (ADA), Appendix A, https://www.ada.gov/ada_mediators.html

[8] The ADA Mediation Guidelines for mediation providers are the product of a national Work Group convened to develop mediation practice guidelines unique to conflicts arising under the Americans with Disabilities Act (42 U.S.C. Sec. 12101-12213) ("ADA") and similar laws promoting the eradication of discrimination against persons with disabilities. http://www.mediate.com/articles/adaltr.cfm

will briefly cover the legal obligation of a mediator to comply with handicap discrimination laws.

Your Legal Duty to Accommodate People with Disabilities

As you know, there are federal laws barring disability discrimination. These laws apply to mediators, who are covered as "public accommodations" – which are businesses that are generally open to the public - under Title III of the Americans with Disabilities Act (ADA).

Keep in mind that the duty to reasonably accommodate a disability has several limitations. For example, a mediator would not be required to provide an accommodation if it would result in an "undue burden" or a "fundamental alteration of the nature of the mediation program."[9]

Not every disability rises to the level that creates a **legal duty** for mediators to accommodate the disability.[10] Regardless**,** many of the suggestions on complying with the federal law would be helpful even if the party's limitations do not rise to the level of a "disability" under that law. Consider these as "best practices" that will help you as mediators and head off problems even if a case is not covered by the Americans with Disabilities Act.

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[9] Undue burden means significant difficulty or expense. In determining whether an action would result in an undue burden, factors to be considered include --

(1) The nature and cost of the action needed under this part;
(2) The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site;
(3) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;
(4) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and
(5) If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.
42 U.S.C. Sec. 12112(10).

[10] An individual with a disability is defined by the Americans with Disabilities Act as a person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment. The ADA does not specifically name all the impairments that are covered.

Excerpted below is federal guidance on how mediate with parties who have disabilities, whether they are elderly or not.[11] I recommend the brochure from which these excerpts are taken – "Questions and Answers for Mediation Providers: Mediation and the Americans with Disabilities Act (ADA)" - as the most succinct resource for mediators learning to handle the needs of impaired parties. It is full of examples and practical tips.

The following questions and answers address situations in which reasonable accommodations may be necessary to make the mediation process accessible to individuals with disabilities. While the legal obligation of a mediation provider (or an employer that offers mediation as a benefit or privilege of employment) extends only to those who meet the ADA and Rehabilitation Act's definition of an "individual with a disability," mediation providers are free to take measures, in accordance with their understanding of ethical obligations or their adoption of best practices, that lead to a greater level of accessibility than the law requires.

- **Does a mediator need to change the way a mediation is ordinarily handled to accommodate someone with a disability?**

In some instances, yes. In addition to ensuring that the mediation site is physically accessible, a mediator may need to modify some typical mediation procedures to ensure that the mediation process is accessible. This does not mean compromising the impartiality and effectiveness of the mediator.

> **Example:** To accommodate a party with a traumatic brain injury who is unable to follow the process for sustained periods of time, a mediator may need to allow more frequent breaks than are usually taken.
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> **Example:** An individual with a cognitive disability tells the mediator that she is having difficulty following discussions and understanding various settlement alternatives available to her. She asks the mediator to advise her what settlement option he thinks is best and to do whatever he can to help convince the employer to agree to it. This is not a reasonable accommodation, because it would require the mediator to act as an advisor to, or advocate for, one of the parties, rather than as a neutral third party, and would thus fundamentally alter the nature of the mediation process. (Of course, the mediator may advise the individual regarding her

[11] https://www.ada.gov/ada_mediators.html. Print it and save it!

right to bring a representative, such as an attorney or family member, to serve as an advocate during the mediation.)

- **How should the mediator find out if any of the participants need accommodation because of a disability?**

When a mediation program has an intake or screening process before the case is referred to a mediator, the intake process should include:

- asking whether any accommodations may be needed;
- making arrangements for the accommodations requested; and
- advising the mediator of any accommodation arrangements that have been made and any accommodation needs that the mediator will need to address.

Referral sources and intake personnel should ensure that mediation providers are advised in advance when their cases involve parties with disabilities who need accommodation, and when any accessibility arrangements have already been made or any process changes or other accommodations have been requested. Mediators should also consult directly with the parties and their representatives before the first session to help identify any accessibility needs. This consultation can be conducted in person, by telephone, or by e-mail.

The Cognitively Impaired Party in Mediation

The federal ADA website for mediators has a helpful list of common disabilities and how you might accommodate them in a mediation. Here is the example they provide regarding a cognitively impaired party.

The Party's Request to You: The party asks for reminders about what is being discussed, and the roles of others who are present, etc.

Some Possible Barriers (reasons for the request):

- Cognitive impairment causes confusion or forgetfulness.

- Physical condition prevents party from full advantages of all sensory data to simultaneously track data and remember details.
- Party unable to take notes, is unfamiliar with language used during mediation, or does not absorb all the information.

Some Possible Solutions:

- Regularly recap proceedings.
- Regularly verify the party's understanding thus far.
- Provide party with effective notes of the meeting.

How to Adapt Your Mediation Practice to Comply with the Law

The federal website on the ADA and mediation gives an example of costs associated with a handicap accommodation you might be expected to provide.[12]

Example: A private practice solo mediator is offering mediation services on a case in which one of the parties has requested a sign language interpreter due to a hearing impairment. The mediator contacts an interpreter service, and learns that hiring an interpreter will cost $80/hour. The mediation is expected to last 6 hours. The total cost of $480 to provide the interpreter is unlikely to be deemed a "significant difficulty or expense" under the ADA, because the overall financial resources of the mediation provider are considered, not just the fee for that single mediation.

Practice Tip: Mediation providers should anticipate that accommodations or auxiliary aids and services will be periodically requested, and should take this into account in annual budget planning.

Elder Care Mediation

[12] "Questions and Answers for Mediation Providers: Mediation and the Americans with Disabilities Act (ADA)," General Considerations, #1; https://www1.eeoc.gov//eeoc/mediation/ada-mediators.cfm?renderforprint=1.

In some states, family disputes about caregiving are being addressed by "elder care mediators."[13] These are matters that are not in court – at least not yet. As you might imagine, elder care mediation is useful for families that are in conflict with elderly relatives or among family members (especially adult siblings.).

Often the issue is whether the elder is "safe." (This is also a common theme in guardianship cases.) Where care of an older person is part of the case, the elder care mediator should know about the aging services organizations in the area. Mediators should also have some familiarity with the medical resources available, caregiver support groups, care manager programs, and services offered by the Area Agency on Aging. If the parties and the mediator are not familiar with guardianship law, a referral to an elder law attorney would be advisable. [14] The family can be referred to an "aging life care manager" who has this knowledge base. This can be done before, during or after the mediation process.[15]

The mediator can also suggest ways for feuding family members to be reassured about financial issues, such as building in regular accountings or hiring an independent money manager.

Statutes and Rules of Conduct to Keep in Mind

Some of the rules from the Clerk Mediation program can provide us guidance in other cases involving elders. For example, if a party to the mediation seems easily fatigued, you have the authority as the mediator to recess the mediation. Rule 3(D) Also, one of the mediator's duties is to inquire of and consider the desires of the parties to cease or continue the mediation. Rule 6(B)(3)

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[13] "Family Strife over Elder Care? Consider an Elder Mediator," ElderLaw Answers, https://www.elderlawanswers.com/family-strife-over-elder-care--consider-an-elder-mediator-14857. "Elder and Family Mediation Services," Arline Kardasis and Blair Trippe, https://www.longtermcarelink.net/eldercare/elder_mediation.htm

[14] To locate a board-certified elder law attorney, contact:

- The N.C. State Bar Board of Legal Specialization, http://www.nclawspecialists.gov/for-the-public/find-a-board-certified-specialist/results/?id=1113 or
- The National Elder Law Foundation, http://www.nelf.org/find-a-cela/member-directory/cat/north-carolina/

[15] Revised Standards of Professional Conduct for Mediators, Standard IV(D). "In appropriate circumstances, a mediator shall inform the parties of the importance of seeking legal, financial, tax or other professional advice before, during or after the mediation process." http://www.nccourts.org/Courts/CRS/Councils/DRC/Standards/Conduct.asp

Generally, a mediator may not be compelled to testify about the mediation or provide evidence about it, with certain exceptions. One exception is in proceedings to enforce laws on elder abuse, neglect or exploitation. G.S. 7A-38.1(1). Note that all persons in N.C. are mandatory reporters of elder abuse. Also, mediators may report threats made by parties or participants to commit serious bodily harm or death, or significant damage to real or personal property.[16]

When Parties Want to Repudiate the Mediation Agreement

After a mediated settlement agreement is entered into, some parties will second-guess their decision to settle the case. Some will contend that that they were not mentally capable of entering into a binding contract. This may be due to illness, pain, age, grief, fatigue or other reasons. Some reported appellate decisions are listed in the Resource section below, involving challenges to settlement agreements of various kinds, though not necessarily mediated settlements.

Hopefully, by following the best practice suggestions discussed earlier, mediators can reduce the chances of this happening. The steps to remember include having shorter sessions, taking breaks, involving and really listening to the impaired party, and patiently explaining the process. Ask about the need for accommodations before you gather the parties together and consult the well-developed ADA materials to avoid problems.

Conclusion

Rest assured that a good mediator is very capable of the creative thinking involved in finding a "reasonable accommodation." Older or disabled litigants deserve full access to the benefits of mediation. Let's make that happen!

Resources

N.C. specific:

[16] Revised Standards of Professional Conduct for Mediators, Standard III(D). http://www.nccourts.org/Courts/CRS/Councils/DRC/Standards/Conduct.asp

- N.C. Clerk Mediation Program, with Rules and Statutes: http://www.nccourts.org/Courts/CRS/Councils/DRC/Clerks/Default.asp

- Training of mediators for the Clerk Mediation program, according to Rule 9, must include:

  (1) Factors distinguishing estate and guardianship mediation from other types of mediations;
  (2) The aging process and societal attitudes toward the elderly, mentally ill and disabled;
  (3) Ensuring full participation of respondents and identifying interested persons and nonparty participants;
  (4) Medical concerns of the elderly, mentally ill and disabled;
  (5) Financial and accounting concerns in the administration of estates and of the elderly, mentally ill and disabled;
  (6) Family dynamics relative to the elderly, mentally ill and disabled and to the families of deceased persons;
  (7) Assessing physical and mental capacity;
  (8) Availability of community resources for the elderly, mentally ill and disabled;
  (9) Principles of guardianship law and procedure;
  (10) Principles of estate law and procedure;
  (11) Statute, rules and forms applicable to mediation conducted under these Rules; and
  (12) Ethical and conduct issues in mediations conducted under these Rules.

- Duty to Report Abuse, Neglect or Exploitation:

  - NCGS 108A-102 – Any person having knowledge of elder abuse or exploitation shall report it to the County Department of Social Services. 1-800-662-7030.

  - NCGS 7A-38.3B(g)(5) – In the Clerks' Mediation program, evidence of statements made or conduct occurring during a mediation conducted pursuant to this section, whether attributable to any participant, mediator, expert, or neutral observer, shall be subject to discovery and shall be inadmissible **except** in proceedings for elder abuse, neglect or exploitation [and other listed exceptions].

  - Help with reasonable accommodation costs (see next section).

National:

- "Questions and Answers for Mediation Providers: Mediation and the Americans with Disabilities Act (ADA)," prepared jointly by the U.S. Equal Employment Opportunity Commission, National Council on Disability, and U.S. Department of Justice, https://www.ada.gov/ada_mediators.html

- www.Mediate.com has numerous resources, such as "On the Question of a Party's Capacity to Use Mediation," Jeanne Cleary, Aug. 2015.

- ADR Handbook for Judges (ABA Section on Dispute Resolution, 2004) Stienstra, Donna; Yates, Susan M.

- The Center for Social Gerontology, www.tcsg.org

- Kate Mewhinney, "State-of-the-Art Problem-Solving: How Guardianship Mediation Can Protect Elders While Strengthening Families." Chap. 23 of Comparative Perspectives on Adult Guardianship," A. Kimberley Dayton, ed.; Carolina Academic Press, 2014.

- Americans with Disabilities Act, www.ada.gov

- Help with reasonable accommodation costs:

    - Tax credit of 50% of the cost, up $10,250, if the disability related modification exceeds $250. https://www.ada.gov/taxcred.htm

    - The N.C. State Bar has a fund that will reimburse attorneys, including those acting as mediators, up to $300/client for sign language interpretation. Here's the application. The person who handles that fund is Joy Belk, with the Board of Paralegal Certification.

- Aging Life Care Managers, https://www.aginglifecare.org

- Association for Conflict Resolution, www.acr.org

- Model Standards of Conduct for Mediators, http://www.mediate.com/articles/model_standards_of_conflict.cfm

- National Academy of Elder Law Attorneys (NAELA) Aspirational Standards for the Practice of Elder Law, Second Ed., (2017), https://www.naela.org/AspirationalStandards. Section G on "Client Capacity" has useful tips: https://tinyurl.com/y74a7y5d

- Basic overview of "elder care mediation" (out of court matters), https://www.elderlawanswers.com/family-strife-over-elder-care--consider-an-elder-mediator-14857

- ADA materials in Spanish: http://adata.org/ada-national-publications#quicktabs-ada_national_network_comprehensi=1

Cases and Resources on Repudiation of Settlement Agreements

- West Key Number System 89, Compromise and Settlement, Sec. 8(2) – Capacity of Parties. For example, see:

    - **Employee did not lack mental competence at mediation** to enter into signed settlement agreement, under which employee accepted payment as final settlement of her action against employer based on employer's alleged failure to accommodate employee's cognitive disabilities in violation of the ADA; mediator and employee's counsel stated that employee was fully engaged in mediation, asked appropriate questions, and actively negotiated the settlement. Ellis v. Ethicon Inc., U.S. Court of App., 3d Circuit. 6/11/15, 614 Fed. Appx. 613 - ADA of 1990, §2, 42 U.S.C.A. § 12101.

    - District court did not abuse its discretion in finding that parties to settlement agreement had formed an oral contract under Florida law, **despite plaintiff's contention that he was on pain medication that reduced his capacity to agree to a settlement; plaintiff had capacity to contract, as he was left to act upon his own free will and he failed to show any inequity beyond "mere weakness of mind,"** both parties agreed to the agreement's essential terms, namely, a monetary settlement payment, dismissal of certain lawsuits, and confidentiality, and there was an external showing of agreement as to these terms, and plaintiff's alleged internal confusion as to those terms did not prevent the formation of the contract. Berman v. Kafka, U.S. Ct. of App., 11th Circuit. 5/9/13, 518 Fed. Appx. 783.

    - Seaman who sustained head injury while working aboard inland drill barge had mental capacity to understand settlement at time he entered into receipt and release, in Jones Act action against his former employer, **despite seaman's allegedly erratic behavior in period leading up to settlement due to prescription medications, as weighed against setting aside settlement and release on motion for relief from final judgment brought by seaman's mother in subsequent action; claims adjuster hired by employer testified that he never observed seaman acting in way that would cause him to question his competence, attorney hired by employer testified that seaman did not hesitate in responses to questions or exhibit any unusual behavior during settlement conference**, magistrate questioned seaman about settlement

and his understanding of its terms, and seaman's former attorney testified that seaman and his mother both wanted to settle case, and she did not believe there was anything else court could have done to prevent seaman from entering settlement. Shoemaker v. Estis Well Service, L.L.C., U.S. D. Ct., E.D. Louisiana, 2015; 122 F. Supp.3d 493.

- 15A C.J.S. Compromise & Settlement § 65 – Incapacity of Party.

- Plaintiff in a personal injury case, following a mediated settlement, wanted to repudiate the agreement because she claimed she was "not of clear mind during the discussions." She did not prevail on this. Adsit v Wal-Mart Stores, Inc., 79 A.D.3d 1168 (N.Y. App. Div. 2010).

- Plaintiff sought to show that he was pressured to settle and was **under the influence of multiple medications during the hearing.** The Court applied Rule 60(b) and found that the plaintiff "understood and voluntarily agreed to the terms of settlement, that the Court was not convinced that he was not competent or unable to make an informed decision about the settlement agreement, that nothing had occurred since the date of the hearing to call into question the legitimacy of the settlement agreement, and that DeMatthews (plaintiff) therefore had not demonstrated any 'extraordinary circumstances' to warrant reopening." DeMatthews v. The Hartford Insurance Co., 402 Fed. Appx. 686, 2010 WL 4671006 (U.S. 3d Cir.).