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Managed Cooperation In a Post-Sago Mine Disaster World

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MANAGED COOPERATION IN A POST-SAGO MINE DISASTER WORLD

By Patrick R. Baker

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The Sago Mine disaster in West Virginia caused the tragic deaths of 12 coal miners on January 2, 2006. The nation became enthralled by the epic struggle for life and death, as rescuers attempted to free the 13 trapped miners, only to learn that there was one survivor. Following the accident, a federal and state investigation ensued and found that the mine had received numerous safety violations before the disaster. As the public became enraged over the lack of regulatory enforcement, Congressional hearings soon followed. The Sago Mine disaster sparked substantive legislative reforms and regulatory changes, and the industry, miners, and regulators witnessed the first major changes to mine safety in over 30 years. The “Mine Improvement and New Emergency Response Act of 2006,” (“the New Miner Act”), was signed into law on June 15, 2006. President George W. Bush pledged that,
“[w]e make this promise to American miners and their families: We’ll do everything possible to prevent mine accidents and make sure you’re able to return safely to your loved ones.”

The new law escalated penalties for safety violations, required the industry to install emergency underground shelters and new communication devices, and mandated new guidelines for flame retardant equipment. The new legislation focused primarily on oversight, enforcement, post-accident safety technology, and accident response, but did little to address accident prevention. While the parties argued over the new law’s effectiveness and broad reforms, the law was enacted with little consideration about how court challenges to the new legislation would likely increase. What no one seemed to recognize or appreciate was the voluminous surge in legal challenges to the New Miner Act that would soon follow.

The Mine Health and Safety Administration ("MSHA")

9 Baker, supra note 2, at ___, citing Mark Guarino, West Virginia disaster: Will Congress take on coal mining companies? Christian Science Monitor, April 7, 2010, http://www.csmonitor.com/layout/set/print/content/view/print/293176. (Only 14 percent of mines have complied with the New Miner Act requirements to install improved communication systems. Only 34 of 491 coal mines have complied with the 2006 mandate require installation of improved communication systems, such as two-way wireless devices that can talk with and locate trapped miners.)
11 Id.
12 § 1, 120 Stat. 493.
13 Id.
15 Id.
16 Id.
47,034\textsuperscript{18} were contested, yielding a 24\%\textsuperscript{19} rate of appeal. Thus, the Federal Mine Safety and Health Review Commission\textsuperscript{20} (“Commission”), an independent adjudicative body that provides both trial and appellate review of legal disputes arising under the Mine and New Miner Act\textsuperscript{21}, endured a 42\% increase in court challenges from 2007 to 2008. By 2009, MSHA assessed a total of 173,705\textsuperscript{22} violations and 47,363\textsuperscript{23} were contested before the Commission. Violations dropped in 2010 to 166,366,\textsuperscript{24} but operators still challenged 45,005\textsuperscript{25} of those violations. The Commission received some relief in 2011 when the number of violations was reduced to 149,744\textsuperscript{26} and operators only contested 37,545 or 25.1\%\textsuperscript{27}.

At first glance it appears that court challenges are decreasing, but converting violations into monetary penalties tells a different story. In 2005, MSHA assessed $28,100,000\textsuperscript{28} in penalties against operators, and in 2006, operators were assessed $42,900,000\textsuperscript{29} in penalties. Civil penalties increased to $74,431,611\textsuperscript{30} in 2007 and $193,291,971 in 2008, a 690\% increase.

\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{22} Number of Penalties Assessed, supra note 14.
\textsuperscript{23} Id.
\textsuperscript{24} Id.
\textsuperscript{25} Id.
\textsuperscript{26} Id.
\textsuperscript{27} Id.
\textsuperscript{28} Mine Safety and Health Administration, MSHA Fact Sheet: Total Dollar Amount Assessed Coal Mines 2002-2010 (May 2012), http://www.msha.gov/MSHAINFO/FactSheets/MSHABytheNumbers/CalendarYear/Assessments%20data.pdf, (Violation and appeal statistics are not available on MSHA’s website before 2007. MSHA does provide the total amount of dollars assessed against coal mines from 2002-2010. However, MSHA’s data reporting total dollars assessed and contested found at Number of Penalties Assessed and Percent Contested: January 2007 – April 2011, Mine Safety and Health Administration, http://www.msha.gov/stats/ContestedCitations/Civil%20Penalties%20Assessed%20and%20Contested.pdf., does not match the statistics provided at former citation).
\textsuperscript{29} Id.
\textsuperscript{30} Number of Penalties Assessed, supra note 14.
from 2005. In 2009, civil penalties retreated to $139,835,600\textsuperscript{31} and $133,761,974\textsuperscript{32} in 2010. However in 2011, operators witnessed penalties increase to $152,370,691.\textsuperscript{33} While assessed violations and court challenges may be temporarily on the decline, the amount of penalty dollars assessed increased in 2011, and therefore, operators still have a clear incentive to contest violations. As a former MSHA official stated, “‘[i]f operators are not contesting, penalties are not high enough.’”\textsuperscript{34} Based on the case backlog, the increased penalties are clearly “high enough.”\textsuperscript{35}

From 2000 through 2005, an average of 2,307 cases were filed each year with the Commission.\textsuperscript{36} However, that number increased after the passage of the New Miner Act. In 2010, 11,087 cases were filed, and in 2011, 10,593 new cases were filed.\textsuperscript{37} In 2011, the Commission began the year with 18,170 cases.\textsuperscript{38} In comparison, the average trial-level caseload from 2000 through 2004 was only 1,379.\textsuperscript{39} As the number of cases has increased, frustration and delay with the system has skyrocketed. In the end, the system teeters on collapse from its own weight.

This article proposes a Commission mandated mediation process that will offer a solution to the case backlog that prevents regulatory capture while promoting managed cooperation and communication toward a common goal, safety. While the Commission has implemented new rules, procedures, and steps that have helped the backlog, these improvements have only addressed the symptoms and not the cause. Currently, the solutions have focused on how reduce

\textsuperscript{31} Id.
\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Michael T. Heenan, What About that Case Backlog?, 17 Mine Safety and Health News 2, 1 (2010).
\textsuperscript{37} Id.
\textsuperscript{39} Id.
the case backlog, instead of creating a system that allows for communication and cooperation, while ensuring compliance and safety. While there has been disagreement as to whether or not the case backlog undermines miner safety\textsuperscript{40}, it only seems logical that a system premised upon litigation, delay, and frustration does little to enhance safety. While there have not been any formal studies linking the case backlog to unsafe working conditions, the goal of any civil penalty system should be compliance, not litigation.

The split-enforcement model was adopted to prevent regulatory capture and ensure mine safety, and while some level of adversarial proceedings is healthy to preclude capture, it also stands to reason that too much litigation could be equally detrimental. Thus, it is simply illogical to think that all forms of cooperation and communication between the regulated and regulator are detrimental and promote malfeasance. Instead, the regulator and regulated should be able to work together and avoid unnecessary litigation and delay. Ideally, the regulated and regulator should work together toward a common goal, safety. While this theory is simply not always possible, simply abandoning it or demonizing it in every case is equally imprudent and detached from reality. Therefore this question should be posed: Can a system or procedure be created that ensures compliance, but also allows for communication and collaboration? The answer is “yes” and one realistic solution is mandatory mediation.

Finally, it is worth noting, that while there are numerous Dispute System Designs ("DSDs"), my arguments will primarily focus, and be premised on only one option; a DSD adopted by a third-party, the Commission, for the benefits of the disputants, MSHA and the

\textsuperscript{40}On February 23, 2010, the House of Representatives’ Committee on Education and Labor held a Hearing on “Reducing the Backlog of Contested Mine Safety Cases,” Cecil Roberts, President of the UMWA, asserted the case backlog at the Federal Mine Safety and Health Review Commission adversely affects miners’ health and safety, while Bruce Watzman, Senior Vice President for Regulatory Affairs of the National Mining Association, contended the operators’ enhanced contest rate does not jeopardize miners’ health and safety. (http://edlabor.house.gov/hearings/2010/02/reducing-the-growing-backlog-o.shtml#more.)
operator. In the end, a procedural process that provides for managed cooperation and compliance toward safer working conditions will reduce the case backlog, benefit the parties, and most importantly, improve safety.

II. AN IN DEPTH EXAMINATION OF MINE SAFETY AND HEALTH LEGISLATION

The American mining industry has been regulated by a patchwork system of state, local, and federal laws for over a century. The first comprehensive federal legislation emerged in 1910 with the creation of the Bureau of Mines within the Department of the Interior. However, over the next 60 years, enforcement and safety advances within the industry remained relatively modest and ineffective. The public’s inattention would significantly change on November 20, 1968, when a mine explosion in Farmington, West Virginia took the lives of 78 miners. During the next 11 months, 120 additional miners lost their lives while making a modest, hard-earned living. Between 1967 and 1968, a total of 533 miners lost their lives in mining disasters. Finally, public outrage prompted broad, swift Congressional action.

In 1969, Congress enacted the Federal Coal Mine Health and Safety Act (“the 1969 Coal Act”), representing the first comprehensive and authoritative step by the federal government to regulate and police the industry. The 1969 Coal Act charged the Mine Enforcement and Safety Administration (“MESA”), an agency within the Department of the Interior, with broadened investigatory and enforcement powers. Most notably, the 1969 Coal Act permitted random and mandatory inspections; increased inspections within hazardous operations; and permitted

41 Baker, supra note 2, at ___.
43 Id.
44 Id.
45 Id.
47 Id.
inspectors to order miners out of areas deemed hazardous until the condition could be abated. 49 Despite the 1969 Coal Act’s success, more regulation and enforcement was needed.

In 1977, the Senate Committee on Human Resources determined that allowing MESA to operate under the auspices of the Department of the Interior was rife with conflicts that prevented complete and effective enforcement. 50 Congress attempted to remedy these inherent conflicts with the passage of the Federal Mine Safety and Health Act of 1977 (“the Mine Act”). 51 As part of the Mine Act, Congress created the Mine Safety and Health Administration (“MSHA”), an independent regulatory body charged with enforcement of the Act. 52 The Mine Act adopted a split-enforcement model whereby safety and health standards are promulgated 53 and enforced 54 by the Secretary of Labor through MSHA. Industry challenges to MSHA’s enforcement are then decided 55 by an independent administrative adjudicative body, the Commission. 56 Congress designed the split-enforcement model to overhaul the 1969 Coal Act framework that permitted the agency to settle penalties for small, and sometimes unjustifiable, fractions of the original assessment and prevent the inherent conflicts that emerge when regulators become too familiar with industry. 57 Consequently, the Mine Act’s dual-enforcement model 58 was intended to serve as an impediment to unjust or unreasonable settlements. However, this model, left unchanged, has demonstrated that it is unequipped to handle the voluminous amount of cases that exist in today’s high stakes litigation.

49 Id.
51 Id.
52 Id.
54 Id.
55 Id.
56 Federal Mine Safety and Health Act of 1977 § 113(a).
Over the next 30 years, the Miner Act would undergo few substantive changes despite significant engineering, technological, and safety advancements. Coincidentally in 2005, coal-related fatalities dropped to 23 nationwide. Many within the industry and MSHA credited the record-low mine fatalities to advancements in mine safety technology and a new corporate culture that encouraged safety over production and profits. After a century of development, a more collaborative and cooperative relationship between MSHA and industry had facilitated a safer workplace.

As history routinely reminds us, it repeated itself in 2006, when three mining tragedies within five months served as the precipitating event for ground-breaking legislation. The events surrounding the Sago disaster captivated the nation. Then, just seventeen short days later, on January 19, 2006, West Virginia and the country mourned the loss of two miners tragically killed in another underground mine fire at the Aracoma Alma Mine Number 1. MSHA determined the fire started due to a conveyor belt misalignment that ignited accumulated and combustible materials. Finally, four months later, on May 19, 2006, Kentucky witnessed the death of five miners at the Darby Mine Number 1, in Harlan County. Evidence showed the explosion was caused by methane gas ignited by an acetylene torch, which resulted in the

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60 Mark E. Heath, Increased Enforcement and Higher Penalties Under the Miner Act: Do They Improve Worker Safety?, 30 Energy & Mineral L. Inst. 10 § 10.01 (2009).
61 Id.
62 Id.
63 Id.
64 Id.
65 Id.
66 Id.
67 Id.
immediate death of two miners.\textsuperscript{68} Unfortunately, three evacuating miners succumbed to carbon monoxide and soot inhalation while escaping.\textsuperscript{69}

These tragedies captured the attention of the public and forced the government’s hand to once again scrutinize the effectiveness of mine safety laws, regulations, and enforcement. As one former MSHA official stated, ‘it’s unfortunate it took a disaster to bring renewed attention to the issue: ‘That’s the history of coal mining legislation in the U.S. – it’s always born out of disaster and as it’s said the safety laws are written with the blood of miners. That’s what it takes.’’\textsuperscript{70} Clearly, the events surrounding Sago,\textsuperscript{71} the subsequent mine tragedies, and the current case backlog, demonstrate that this symbiotic relationship to mine safety is now extinct.

On June 15, 2006, the New Miner Act became law.\textsuperscript{72} The heart of the Act requires each mine to develop an Emergency Response Plan (‘‘ERP’’).\textsuperscript{73} The ERP addresses such areas as post-accident communication and employee tracking, self-contained rescue devices, post-accident breathable air, post-accident lifelines, and increased escape training standards.\textsuperscript{74} The Act further imposed new requirements on each mine’s designated mine rescue team.\textsuperscript{75} The Act also required MSHA to promulgate new rules for sealing off abandoned areas.\textsuperscript{76} While, the Act did not impose any specific changes to the law with respect to refuge chambers,\textsuperscript{77} it did require the National Institute of Occupational Safety and Health (‘‘NIOSH’’) to report on the ‘‘utility,
practicality, survivability, and cost of refuge chambers.” The Act also required the Technical Study Panel (“TSP”) to conduct studies and provide recommendations with respect to the utilization of belt air and the composition and fire retardant properties of conveyer belt materials in coal mining. Most notably, the Act dramatically increased some civil and criminal penalties, which prompted MSHA to promulgate new rules that further increased penalties and created new categories of violations.

On April 5, 2010, 29 miners tragically died in an underground explosion at the Upper Big Branch Mine (“UBB”) in Montcoal, West Virginia. In 2010, the mine had received 124 safety violations, including dozens of citations evidencing problems with ventilation and accumulation of combustibles. Massey Energy Company (“Massey”), operator of the Big Branch mine, had allegedly “contested 97 percent of the serious violations against it in 2007.”

Even more ironic, after the explosion, Massey went on the offensive in an attempt to thwart MSHA’s regulatory ability and stem the tide of public sentiment and political scrutiny. Massey sent letters to the governors of Kentucky, West Virginia, Virginia, and Illinois alleging that MSHA requirements may have been a cause in the explosion. However, the letter stopped...
short of blaming the ventilation plan developed and approved by MSHA as the cause of the explosion.\textsuperscript{89} Massey’s CEO, Don Blankenship,\textsuperscript{90} stated “[o]ur investigation into the UBB accident is continuing. While we do not yet know the cause of the explosion, we have developed grave and serious concerns about the MSHA imposed ventilation system employed at UBB.”\textsuperscript{91}

On May 19, 2011, MSHA released a press release in response to the Governor’s Independent Investigation Panel’s report (“GIIP”)\textsuperscript{92} detailing the cause of the Upper Big Branch Mine accident.\textsuperscript{93} The GIIP report noted the Upper Big Branch Mine accident was preventable as basic safety practices were ignored by Massey Energy.\textsuperscript{94} The report attributed the explosion to a methane gas build-up that was ignited due to faulty water sprayers, thus contributing to a major coal dust explosion.\textsuperscript{95} The GIIP report detailed that Massey knew it had compliance problems but failed to effectively address the issue.\textsuperscript{96} The report added that Massey promoted a culture that “prized production over safety” and where “wrongdoing became acceptable.”\textsuperscript{97} Though the GIIP report was not binding on MSHA, MSHA stated “[w]hile our own investigation is ongoing, it is fair to say that MSHA is in agreement with many of the GIIP findings. The panel’s report echoes many of the findings that MSHA has been sharing with victims’ families and the public.”\textsuperscript{98}

\textsuperscript{89} Id.
\textsuperscript{91} Letter from Massey Energy for Kentucky, West Virginia, Virginia, and Illinois Governors, supra note 88.
\textsuperscript{92} J. Davitt McAteer, \textit{Upper Big Branch Report to the Governor}, Governor’s Independent Investigation Panel, (May 2011), http://www.minesafety.com/archive/2011/e_May/19/UBB_Gov_Rpt__FINAL.pdf (The Governor of West Virginia has the authority to appoint one person to lead an independent panel to investigate the cause of various mining disasters and tragedies.)
\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{97} Id.
\textsuperscript{98} Id.
As lawmakers and regulators conduct their own investigations into the Upper Big Branch Mine disaster, political momentum and traction are building on both sides of the aisle for increased oversight and additional legislation. In the House, the “Robert C. Byrd Miner Safety and Health Act of 2010” is being circulated. In the Senate, a competing bill, the “Robert C. Byrd and Workplace Safety Act of 2010” is currently being considered. It remains uncertain if a compromise bill can be reached or if any action will be taken before the 2012 elections.

However, with the balance of power shifting in the House from Democrat to Republican and the Senate remaining in Democratic hands, one can safely assume legislative deadlock and political inaction.

An in depth examination of the proposed legislation shows that it takes bold steps to increase MSHA’s investigatory power by calling for an independent investigation team for accidents involving three or more deaths. It expands MSHA’s enforcement authority by expanding Section 104(d)(1) of the Mine Act to include “any violation” compared to the current law, which limits liability to “violations of mandatory health and safety standards.” Additionally, the legislation aggressively targets mines found to be in “pattern of recurring noncompliance or accidents.” Civil penalties are once again heightened, as well as, expanding personal and criminal liability. Interestingly enough, the Act makes one feeble

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100 Id.
101 S. 3671, 111th Cong. (2010) & H.R. 5663, 111th Cong. (2010) (Last action taken on both Bills occurred on July 29, 2010 as S. 3671 was referred to the Committee on Health, Education, Labor, and Pensions; and HR 5663 was placed on the Union Calendar as Calendar No. 334. Neither bill became law.)
104 Id. at § 104(d)(1).
106 Id. at § 202.
107 Id. at § 301, 305.
108 Id. at § 302.
109 Id. at § 104(d).
attempt to stem the growing surge of litigation by requiring operators to pay pre-judgment interest on any amount of contested penalty not reduced by the Commission.\textsuperscript{110} In the end, the legislation does nothing substantive to address the current case backlog and reform the ineffective administrative law procedure and system.

As the emerging legislation proves, the arguments of more oversight, expanded liability and higher penalties are the politically popular solution.\textsuperscript{111} However, one question that should be posed to regulators and legislators is “if more regulations and enforcement were the answer, why did the tragedy at Upper Big Branch Mine happen?”\textsuperscript{112} While part of the solution may rest in the current regulatory and oversight approach, safety “[r]egulations alone are not sufficient to see continued improvement” and instead, there needs to be a more cooperative and collaborative approach between regulators and the industry when dealing with human life.\textsuperscript{113}

Regardless of which philosophy one embraces, one potential problem recognized by both the mining industry and regulators, is a clear lack of alternatives to the backlogged appeals process for contesting safety violations.\textsuperscript{114} As evidenced by Hilda Solis, the Secretary to the Department of Labor (“DOL”), the DOL and MSHA have no plans of folding under industry pressure.\textsuperscript{115} However, the industry argues the case backlog is attributable to a wave of new hires at MSHA who, they say subjectively apply the law, issue numerous violations, and slow the

\textsuperscript{110} H.R. 5663, 111\textsuperscript{th} Cong. § 305(a) (2010).
\textsuperscript{112} Heath, supra note 60.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} Hilda L. Solis, Make mines safe: Fatalities hit an all-time low last year but coal miners need more protection, Pittsburgh Post-Gazette (Jan. 26, 2010), http://www.post-gazette.com/pg/10026/1030997-109.stm, (“I and MSHA Assistant Secretary Joseph Main are redoubling the department of labor’s commitment to ensure that every miner can return home at the end of each shift – safe and healthy. For only the second time ever, MSHA last year completed 100 percent of its mandated inspections of all surface and underground mines. Robust hiring of mine inspectors will enable us to continue this.”)
process. Clearly, the parties have drawn a line in the proverbial sand with no sign of surrender. Thus, it is safe to assume the coal industry will continue to experience increased regulation, oversight and pressure; and in response, the operators will continue to file voluminous amounts of appeals in order to stifle, frustrate, and delay an already broken system. Alternatively, MSHA is more consumed and committed to proving its case and litigating, rather than working with the industry to ensure a safe workplace. In the end, the Commission is left to resolve a conflict without the proper tools and process needed to resolve the case backlog.

III. A CLOSER ANALYSIS OF COMMISSION PROCEEDINGS

a. How Cases Proceed before the Commission

Once a case reaches the Commission, it is assigned a docket number and referred to the Chief Administrative Law Judge (“Chief ALJ”). In some cases, the Chief ALJ will accelerate the decisional process by reviewing the case and issuing orders of settlement, dismissals, or defaults. After review by the Chief ALJ, cases are then referred to, and decided by, Administrative Law Judges (“ALJ”). The ALJ then rules on motions, settlement proposals, or schedules the case for hearing. If the parties are unhappy with the ALJ’s ruling, they can appeal the decision to the Commission. The Review Commission is comprised of five members that provide an administrative appellate review of ALJ decisions. Afterwards, the parties can appeal Commission decisions to the U.S. Courts of Appeals.

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116 Id.
118 Federal Mine Safety and Health Review Commission Performance and Accountability Report, supra note 36, at 1, 2.
120 Federal Mine Safety and Health Review Commission Performance and Accountability Report, supra note 36, at 1, 2.
121 Id.
122 Id.
123 Id.
There are six types of Commission proceedings: Contesting the occurrence of the violation, the amount of civil penalty assessed against the operator, employee discrimination, temporary reinstatement, emergency response plan dispute, and compensation proceedings.\textsuperscript{124} The case backlog is fueled primarily by two types of cases; contest and civil penalty proceedings.\textsuperscript{125} These two forms of proceedings comprise approximately 10,500 cases, or 63,000 separate violations, of the Commission’s docket, an overwhelming majority.\textsuperscript{126}

In a contest proceeding, the operator challenges the citation or order before MSHA assesses a penalty.\textsuperscript{127} Essentially, the operator is attacking whether the alleged conduct constitutes a violation.\textsuperscript{128} Once MSHA files an answer, the case is assigned to an ALJ.\textsuperscript{129} In civil penalty proceedings, the mine operator files a compliant with the Commission within 30 days of receipt of a civil penalty.\textsuperscript{130} The mine operator can contest some or all of the proposed penalty assessment.\textsuperscript{131} Here, the operator is challenging the severity of the violation and the financial liability that accompanies the assessment of penalty.\textsuperscript{132} Once MSHA receives notice, it notifies and provides the Commission and the operator with a “petition for assessment of penalty.”\textsuperscript{133} Once the operator receives the petition, the operator has 30 days to file an answer with the Commission challenging the proposed penalty assessment.\textsuperscript{134} It is vitally important to note that the operator must correct the alleged violation regardless of whether or not the operator

\begin{itemize}
\item \textsuperscript{124} \textit{Guide to Commission Proceedings, supra} note 117.
\item \textsuperscript{126} \textit{Id.}
\item \textsuperscript{127} \textit{Id.}
\item \textsuperscript{128} \textit{Id.}
\item \textsuperscript{129} \textit{Id.}
\item \textsuperscript{130} \textit{Id.}
\item \textsuperscript{131} \textit{Id.}
\item \textsuperscript{132} \textit{Id.}
\item \textsuperscript{133} \textit{Id.}
\item \textsuperscript{134} \textit{Id.}
\end{itemize}
appeals the alleged violation.\textsuperscript{135} Therefore, appealing violations does not by itself hamper or relieve the operator of its duty to comply with safety laws and regulations.\textsuperscript{136}

b. \textit{Implemented Procedural Improvements and Initiatives Aimed at Resolving the Case Backlog}

The Commission has taken several steps with Congressional support to reduce the case backlog and stem the tide of litigation. Pursuant to H.R. 4899, the “Supplemental Appropriations Act, 2010, (P.L. 111-212)”\textsuperscript{137} the Commission received $3,800,000, available for one year to reduce and address the case backlog.\textsuperscript{138} The Commission chose to allocate a large portion of the funding toward hiring new personnel.\textsuperscript{139} Several additional support staff, as well as six new ALJs were hired.\textsuperscript{140} The Commission reported the additional staff and ALJs dedicated to reducing the case backlog have made a significant impact.\textsuperscript{141}

The Commission has also explored the implementation of an electronic case management system.\textsuperscript{142} The Commission hopes to establish an electronic system that would allow the parties direct access online to file and manage all documents involved in the case.\textsuperscript{143} In March of 2011, the Commission reported to Congress laying out the options, costs, and timelines associated with the project.\textsuperscript{144} Additionally, the Commission has initiated several pilot projects aimed at increasing the use of technology, e-filing, and any possible barriers to technological

\textsuperscript{135} \textit{Id.}
\textsuperscript{136} \textit{Id.}
\textsuperscript{137} Supplemental Appropriations Act, H.R. 4899, 111\textsuperscript{th} Cong. (2010) (enacted); \textit{Federal Mine Safety and Health Review Commission Performance and Accountability Report, supra note 36, at 2.}
\textsuperscript{138} \textit{Id.}
\textsuperscript{139} \textit{Id. at 3.}
\textsuperscript{140} \textit{Id. at 3.}
\textsuperscript{142} \textit{Id.}
\textsuperscript{143} \textit{Case Backlog Reduction Project Joint Operating Plan, supra note 125, at 15.}
\textsuperscript{144} \textit{Id.}
improvements aimed at making the system more efficient.\textsuperscript{145} Further, the Commission has promulgated several new rules aimed at reducing the case backlog and facilitating the adjudicative process.\textsuperscript{146} In the fall of 2010, Final Rule 75 Fed. Reg. 73955\textsuperscript{147} was published streamlining the settlement process.\textsuperscript{148} The rule makes case settlements more efficient and less time consuming by requiring parties to file a proposed decision with their settlement motions.\textsuperscript{149} Also, the rule requires that settlement motions and proposed orders be filed electronically.\textsuperscript{150} From December 2010 through the end of 2011, over 7,200 cases had been filed pursuant to the new rule and settled.\textsuperscript{151}

Additionally, MSHA has attempted to improve the review system and increase settlements by inserting conferencing opportunities at the beginning of the formal review procedure.\textsuperscript{152} Due to the case backlog, MSHA relies upon its own employees to serve as Conference and Litigation Representatives (“CLR’s”) rather than the attorneys in the Labor Department Solicitor’s Office.\textsuperscript{153} Operators and MSHA have tried to work out settlements before investing too much in litigation.\textsuperscript{154} CLR’s have generally requested a 90-day extension from the Commission to explore settlement.\textsuperscript{155} Thus, a settlement may be reached before the issuance of the formal Petition for Assessment of Civil Penalty is filed and the case is subject to Commission procedures.\textsuperscript{156}

\begin{footnotes}
\item[145] Id.
\item[146] Id.
\item[149] Id.
\item[150] Id. at 3.
\item[151] Id. at 3.
\item[152] Heenan, supra note 34, at 6.
\item[153] Id.
\item[154] Id.
\item[155] Id.
\item[156] Id.
\end{footnotes}
Despite MSHA’s and the Commission attempts to facilitate settlement, this approach has been rife with difficulties, shortcomings, and conflicts. One issue that undermines the settlement procedure is that neither MSHA nor the CLR take into account what can or cannot be proven at trial.\(^{157}\) Instead, the government enters the process inflexible and generally unwilling to compromise.\(^{158}\) Consequently, unless the operator simply gives up or accepts liability, nothing of any real consequence gets resolved.\(^{159}\) Thus, the one mechanism that enables the parties to opt out of litigation and should encourage communication is undermined by a general lack of good faith.\(^{160}\) “As a result, neither side can get serious until right before trial. That is when what can be proved becomes more important than insisting the inspector was right in [every] aspect.”\(^{161}\) This type of procedure, without more safeguards and protections, only fuels case the backlog and operator frustration with the system because the operator simply wants a fair review and possible modification or adjustment of the possible violations and penalties.\(^{162}\) However, MSHA’s stance and position toward settlement serves an important function because it precludes regulatory capture and ensures compliance.\(^{163}\)

In December of 2010, the Commission published Final Rule 75 Fed. Reg. 81459, establishing a new simplified proceeding procedure in civil penalty cases.\(^{164}\) On March 1, 2011, the simplified proceeding pilot program commenced for a period of 9-12 months with the goal of streamlining the procedures for handling certain types of cases.\(^{165}\) Under the new rule, cases may be designated for simplified proceedings if the controversy involves no fatality, injury, or

\(^{157}\) Id.

\(^{158}\) Id.

\(^{159}\) Id.

\(^{160}\) See, Id.

\(^{161}\) Id.

\(^{162}\) Id.

\(^{163}\) Id.


illness and (1) contains only section 104(a) citations, (2) no special assessments, (3) absent complex issues of law or fact, (4) involves a limited number of citations, (5) limited penalty amount, (6) prospective hearing will be only for a limited duration, (7) does not involve any questions of law, and (8) the case does not require expert testimony. After applying the criteria, the ALJ determines whether the case is suitable for simplified proceedings. Additionally, either party can request a simplified proceeding or if a party disagrees, it may opt-out.

After the ALJ designates a case for simplified proceedings, the attorneys must file a notice of appearance, but no answer is no required. The parties then have 45 days to provide the other with copies of all non-privileged documents, electronically stored information, and any additional evidence used to support claims or defenses. Formal discovery is not permitted unless leave of court is granted. Once the documents are exchanged, the ALJ holds a pre-hearing conference in an attempt to reach a settlement, narrow the issues, make factual stipulations, establish defenses, and identify the planned witnesses, exhibits, motions, and any other relevant matters. After completion of the pre-hearing conference, the ALJ schedules a hearing. However, the ALJ who presides over the pre-hearing conference is conflicted out of the hearing.

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166 Federal Mine Safety and Health Act of 1977 § 104(a) (MSHA representatives may issue a 104(a) citation when they believe that a mine or mine operator has violated any part of the Act.)
173 Id.
In addition to the new rules, the Commission has implemented Global Settlement Conferences.\textsuperscript{178} The conferences group together multiple violations of one mine operator, mine, or law firm in order to consolidate the docket and dispose of multiple cases at one time.\textsuperscript{179} The Commission then generates an order to the Secretary and the operator or operator representative to appear via teleconference or in person to address those issues that can be settled.\textsuperscript{180} Settlements reached at the conference are approved immediately.\textsuperscript{181} If some issues remain unresolved, they are assigned to an ALJ and placed on the docket.\textsuperscript{182} By employing this strategy, the Commission is able to resolve less complicated issues and reserve the hearing docket for more controversial and complex matters.\textsuperscript{183} The Commission reported that during the period of April 29, 2011 through July 29, 2011, 17 Global Settlement Conferences were conducted,\textsuperscript{184} totaling 99 cases including 854 separate citations.\textsuperscript{185} Consequently, 77 of those cases, totaling 706 citations, were settled producing a 78\% success rate.\textsuperscript{186}

Also, in 2010 the Commission unveiled a plan to prioritize undecided cases.\textsuperscript{187} The cases which received the highest priority involved “fatalities, injuries, flagrant violations, emergency response plans, and discrimination complaints.”\textsuperscript{188} Next, cases designated the second highest priority were calendar calls.\textsuperscript{189} Finally, the third category prioritizes cases by the date the initial pleading was filed.\textsuperscript{190} The Commission reported 547 cases designated as priority cases.\textsuperscript{191}

\begin{footnotes}
\item[178] \textit{Case Backlog Reduction Project Joint Operating Plan, supra} note 125, at 14.
\item[179] \textit{Id.}
\item[180] \textit{Id.}
\item[181] \textit{Id.}
\item[182] \textit{Id.}
\item[183] \textit{Id.}
\item[185] \textit{Id.}
\item[186] \textit{Id.}
\item[187] \textit{Case Backlog Reduction Project Joint Operating Plan, supra} note 125, at 13.
\item[188] \textit{Id.}
\item[189] \textit{Id.}
\item[190] \textit{Id.}
\end{footnotes}
year’s end, the Commission disposed of 308 of those cases, assigned 228 to ALJs, and had eight settlement motions pending before the Chief Judge.  

Similar to Global Settlement Conferences (“Global Settlements”), the Commission has implemented a calendar call program as another tool to fight the case backlog.  

Calendar calls are prioritized and organized around specific operators or geographic locations.  

Hearings are held in one location and occur sequentially over the course of a week or two.  

Operators are able to attend multiple hearings in conjunction with one another in order to save time and resources rather than attending different hearings in different locations.  

In its final report, the Commission reported that between April 29, 2011 and July 28, 2011, 12 calendar calls were scheduled.  

ALJs heard 77 different cases, totaling 241 separate citations; consequently, 64 cases were resolved, totaling 211 separate citations.  

The new regulations aimed at settlement and simplified proceedings, as well as the other initiatives have shown promise. In 2010, the Commission ALJs disposed of only 7,132 cases, and the Commission initiatives resulted in 12,944 cases being disposed of in 2011.  

The Commission received approximately 10,600 new cases in 2011. The Commission estimated that each ALJ would dispose of approximately 450-500 cases per year. However, even with the new procedures and initiatives, the system is still largely inefficient in disposing of cases in a

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192 *Id.* (Three cases had pending show cause orders because the operator failed to file a timely answer.)


194 *Id.*

195 *Id.*

196 [Case Backlog Reduction Project Joint Operating Plan, supra note 125, at 7.]

197 [Final Report on the Targeted Caseload Backlog Reduction Project, supra note 141, at 7.]

198 *Id.*

199 *Id.*

200 [Federal Mine Safety and Health Review Commission Performance and Accountability Report, supra note 36, at 3.]

201 *Id.*

202 *Id.* at 4.

203 *Id.*
timely fashion. In 2006, cases on average were decided 188 days after Commission receipt, approximately a six-month adjudicative period. However, in 2011, cases were disposed of on average 524 days after receipt, or roughly an 18-month adjudicative period. In 2006, 81% of cases were decided within one year, compared to only 33% in 2011. In 2006, only 14% of the Commission’s cases were pending after one year. That number tripled in 2011 to 45.

While the new rules and regulations, initiatives and additional ALJs have made modest gains in reducing the case backlog, the quicker disposal of cases and pressure placed upon ALJs to meet those goals have increased appeals to the Commission. The Commission hears primarily two types of appeals: (1) substantive cases and (2) default cases. Substantive cases are cases where an ALJ issues a decision on the merits, and either party has filed a petition for review with the Commission. Default cases are those contests where the operator has failed to timely contest a proposed penalty, and the operator has filed a motion to reopen the final order.

In 2008, eight petitions for review of substantive cases were filed with the Commission, and only four were granted. In 2011, 66 petitions for review of substantive cases were filed with the Commission, and 43 of those were granted. Additionally, before 2007, approximately 50 motions to reopen default cases were filed with the Commission. However,
since 2008, approximately 200 motions to reopen default cases are being filed annually. Each default case petition is carefully reviewed by Office of General Counsel (“OCG”), who then prepare a draft order for the Commission to consider.

While the Commission’s reforms and attempts to reduce the case backlog are commendable and have produced marginal results, their treatments and solutions only address the symptoms of the backlog and fail to adequately provide a cure to underlying disease. Consequently, the number of cases pending before the Commission is approximately the same as it was two years ago when most of the new initiatives, rules, and regulations were implemented. Over 90% of the cases filed with the Commission eventually settle, which begs the question, why are so many cases being filed if the parties are so willing to reach settlement? One answer: There is not a legitimate escape valve for the parties during the litigation process that allows for meaningful communication aimed at resolving disputes over mine safety while ensuring compliance and precluding regulatory capture.

c. Proposed and Pending Solutions Focused on Solving the Case Backlog

The demise of the traditional “Pre-Penalty Safety and Health Conference” (“Pre-penalty Conference”) is one catalyst fueling the case backlog. Before February 2008, MSHA held the Pre-penalty Conference prior to the assessment of a civil penalty and Commission jurisdiction. At the conclusion of the Pre-penalty Conference, MSHA would take into account any mitigating

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217 Id.
218 Id. (The OCG play an important role in handling cases. The OCG is responsible for handling the initial legal research, preparing draft order and opinions for the Commission, evaluate FOIA request, and formulate and draft the Commission’s rules.)
219 Id.
222 Id.
factors, extenuating circumstances, or modifications when compiling their inspection report.\textsuperscript{223} Disputes that were resolved during the Conference did not require Commission approval, and therefore, operators did not need to file as many cases with the Commission.\textsuperscript{224} However, in March of 2009, MSHA abandoned the Pre-Penalty Conference because operators were requesting conferences for every violation and abusing the system, as well as, justified violations and penalties were being unfairly compromised and settled.\textsuperscript{225} In 2009, MSHA implemented the “Enhanced Safety and Health Conference” (“Enhanced Conference”) to reduce operator abuse and prevent regulatory capture.\textsuperscript{226} The significant change in the procedure required the operator to first contest the violations and penalties before it could request the Enhanced Conference.\textsuperscript{227} As a result, the operator is forced to file a claim with the Commission before it can attempt some type of settlement with MSHA; however, while the Enhanced Conference has reduced operator abuse on the conferencing level, it has fueled the current case backlog.\textsuperscript{228} As a result, once a claim is filed, the Commission is required to approve “any compromise, mitigation, or settlement.”\textsuperscript{229} Consequently, disputes that could have been worked out without Commission intervention require Commission action and clog up the docket.\textsuperscript{230}

For most of MSHA’s existence, the operator could easily request a Pre-penalty Conference, and it was granted.\textsuperscript{231} The parties could then meet informally and discuss the

\textsuperscript{223} Id.
\textsuperscript{224} Id.
\textsuperscript{226} Id.
\textsuperscript{227} Bell, supra note 221, at 3.
\textsuperscript{228} Id.
\textsuperscript{230} Pre-Hearing Conference, 29 C.F.R. 2700.106 (2011) (the new regulation has streamlined the settlement process and has resolved some of the case backlog created because of the statutory requirement found in 30 U.S.C. 820(k) (2006) that requires Commission approval of all settlement agreements reached between MSHA and the operator.)
\textsuperscript{231} Heenan, supra note 34, at 2.
violations, corrective actions, mitigating factors, and any modifications to the violations. The process was not a hearing, but an opportunity for MSHA to review its own actions as well as educate the operator on safety compliance.\textsuperscript{232} Both parties welcomed the process, and for most operators, this was all the review and due process they felt was needed.\textsuperscript{233} However, once the Enhanced Conference was implemented, the process naturally propelled both parties toward litigation and undermined the parties’ ability to communicate with one another. Today, operator requests for conferences are often met with “‘conference will be scheduled after . . . penalties . . . have been assessed . . . Failure to timely contest penalties will result in your conference request being cancelled.’”\textsuperscript{234} In the end, the one procedural mechanism that encouraged communication and promoted settlement was replaced by formal, time-consuming, and costly litigation initiated before the Commission.\textsuperscript{235} Elimination of the Pre-penalty Conference has made “formal contests the only reliable avenue for dialogue.”\textsuperscript{236}

All the parties concerned agree the best approach would be to hold the Safety and Health Conference before the penalty is formally contested before the Commission.\textsuperscript{237} However, in order for the change to be effective, a dialogue and willingness to cooperate must be fostered between the parties without compromising safety. On August 20, 2010, MSHA unveiled a pilot mediation program to help stem the tide of legal contests.\textsuperscript{238} MSHA’s goal was to “alter [the] ‘safety and health conferences’ so that mine operators can informally dispute citations before filing a formal appeal with the [Commission].”\textsuperscript{239}

\begin{footnotesize}
\textsuperscript{232} Id.
\textsuperscript{233} Id.
\textsuperscript{234} Id.
\textsuperscript{235} Id.
\textsuperscript{236} Id. at 3.
\textsuperscript{237} See Id.
\textsuperscript{239} Id.
\end{footnotesize}
On November 28, 2011, MSHA released its evaluation of the pilot mediation program. The program yielded modest success as 67% of the violations that went to conference were settled, while 33% were eventually contested to the Commission. MSHA estimated that pilot conferences reduced the case backlog by up to 17%. Interesting enough, MSHA reported the parties found the process improved communication and overall they were pleased with the process. The stakeholders reported the conferencing procedure was useful and felt it would decrease the number of violations contested in the long term. A majority of participants stated they did not intend to litigate issues discussed in the conference. MSHA’s plan is to institute the Pre-Assessment Safety and Health Conference (Pre-Assessment Conference”) in every district by March 2013.

However, a closer examination of the new Pre-Assessment Conference reveals some troubling trends. First, the new conferencing procedure is eerily similar to the one abandoned by MSHA in 2008 because it had become largely ineffective and enabled too many abuses. Also, the new procedure is optional and 90% of contested violations did not use the conferencing procedure. Of those responding to the survey, operators reported that they did not conference because there were dissatisfied with previous results, and some stated they contested violations automatically based on the proposed penalty amount. Finally, the process and procedure is

241 Id.
242 Id.
243 Id.
244 Id. at 9.
245 Id. at 10.
247 Evaluation of MSHA’s Pre-Assessment Safety and Health Conferencing Pilot, supra note 240, at 1.
248 Id. at 7.
still controlled by MSHA and presents a clear lack of impartiality.\textsuperscript{249} CLRs are MSHA employees and operators stated that they felt “the person conducting the conferences should be independent from the district management and allowed to make decisions at the conference in order to speed up the conferencing process.”\textsuperscript{250}

Additionally, several additional ideas have been floated to help improve the negotiation and settlement process.\textsuperscript{251} First, allow mini-trials whereby the parties could only call one witness and exhibits would have to be submitted in advance of the hearing.\textsuperscript{252} Second, allow more simplified written submittals of positions as well as stipulations to resolve more issues before trial.\textsuperscript{253}

Interestingly enough, some have called for a formal mediation process and procedure as a solution to the case backlog.\textsuperscript{254} While in the theoretical sense this is a well-reasoned solution, there are numerous questions that remain unresolved and that must be addressed if the mediation process is going to serve a real solution to the current stalemate. When is the most opportune time to conduct the mediation? What DSD will be adopted and is the most effective at reducing the case backlog as well as addressing the underlying conflicts? What type of mediator style will best facilitate the process and increase the chances of success? Additionally, how can a mediation process be implemented that encourages cooperation and compliance without sacrificing miner safety? In the end, a Commission-mandated mediation process offers a solution to reducing the case backlog, creates a system that encourages cooperation and collaboration toward miner safety, and prevents regulatory capture.

\textsuperscript{249} Id. at 10.
\textsuperscript{250} Id.
\textsuperscript{251} Heenan, supra note 34, at 6.
\textsuperscript{252} Id.
\textsuperscript{253} Id.
\textsuperscript{254} Id.
c. CONSIDERATIONS FOR DESIGNING A MANDATORY MEDIATION SYSTEM AND IT’S IMPACT ON THE CASE BACKLOG

a. Benefits of Mediation and Why the Process Works

The benefits of mediation in lieu of litigation are widely accepted and understood within the legal community. Attorneys and judges have embraced mediation as an effective alternative to traditional litigation that generally yields a result both parties find amenable. While the populous may be unfamiliar with the intricacies of the mediation process, more and more participants in the judicial system are finding their disputes resolved through this important system.

Mediation accelerates and facilitates possible settlement. In fact, 95% of cases filed in California state judicial system eventually settle before trial.\(^{255}\) Some cases settle early and some settle on the eve trial; however, the key difference between the former and latter is the amount of time, resources, money, and psychological toll one is willing to invest or sacrifice in the process. One important advantage of mediating disputes is avoiding the financial burden associated with litigation.\(^{256}\) In many cases, the simple process of telling one’s story to a mediator facilitates the settlement process.\(^{257}\) The cost of mediation generally pales in comparison to the cost incurred through the life of a lawsuit.\(^{258}\) While cost and outcome are important considerations, there are other benefits that are generated from the process. One intangible benefit of mediation is that it fosters an environment that encourages and promotes communication in lieu instead of litigation tactics that often undermine and serve as impediments to communication.

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\(^{256}\) *Id.* at 1.

\(^{257}\) *Id.*

\(^{258}\) *Id.*
Additionally, in most states and mediation systems, “what takes place in mediation is confidential.” Generally, mediators cannot be forced to testify about the communications during the process. Also, offers, counter-offers, and concessions are confidential if the case does not settle in mediation. While there are some confidentiality exceptions, parties to the most typical forms of dispute over money and negligent conduct are generally protected by confidentiality laws.

The American Arbitration Association (“AAA”) reports that over 85% of all mediations result in settlement. Whereas settlement offers during the litigation process may be perceived as showing weakness, mediation provides a secure environment for negotiation. Mediators provide structure to the communication process and unproductive discussions can be avoided. Next, hard bargaining and posturing are reduced or eliminated during the mediation process. Instead of each party focusing on the differences in their positions, mediation provides an opportunity to seek common ground and agreement. Further, mediation brings together the decision makers who are essential to reaching a settlement. During mediation, each party has an opportunity to be heard, present information, educate, and provide a realistic viewpoint not filtered by lawyers or precluded by the fog of litigation. Also, mediation provides the parties realistic assessment of their case’s strengths and weaknesses. Finally, the mediator can aid the

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259 Id. at 2.
260 Id.
261 Id.
262 Id.
263 Id.
264 Id. at 2.
265 Id.
266 Id.
267 Id.
268 Id.
269 Id.
270 Id.
parties in generating options for settlement instead of getting bogged down in legal and factual issues.\textsuperscript{271}

\textbf{b. Dispute System Designs, Mediator Approaches, Defining the Problem, and the Benefits of Third Party Designed Mandatory Mediation Systems}

There are several different DSDs and mediation styles one must consider when designing and participating in a mandatory DSD. Based on today’s political and budgetary constraints and the economic feasibility of working within the existing regulatory and procedural framework, some DSDs, styles of mediation, specific mediator, and style of negotiation may not be well-suited or practical in addressing the case backlog in a timely cost-effective format. Therefore, I only provide an overview of different DSDs, mediator approaches, and the benefits of mandatory mediation.

\textbf{i. Dispute System Designs}

DSDs vary from the disputant’s full control over the whole system to very little control over the system.\textsuperscript{272} One key factor affecting DSDs and their success depends on who is exercising control during and over the process.\textsuperscript{273} Three key components to consider when designing a DSD or selecting a DSD are; 1) who is designing the system, 2) what are the goals, and 3) how will power be exercised during the process.\textsuperscript{274} Traditionally, public justice system mediation has been a third-party DSD provided by the courts through the support of the legislature for the benefit of the disputants.\textsuperscript{275} Whereas private justice systems have created and developed mediation DSDs to resolve contract disputes, labor grievances and other commercial

\textsuperscript{271} Id.
\textsuperscript{273} Id.
\textsuperscript{274} Id. at 12-13.
\textsuperscript{275} Id.
issues. Traditionally, mediation DSDs can be categorized as one-party, two-party or third-party DSDs.\(^{276}\) One-party DSDs are a newly emerging trend where one party to the conflict, who typically has superior economic power, designs the entire system through which the conflicts are mediated.\(^{277}\) In this system, one party who designs the system is generally the only party who has control over it.\(^{278}\) More often than not, these DSDs create restrictive outcomes, such as binding arbitration.\(^{280}\)

Two-party DSDs bring the parties together to design the system which will hopefully resolve their conflict.\(^{281}\) These systems are generally seen as fair and efficient ways to resolve conflicts.\(^{282}\) They are often tailored to specific disputes that might arise and are most often seen in private international commercial arbitrations.\(^{283}\) They occur where the parties are “repeat players,” such as labor relations and collective bargaining.\(^{284}\) As stated earlier, my analysis primarily focuses on a public DSD adopted by a third-party for the benefit of the disputants and, in this case, an administrative adjudicative process. Due to the existing regulatory and legislative constraints and mandates one-party or two-party designs are not practical or workable solutions without significant Congressional and regulatory reform.

\(\text{Id.}\)
\(\text{Id.}\)
\(\text{Id.}\)
\(\text{Id.}\)
\(\text{Id.}\)
\(\text{Id.}\)
\(\text{Id.}\)
\(\text{Id.}\)
\(\text{Id.}\)

\(^{276}\) Id.
\(^{277}\) See Id.
\(^{279}\) Id.
\(^{280}\) Id.
\(^{281}\) Id.
\(^{283}\) Id.
\(^{284}\) Id.
ii. Mediation Styles and Approaches

First, a mediator’s approach typically falls somewhere on an continuum from an evaluative approach, to the other end of the spectrum providing a more facilitative role. The mediator who utilizes an evaluative approach generally intends to direct some or all of the outcomes of the mediation. In this strategy, the mediator helps the parties understand the strengths and weaknesses of their positions and the likely outcome of litigation. The evaluative mediator typically stresses his education and experience and provides an in-depth review of court documents, pleadings, and evidence. At the outset of the mediation, the mediator allows each party to present their case and positions. Most discussions take place in private caucuses, and the mediator is able to employ his evaluative techniques. Finally, the mediator pushes the parties toward settlement arriving at a “position-based compromise agreement.”

By providing assessments and direction, the evaluative mediator removes some of the parties’ decision-making powers. In some instances, this allows the parties to reach settlement more efficiently. However, the evaluative approach may undermine settlement because the neutrality of the mediator can come into question and the parties’ flexibility and decision-making power is limited.

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286 Id.
287 Id. at 26.
288 Id.
289 Id.
290 Id. at 27.
291 Id.
292 Id. at 44.
293 Id.
294 Id.
However, the facilitative mediation approach fosters a more communicative style between the parties allowing each party more opportunities to express differing viewpoints.\textsuperscript{295} Additionally, the mediator enhances the communication between the parties by helping them determine the outcome.\textsuperscript{296} Typically, parties will make opening remarks and statements and caucuses are conducted during the process.\textsuperscript{297} However, the focus of the mediation is not on the legal merits of the dispute or the mediator’s knowledge, but instead on the parties’ underlying needs and how they can be met through an interest-based settlement, and therefore, the mediator generally avoids case evaluation.\textsuperscript{298} Finally, the facilitative model supports brainstorming and suggests options for reaching settlement.\textsuperscript{299}

The facilitative model can offer certain advantages if the parties are capable of understanding opposing interests and developing solutions.\textsuperscript{300} This model provides the parties more control over the process, decision-making, and the agreement.\textsuperscript{301} Finally, this system offers greater opportunities for the parties to educate one another about different viewpoints, interests, and positions.\textsuperscript{302} In the end, the process should help the parties’ future ability to work together.\textsuperscript{303}

iii. Mediator Experience, Expertise, and Impartiality

In the design of a dispute resolution system, thought and consideration must be given to

\textsuperscript{295} Id. at 23.
\textsuperscript{296} Bingham, supra note 272, at 12.
\textsuperscript{297} Id.
\textsuperscript{298} Id.
\textsuperscript{299} Id. at 12-13.
\textsuperscript{300} Riskin, supra note 285, at 45.
\textsuperscript{301} Id.
\textsuperscript{302} Id.
\textsuperscript{303} Id.
the mediator’s level of knowledge, expertise, and experience. Ideally, the mediator should have an expertise in both the subject-matter of the dispute as well as the mediation process.\textsuperscript{304} However, those two characteristics are not always feasible. “‘Subject-matter expertise’ is defined as a substantial understanding of . . . administrative procedures, customary practices, or technology associated with the dispute.”\textsuperscript{305} Subject-matter expertise generally increases in proportion to the parties’ needs for evaluation.\textsuperscript{306} Therefore, parties looking for an evaluative approach will most likely prefer a mediator with a strong background with the disputed subject-matter.\textsuperscript{307} For instance, parties looking to propose new government regulations may want a mediator who understands that specific area of administrative law and procedure.\textsuperscript{308} Conversely, parties capable of understanding the problems, issues, and working toward their own agreement may want a mediator with greater knowledge of the mediation process and procedure.\textsuperscript{309}

Also, impartiality is essential to the mediation process and its success.\textsuperscript{310} The need for actual impartiality or the perception of impartiality, generally increases as the parties’ desire a more evaluative approach.\textsuperscript{311} Therefore, a system that utilizes an evaluative approach must possess mediators who remain impartial through the process and gain the trust of the parties.\textsuperscript{312} The impartiality of the mediator in a facilitative approach is less essential to the process due to the decision-making ability and creativeness given to the parties.\textsuperscript{313}

\textsuperscript{304} See Id. at 46.
\textsuperscript{305} Id.
\textsuperscript{306} Id.
\textsuperscript{307} Id.
\textsuperscript{308} Id.
\textsuperscript{309} Id.
\textsuperscript{310} Id. at 47.
\textsuperscript{311} Id. at 48.
\textsuperscript{312} Id.
\textsuperscript{313} Id.
iv. Defining the Problem and Focusing the Mediation

Defining the problem and the vast expanse between narrowing the issues and broadening the result is another consideration the parties and mediator must determine in the process.\textsuperscript{314} A narrow problem-definition generally increases the efficiency of mediation and the chances for settlement.\textsuperscript{315} This is accomplished by narrowing the number of issues and relevant information, and avoiding the pitfalls of a broader approach.\textsuperscript{316} However, the narrow approach can increase the possibility of impasse because it limits the decision-making of the parties and creativity toward designing a settlement agreement.\textsuperscript{317}

A broad problem-definition approach can facilitate an agreement that addresses the parties’ underlying issues.\textsuperscript{318} Also, broadening the problem can increase the likelihood of settlement because it increases the possible outcomes and solutions of the parties and permits creativity.\textsuperscript{319} However, this approach can have the opposite effect.\textsuperscript{320} By broadening the problems, the likelihood of impasse can increase, therefore, increasing time and expense.\textsuperscript{321}

v. Mandatory Mediation Viability and Success

Finally, third-party designed mandatory mediation as an avenue for settling disputes has proved successful in some of the most contentious arenas. The Equal Employment Opportunity Commission (“EEOC”) has made extensive use of mediating discrimination complaints and has one of the largest workplace mediation programs.\textsuperscript{322} The administrative agency uses internal or

\begin{footnotes}
\footnotetext{314}{Id. at 43.}
\footnotetext{315}{Id.}
\footnotetext{316}{Id.}
\footnotetext{317}{Id.}
\footnotetext{318}{Id.}
\footnotetext{319}{Id.}
\footnotetext{320}{Id.}
\footnotetext{321}{Id.}
\footnotetext{322}{Bingham, supra note 272, at 17-18.}
\end{footnotes}
staff mediators, as well as, independent contractors as external mediators.\footnote{323} Every mediator receives training in both mediation and EEOC laws and generally uses evaluative techniques.\footnote{324} There have been several studies about the EEOC mediation process and its success.\footnote{325} In 1994, 267 exit mediation surveys and 125 mail surveys showed that 66\% of the charging parties and 72\% of the supervisors were satisfied with the process and outcome.\footnote{326} Also, 95\% of the parties trusted the mediator and 84\% and 83\% of the charging parties and supervisors would use mediation again.\footnote{327} In 2000, a study was conducted over 11,700 EEOC mediations and it revealed that 91\% and 96\% of charging parties and supervisors would use mediation again to resolve disputes.\footnote{328} In the end, this third-party DSD performed well in handling and resolving discrimination complaints within the workplace.\footnote{329} In fact, the studies showed the parties perceived the process as fair due to the fact it was designed by authoritative third-parties and not by one disputant,\footnote{330} whereas a one-party design carries a higher burden to establish fairness with the disputants.\footnote{331}

Another example of a successful mandatory mediation emerged during the Great Recession.\footnote{332} As the financial crisis continues to plague the country, fueled in large by the mortgage meltdown, mandatory mediation has become a viable solution for resolving foreclosures between banks and homeowners.\footnote{333} In fact, 21 states now offer some form of mediation that allows the homeowners to negotiate with the bank in hopes of finding a faster

\footnote{323}{\textit{Id.} at 18.}
\footnote{324}{\textit{Id.}}
\footnote{325}{\textit{Id.}}
\footnote{326}{\textit{Id.} at 19.}
\footnote{327}{\textit{Id.}}
\footnote{328}{\textit{Id.}}
\footnote{329}{\textit{Id.}}
\footnote{330}{\textit{Id.}}
\footnote{331}{\textit{Id.}}
\footnote{333}{\textit{Id.}}}
remedy.  Six states offer an automatically-scheduled mandatory mediation process and 15 states offer an opt-in mediation process once the lending institution initiates the foreclosure process. Those states that offer automatic scheduling reported a 75% participation rate, whereas those states providing opt-in mediation have reported only a 21% participation rate. Due to the high participation rate, many opt-in states are beginning to switch to mandatory mediation because success and settlement is premised upon participation and good faith. Courts, states, and governments can mandate participation, but they cannot legislate good faith. Despite the mandatory nature of the process, homeowners reached a settlement 70-75% of the time, and 60% of homeowners were able to stay in their homes. Thus, the mandatory requirement did not serve as a large impediment to settlement or negotiating in good faith.

In some states, mandatory mediation has yielded very positive results in one of the most contentious arenas of dispute, domestic relations. Beginning in 2005, the State of Utah launched a mandatory mediation process. Once an answer is filed in a contested divorce case, all remaining contested issues are referred to mandatory mediation. Parties are required to participate in at least one session before their case can move forward, unless the parties are

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335 Id. at 4.
336 Id.
337 Id. at 5.
338 Id. at 4.
339 Id. at 5.
340 Some states require mediation for domestic relation conflicts such as: Oregon, http://courts.oregon.gov/Clatsop/Services/Family_Court_Program.page (accessed June 28, 2012); Utah, http://www.utcourts.gov/mediation/divmed/ (accessed June 28, 2012); and Montana, http://courts.mt.gov/clerk/filing/mediation.mcpx (Montana requires mandatory mediation for all appeals from district court to the supreme court involving money judgments, domestic relations, or workers’ compensation claims and this process which has historically reduced the number of appeals actually heard at the supreme court by approximately ten percent).
342 Id.
excused for good cause.\textsuperscript{343} Utah states that mediation is appropriate in domestic conflicts because “it encourages collaborative problem solving by the parties . . . [and] offers an environment well-suited to identifying and addressing the strong emotional issues associated with divorce and parenting conflicts.”\textsuperscript{344} Most importantly, Utah notes that mediation allows the parties to find solutions to their own disputes, the case is resolved more quickly, mediation is less expensive, and it promotes relationships and communication.\textsuperscript{345} While this rationale may oversimplify to the benefits of mediation, those principles are nonetheless legitimate and serve as influential motivating factors.

d. Creating a Post-Litigation Mandatory Mediation Process at the Commission Level

a. The Mandatory Mediation Procedure and Designing the System

First, the split-enforcement model adopted by Congress in the 1970’s serves a very critical purpose in ensuring mine safety and precluding regulatory capture. However, under today’s high-stakes litigation, the system is inefficient and ineffective. The system and process not only improves efficiency and outcomes, but it can be done in such a way as to preclude regulatory capture. The procedures for contesting cases before the Commission must be amended and adapted if the system is going to be saved. Therefore, not only is the mandatory mediation process essential to saving the split-enforcement model and solving the case backlog, establishing a mandatory mediation process within the current procedures for contesting mine safety violations is practical, efficient, and should be embraced by the parties. It is unreasonable to think that to prevent regulatory capture a system must preclude all cooperation and communication. One some level the system and safety are improved if the regulator and

\footnotesize{\textsuperscript{343} Id.  
\textsuperscript{344} Id.  
\textsuperscript{345} Id.}
regulated can communicate and work toward a common goal, safety. Mandatory mediation with Commission oversight facilitates this goal and permits managed cooperation.

Clearly, the Commission has launched numerous initiatives to address the case backlog. Some of these programs have created a partial escape valve to traditional litigation, but have failed to bring about the types of substantive changes and reforms needed to overhaul an overwhelmed. While the split-enforcement model\textsuperscript{346} does stymie regulatory capture, it was never intended to handle the volume of litigation that exists today due to increased penalties, violations, and court challenges. The split-enforcement model still offers a viable blueprint for the efficient administration of justice as well as an essential check on the regulator-regulated relationship; however, it must be amended and updated to function in today’s high-stakes litigation world. As it stands, the Commission has implemented simplified proceedings, Global Settlements, calendar calls, and new rules to expedite the settlement process, all in an effort to reduce the case backlog. And recently, MSHA announced they planned to turn back the clock and institute the new Pre-Assessment Conference which is eerily similar to the old Pre-Penalty Conference. The new Pre-Assessment Conference presents many of the same complaints, conflicts and abuses as the old conferencing process.

The reforms have yielded modest results and the data suggests that 90\%\textsuperscript{347} of cases eventually settle somewhere during the litigation process. However, a mandatory mediation process at the onset of litigation would yield even better results in a more efficient time frame, while improving the split-enforcement model. The characteristics of mediation not only encompass most of the Commission’s goals in one avenue, but more importantly, create a dialogue that should reduce the amount of cases being filed in the future. If 90\% of the cases

\textsuperscript{346} 30 U.S.C. § 811(a).
\textsuperscript{347} Manning, \textit{supra} note 220, at 1.
eventually settle, why not capitalize on that fact by offering parties one clear, efficient, and fair alternative at the beginning of the litigation process, not years into the process.

Under the proposed mandatory mediation process, much of the Commission’s procedures already allow for a smooth transition into a clear and effective alternative to litigation. Currently, each case is assigned a docket number when it reaches the Commission by the Chief ALJ. The Chief ALJ could still accelerate the process by ruling on orders of settlement, dismissals, or default judgments. Under the mediation system, the Chief ALJ’s authority would remain unchanged, and both of these procedural steps would remain intact.

However, instead of the Chief ALJ referring each case to an ALJ for a contested proceeding, the Chief ALJ would refer every case to mandatory mediation. There, the parties would have to participate in at least one mediation session before being allowed further access to the courts. Also, similar to Utah’s mandatory mediation process implemented in domestic relations cases, a good cause exception would be available to the parties to opt out of the mediation procedure. However, that exception must be rarely granted and zealously guarded in order for the mediation process to produce outcomes. If mediation proved unsuccessful, the parties would then find themselves back in throws of formal litigation, an all too familiar place. In the end, a mandatory mediation system would capitalize and streamline many of the programs and initiatives already implemented by the Commission.

b. Mediating the Dispute.

i. The Mediator’s Approach

350 Utah State Courts, supra note 341.
While establishing a mandatory escape valve for the parties is achievable, understanding who will mediate the disputes and their role and style in the process is a much different consideration. Will the mediator offer an evaluative or facilitative approach? What is each mediator’s expertise and knowledge about mining, technology, and mine safety? How will impartiality be established and maintained? All these considerations will have a very important impact on the process and its long-term success.

Ideally in this third-party designed system, an evaluative approach would offer the most effective and efficient style for both the parties, as well as, remediying the backlog. The evaluative style would allow the mediator the opportunity to help each party understand their case’s strengths and weaknesses. As it stands, there is already a relatively ineffective conferencing system that transpires at the beginning of the litigation. Under the current approach, MSHA relies on its own employees to serve as CLRs and facilitate settlement. The CLRs request a 90-day extension from the Commission in hopes of reaching settlement. However, this process has been somewhat ineffective and undermined because CLRs and MSHA fail to consider what can or cannot be proven at trial. The reports suggest that all too often MSHA enters the process inflexible and unwilling to compromise; thus, the operator becomes frustrated and effectively withdraws from the process.

An evaluative approach and style would solve both of these issues. First, the process is undermined because the regulator is also serving as the mediator, and therefore, there is a clear absence of impartiality and a conflict of interest emerges. Thus, the operator enters the process with hesitation and distrust. Secondly, there is no objective party offering insight into strengths

\[351\] Heenan, supra note 34, at 6.
\[352\] Id.
\[353\] Id.
\[354\] Id.
and weaknesses of the government’s case. Just a simple glance at this quagmire and one can see that any opposing party should not serve as both the regulator and mediator in the same proceeding. Thus, an evaluative approach by independent third party produces impartiality as well as important perspective about each case’s strengths and weaknesses, and therefore, helps the parties educate each other and make more informed decisions.

Also, an evaluative approach would provide an in-depth review of court documents, pleadings, and evidence. Ideally, the mediator should stress his experience with mine safety and the regulatory climate to establish his credibility with the parties and help facilitate settlement. This will have the intended effect of pushing the parties toward settlement in a more efficient manner and arriving at a position-based agreement. Unlike parties unfamiliar with the system and enthralled in an emotional tug of war, both MSHA and the operator are complex parties and are very knowledgeable with the subject matter, law, and process. Therefore, a successful system should adopt an evaluative approach because settlement will be more position-based rather than interest-based anyway.

ii. Disputant Communication

One frustration expressed by the operator under the current procedural framework is an inability to have their voice and concerns heard about MSHA’s enforcement of higher penalties, inspections, and violations. As the system stands now, this opportunity does not transpire until much later in the process after the parties are well into the litigation process. An evaluative approach at the case’s outset would permit each party the opportunity to make opening statements and present their positions. However, most of the discussions and negotiations would still take place in private caucuses, and therefore, allow the mediator an opportunity to employ evaluative techniques. One weakness of the evaluative approach is that this direction and control
can end in impasse because the parties have diminished control over the process and decision-making power. However, regardless of which style is employed, the parties already have diminished control over the process because the regulations and rules control the parameters around settlement, and the Commission controls the ultimate outcome because it must approve every settlement agreement.\footnote{355}{20 U.S.C. 820(k) (2006).}

Also, substantive communication between MSHA and the operator is a real source of frustration that fuels the current conflict. This point is bolstered by MSHA’s recent evaluation of the pilot mediation program where the parties reported the process “improved” communication.\footnote{356}{Evaluation of MSHA’s Pre-Assessment Safety and Health Conferencing Pilot, supra note 240, at 1.} Within the current stalemate there is a very real interest-based component as some operators choose to spend more capital on litigation than the actual penalty itself. Thus, a facilitative approach could offer each party more opportunities to communicate. However, within the current regulatory framework, the legal merits control the outcome and the parties are extremely limited as to their settlement options both from a regulatory and practical perspective. Therefore, the constraints surrounding settlements squarely restrict interest-based settlement options. Thus, a facilitative approach would create a self-defeating strategy and result. The facilitative model would improve communication, but at the end of the process the law and Commission restrict the parties’ ability to be creative about settlement. Therefore, an evaluative approach is simply more realistic and practical. This approach would still provide a chance to improve and facilitate a dialogue, but still arrive efficiently at position-based settlement agreements.
iii. Mediator Expertise and Impartiality

Another consideration is the mediator’s approach, expertise, and impartiality. These characteristics must be instilled in the mediator and become a benchmark of the process if it is truly going to serve as a legitimate solution to the case backlog. In the current regulatory environment, and with the technological and safety issues associated with mining, the mediator must possess a high level of “subject-matter expertise.” In order for the parties to receive a legitimate evaluation of their case, the mediator must understand the complexities of mining and challenges facing regulators.

The parties will require a high-level of “subject-matter expertise.” One practical and efficient option would be to employ retired ALJs, solicitors or attorneys with extensive legal experience in this area of the law to serve as mediators.357 Beneficially, the mediators would require little training as to the nuances of mine safety and the current administrative law issues.358 However, formal mediation training would be a good and critical investment for the program’s success.359 Instead of the Commission hiring more ALJs and staff to promote litigation, the money could more wisely allocated toward hiring, retaining, and training mediators, similar to the staff mediators found within the EEOC process.360 Quicker judgments simply do not get to the heart of the problem and merely treat the symptoms, and therefore, only a system that enables managed cooperation and communication, while not sacrificing safety, offers a real solution.

Also, by retaining retired ALJs, solicitors, and attorneys, to serve as third-party neutrals, impartiality becomes achievable and transparent. Impartiality is essential to the success of an

357 Baker, supra note 2, at ___.(35).
358 Id.
359 Id.
360 Bingham, supra note 272, at 18.
evaluative approach. Under the current conferencing systems, impartiality is limited, and through no one’s fault, undermined. First, during the conferencing opportunity at the outset of the formal review procedure, the CLR s are MSHA employees. The process is automatically tainted, and a shadow is cast over any appearance of impartiality. While the CLR has admirable goals and works hard to facilitate settlement, this conflict of interest undermines the process. Additionally, the system places the CLR in a difficult position negotiating settlement agreements without undermining safety, and in the end both parties wind up in unworkable situations. This is evidenced by MSHA’s recent evaluation concerning the pilot mediation program that showed 90% of contested violations did not participate in the optional conference. Operators clearly stated that one reason they avoided the conference is because the CLR is not an independent third-party. The process requires an independent third-party.

Alternatively, if a case is not resolved during this initial conferencing opportunity or in MSHA’s new Pre-Assessment Conference, it may be designated for a simplified proceeding. During this process, the ALJ holds a pre-hearing conference in an attempt to reach settlement. The ALJ who presides over the simplified proceedings is conflicted out of the actual proceeding itself precluding the obvious conflict. However, ALJs’ impartiality on a macro-scale comes into question because of the dual role each ALJ is required to fulfill.

It would be naïve to the think and ignore that each ALJ most likely has specific perspectives and ideas regarding mine safety, enforcement, and what or who is fueling the backlog. Obviously, the parties are aware of these realities based on their own knowledge and

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361 Heenan, supra note 34, at 6.
362 Evaluation of MSHA’s Pre-Assessment Safety and Health Conferencing Pilot, supra note 240, at 1.
363 Id. at 10.
experience. Regardless of one’s perspective on what is the best course for mine safety, the reality is that both conferencing opportunities are undermined by either the appearance of or lack of impartiality. By retaining and hiring experienced third-party neutrals outside of MSHA and the Commission, impartiality will improve, as well as, each parties’ participation in the process and the eventual outcome.

Finally, by turning to experienced mediators who can offer an evaluative approach, defining the problem and narrowing the issues will create more efficiency and facilitate settlement. By narrowing the issues, the mediator avoids many of the pitfalls that accompany a broad problem approach. While narrowing can result in impasse and the broadening may address underlying issues, here the parties enter the process knowingly limited as to their settlement options. In most cases, the operator is contesting the level of the violations and points assigned to each of them. Thus, the regulatory regime and framework extremely limit creativity and provide clear parameters around settlement.

c. Embrace of the Mandatory Mediation Process and Why it will Work

i. Allocation of Resources and the Cost-Benefit Analysis

The parties should embrace a mandatory mediation process because they are already mediating most of their disputes in one form or another. In fact, the Commission’s statistics show that matters referred to Global Settlements settled 78% of the time\(^\text{367}\) and 90% of all cases eventually settle before trial,\(^\text{368}\) evidencing the fact the parties want off the litigation highway. Additionally, MSHA’s new Pre-Assessment Conference witnessed violations settle 67% of the time, even though, only 10% of operators chose to participate.\(^\text{369}\) In an attempt to resolve the current backlog, the Commission has adopted a buffet approach to the problem. Currently, the


\(^{368}\) Id.

\(^{369}\) Evaluation of MSHA’s Pre-Assessment Safety and Health Conferencing Pilot, supra note 240, at 1.
Commission allows for an expedited settlement process\textsuperscript{370}, less complex issues are designated for simplified proceedings\textsuperscript{371}, conferences are requested by the CLRs at the case’s onset\textsuperscript{372}, Global Settlements are held to resolve numerous issues that one lawyer, firm, mine or coal operator has pending with the Commission\textsuperscript{373}, and a calendar call system organizes cases geographically.\textsuperscript{374} All these procedures and programs are geared toward one central goal of forcing the parties to resolve the issues without the long, expensive, and winding road of litigation. Instead of this potpourri approach adopted by the Commission, why not have one process and escape valve where the parties are referred to resolve their conflicts and get out of the litigation gridlock. Further, many of the programs and procedures could still be utilized during the mediation process.

If 90\% of the cases settle at the Commission level, one central issue that bears uncovering is when do these cases settle? The main difference between a case that settles during the initial conferencing opportunity at the formal outset of the case,\textsuperscript{375} and on the eve of trial is the amount of time, resources, and money invested or sacrificed during the case. One central benefit of a mandatory mediation process at the outset will be the financial savings reaped by both parties. Extrinsically and practically, coal operators and companies are driven by profits, shareholders, and production. Logically, a process that offers legitimate cost savings, while not sacrificing due process rights or disadvantaging either litigant, and most importantly, not sacrificing safety, should be embraced by the parties. Intrinsically, many operators feel as if they do not have a voice or their concerns about MSHA’s oversight and regulation go unheard until too late in the

\begin{itemize}
\item\textsuperscript{370} Penalty Settlement Procedure, 75 Fed. Reg. 73955-01 (2010).
\item\textsuperscript{371} Simplified Proceedings, 75 Fed. Reg. 81459-01 (2010).
\item\textsuperscript{372} Heenan, supra note 34, at 6.
\item\textsuperscript{373} Case Backlog Reduction Project Joint Operating Plan, supra note 125, at 14.
\item\textsuperscript{374} First Quarterly Progress Report: Targeted Caseload Backlog Reduction, supra note 193, at 4.
\item\textsuperscript{375} Heenan, supra note 34, at 6.
\end{itemize}
litigation process. A formal mediation process at the outset allows for critical dialogue between the operator and MSHA.

There is little room for debate that federal revenue is and will be shrinking, and looming austerity measures are most likely on the horizon. MSHA and the government spend countless resources, time, and money litigating issues that could be more efficiently resolved. Obviously with a shrinking federal budget, MSHA would directly benefit from reducing this expense and allocating their resources toward better training of mine inspectors, mine inspection time and visits, and working with the operator to improve mine safety. While some may take the contrarian position, there is no correlative support for the notion that mine safety is somehow improved by the amount of time spent within the administrative courtrooms found within the beltway. Instead, mandatory mediation offers both parties a chance to resolve disputes while working within the confines of the split-enforcement model. The proposed system improves both cooperation and safety at the same time.

Further, by hiring and retaining retired ALJs, attorneys, or solicitors to serve as mediators, the current Commission ALJs would have more time to hear the more contentious and important cases. Mediation would save vital Commission resources instead of spending millions on ad hoc programs meant to plug the “proverbial holes in the dike.” The pressure to dispose of cases quickly, and the incentive to meet arbitrary guidelines set by bureaucrats, would be replaced by a sense of full adjudication and an attention to detail. Thus, for those parties who could not resolve their disputes in mediation, the litigation process and result would yield a more substantive and meaningful outcome.

ii. Managed Communication and Cooperation
Importantly, mediation promotes communication, whereas hardball litigation tactics often undermine and serve as impediments to this essential function. We want a certain amount of adversarial proceedings and positions in the regulatory process to ensure compliance and safety, and clearly, regulatory capture has been a detriment to mine safety. However, the Commission sponsored mandatory mediation process offers a rare opportunity to promote managed cooperation and improved communication, without sacrificing safety. Instead of each side being solely focused on the zero-sum game of winning in litigation, mediation would foster more communication and collaboration toward a common goal, improving safety. Here, communication is almost non-existent. One positive yielded by the pilot mediation program is that overall the parties reported the process improved communication.\footnote{Evaluation of MSHA’s Pre-Assessment Safety and Health Conferencing Pilot, supra note 240, at 1.} Surely, some form of communication and collaboration must take place between the regulated and regulator in order for the regulatory framework to work. It simply wrong to think that any form of collaboration and communication between the parties is detrimental to safety, and instead, only leads to abuse.

A mandatory mediation process would force the parties to the table with the hopes that civil discourse and open communication between them would resolve a legitimate portion of the conflicts that are currently overwhelming the system. While Congress cannot legislate good faith or discernment, mechanisms can be put in place that will foster and ensure these goals. As with most mediation procedures, rules could be put in place that promote and ensure open and effective communication. Also, negotiations would remain confidential and mediators would be precluded from testifying at trial. In the end, a system is created that allows the operator and MSHA to arrive at a neutral table for meaningful discourse without sacrificing safety. In the end, the Commission would still be charged with approving all settlement agreements and would have authority to reject unjust settlements and abuse.
iii. Mandatory Mediation Success

Cost savings and improved communication will go long way in resolving the backlog and restoring faith in an otherwise damaged process. Further, statistics show that mandatory mediation is successful and the parties are generally pleased with the process and outcomes. The 1994 EEOC study detailing the mandatory mediation process found that over 65% of the parties were pleased with the process, 95% of the parties trusted the mediator, and over 80% reported that would use mediation again.³⁷⁷ The 2000 study revealed that over 90% of the parties would use mediation again to solve their disputes.³⁷⁸ Therefore, imposing mandatory mediation on MSHA and the operator will likely produce favorable results.

Similar to the EEOC third-party designed process whereby most participants found the process fair because it was designed by a third-party and not by the disputants, here, a mediation system established by the Commission aimed at resolving disputes should help establish fairness and credibility with the parties. While some may argue the process will produce more meaningful results if the parties chose mediation, a low participation rate would likely nullify the processes’ ability to resolve the backlog. One fundamental flaw with MSHA’s new Pre-Assessment Conference is that only 10% participated in the process, while 90% chose to litigate.³⁷⁹ Commission backed opt-in procedure will not produce the type of results needed to resolve the backlog. Additionally, as the state mortgage mediation programs show, participation rates in mandatory mediation programs are significantly higher than opt-in programs. Consequently, opt-in states are beginning to switch to mandatory participation mediation.³⁸⁰

³⁷⁷ Bingham, supra note 272, at 19.
³⁷⁸ Id.
³⁷⁹ Evaluation of MSHA’s Pre-Assessment Safety and Health Conferencing Pilot, supra note 240, at 1.
³⁸⁰ Cohen, supra note 334, at 3. (Jun. 2010).
In fact, 70-75% of homeowners reached settlements with their banks in the mandatory mediation states. This outcome can be attributed to a whole host of factors, but one factor that relates closely to the current case backlog, is the cost-benefit analysis that should be conducted by the operator and MSHA. First, mediation is a much more cost effective choice for foreclosing banks than paying voluminous amounts of attorneys’ fees and court costs. Also, it makes more financial sense for the bank to work out a compromise with the homeowner and recoup a larger percentage of the loaned capital, rather than continuing to flood the market with foreclosed properties and recoup even less of their initial capital investment.

The same principles ring true for the homeowner to compromise with the bank and recoup part of their investment instead of walking away with nothing. Additionally, the often times desperate or frustrated homeowner has a voice and decision in the outcome, instead of simply allowing the case to proceed until foreclosure. These same principles and motivating factors apply to MSHA and the operator. These controlling principles should override most of the initial skepticism or concerns the parties have regarding the new mandatory mediation program. A mandatory mediation process serves as a cost savings to both parties, but just as important, provides the parties a voice and input in the final outcome.

No matter how successful the program, there will be those participants who do not want to participate or undermine the process with dilatory tactics or act in bad faith. In fact, the AAA reported that even in those cases where one party did not want to participate in the mediation, 40-50% of those cases still resulted in settlement. Thus, even in those situations where one

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381 Id.
382 American Arbitration Association, http://webster.utahbar.org/barjournal/2001/12/paths_to_mediation_with_sample.html. (The American Arbitration Association (“AAA”) reported that 85-90% of voluntarily mediated cases settle. In those cases where one party was opposed to mediation, 40% reached settlement in Tenth Circuit Court of Appeals and 50% in the Utah Court of Appeals cases).
participant did not want to participate, almost half of those cases still reached settlement. Therefore, regardless of whether or not the proposed mandatory mediation program yields a 75% success rate or a 40% success rate, the success rates illustrate that a mandatory program at the Commission level would work.

A real concern that must be factored into the process is those individuals who simply want their day in court. Obviously, there will be circumstances where MSHA or the operators choose litigation. While this will always be an issue, and especially true for conflicts involving emotionally charged issues or controversies such as domestic relations or employee-employer based conflicts, here, the parties consist of the government and corporations. Therefore, while emotions are still running high, emotional decision-making in this process should be reduced because of the parties’ DNA.

Finally, a successful mandatory mediation program will not only reduce the case backlog and expedite matters in the future it will also reduce the amount of cases filed. As a dialogue begins and communication improves, conferencing opportunities before Commission jurisdiction will benefit from improved communication. Additionally, by installing the process at the Commission level and requiring Commission approval of all settlement agreements, an environment of managed cooperation can be achieved that enhances safety and precludes regulatory capture. Therefore, disputes between MSHA and the operator can be successfully resolved, and in the end, an environment can be fostered that promotes collaboration and cooperation toward mine safety.

e. CONCLUSION
A civil penalty system should encourage cooperation and compliance. In this context, the split-enforcement model has become ineffective in today’s litigation environment. While the split-enforcement model serves an important function, it must be amended to meet the current litigation climate. A Commission mandated mediation process will create an environment of managed cooperation with vital oversight. At the same time, it will improve communication and collaboration between the parties. Mediation offers an efficient cost effective option to traditional litigation. It will not only help resolve the case backlog, but it should be embraced by the parties because, in most instances, they are already settling cases in one of the varying programs and formats offered by the Commission. The new process will not only benefit the parties and the Commission, but will help spark a renewed focus, energy, and collaboration toward a common goal, safety.