

Why Mediation?

Taking the Leap of Faith
(Excerpted from the American Bar Associations's *The Brief*, Fall 2004)

By Patrick Campbell Coughlan

Common to ALL disputes are these reasons to mediate:

- 1) To maintain control of your dispute and privacy of your negotiations.**
- 2) To manage your risk and control your expenses.**
- 3) To give you a vote in the outcome of your case.**
- 4) To unload old or stalled cases.**

Preliminary Considerations: A lawyer should prepare for a mediation with the same dedication and enthusiasm as he or she prepares for trial. The parties must clearly understand their case, understand the problems with their case, and have a clear understanding of their opponent's position.

The attorney should counsel his or her client about the mediation process and ground rules to determine if the client has a good

faith interest in settling the case through negotiation and compromise. The client must have an actual intent to reach an agreement, to let the mediation progress with an open mind to new possibilities.

Choosing the Right Mediator is the most important decision an attorney has to make to ensure a successful mediation. Too few attorneys focus on the mediator's **style** as an important element in settling a case.

Successful mediators tend to have a more hands on and evaluative style. They focus the parties and express opinions as to the probable results of the litigation. They push the parties to look at the law and facts in a more realistic manner.

The mediator must remain optimistic and positive throughout the mediation to help the participants through impasse and conflict. The longer a mediator can keep the parties "in the room," the more likely a case is to settle. Parties develop a vested interest in achieving a resolution when they have spent hours working toward a settlement.

Another thing to remember is that good mediators are expensive—you get what you pay for—and clients should feel that they are getting value by choosing mediation. Successful mediators have settled hundreds of cases and have a reference list that can and should be checked by any attorney considering mediation.

Getting down to Business: The single greatest impediment to successful mediation is lack of patience.

Sufficient time should be set aside to allow the process to work. A seasoned mediator with a track record of settlements should be able to guarantee that he or she will settle the case if no one leaves the premises.

At the mediation itself, both parties will have the opportunity to make a brief presentation summarizing their positions, legal points, and the damages being sought in a case. It is helpful to indicate that you have come with an open mind and with the intention of being fair, and that you hope both sides will listen to what is being said without prejudging the outcome.

Presentations completed, the parties will usually be placed in separate rooms where they will have the opportunity to talk confidentially with the mediator in private sessions. Attorneys should be direct, forthright, and honest with the mediator. The more informed the mediator is about the positions of the parties, the more effective he or she will be in the process of bringing a settlement.

Avoid the tendency to try to "game" the mediator. Good mediators will see through trickery or efforts to mislead them, and such efforts will hurt your credibility and slow down the process. Be "up front" with the mediator at all times. Making sure

that the mediator knows what information is confidential will protect you both from future misunderstandings.

Parties with decision-making authority should attend the mediation. Successful mediations occur most often when a party or representative with full settlement authority is present on each side.

Finishing Up: If an agreement is reached during the mediation, do not leave until the agreement is memorialized in writing, with the major points clearly summarized. This hand written agreement should state that it contains the "essential elements of the settlement" so that it will hold up in court in the event of a dispute concerning whether or not a settlement was reached.

Confidentiality is also another consideration. It is important that the mediation "contract" also contain such a clause. A confidentiality agreement should be signed by all participants and observers at a mediation.

I also strongly recommend that an arbitration clause be placed in the settlement document. The existence of this clause usually speeds up settlements and keeps the parties on track.

Finally: Law books are filled with cases where one party lost and the other party won. Mediation assists the parties in evaluating the strengths and weaknesses of their positions. It also gives attorneys and clients the chance to hear from a neutral observer about his or her assessment of the case. By applying this knowledge to any given case, parties have a greater chance of reaching a settlement from which both sides can gain.

Ever Heard of a Pink Monkey? **(D&O Liability Insurance)**

If any of you represent individuals who serve on corporate or non-profit boards, **Watch Out** for the following language in D&O Policies, Personal Profit Exclusion: “excluding from coverage any claim (against any insured) based upon, arising from, or in consequence of an insured having gained in fact any personal profit, remuneration, or advantage to which such insured was not legally entitled.”

There is a Fifth Circuit Court of Appeals case that holds that if **ANY** director “profits” (defined **VERY** broadly) from an improper activity, **NO** director has coverage. TIG Specialty Ins. Co v. Pinkmonkey, 2004 U.S. App. LEXIS 17142 (5th Cir. Tex., Aug. 11, 2004)

This holding specifically excludes coverage in the event of a situation for which coverage is sought. **Bottom Line:** Don’t accept what a broker represents about coverage! Read the exclusion language and this case.

Here’s Another Interesting One to Watch: **(When do Settlement Demands Become Extortion?)**

The California Supreme Court has agreed to review Flatley v. Mauro, No. S128429, in which a world-famous dancer is suing an Illinois lawyer for \$100 million for extortion based on aggressive settlement demands.

The lawyer threatened to “go public” with rape allegations and “ruin” the dancer by sending news releases to media outlets after filing suit unless a million dollars was paid to the alleged victim. Counsel for the lawyer says that the lower court decision would open lawyers to criminal as well as civil liability for extortion for aggressive demands that simply state the obvious. (from *The Recorder*, 12/17/04)

Are You in the KNOW?

www.ConflictSolutionsInc.com

- ... Mediator Resumes
- ... Commercial Clients
- ... References
- ... Recently Settled Cases
- ... Current Newsletter
- ... Types of Disputes
- ... Types of ADR

PPSRT STD
U.S. Postage
PAID
Portland, ME
Permit No. 477



Professionals in Alternative Dispute Resolution

112 Plains Road
Raymond, Maine 04071

Address Service Requested

Winter 2005 Newsletter

World Class



Mediation

112 Plains Road
Raymond, Maine 04071
Tel: 207-655-6677
U.S. 800-762-5582
Fax: 207-655-6699

1540 Star Pointe Lane
Naples, Florida 34112
Tel/Fax: 239-417-5969
U.S. 800-762-5582

Denver, Colorado and Scottsdale,
Arizona
Tel: 888-355-2005

Website: www.ConflictSolutionsInc.com
E-mail: pat@conflictsolutionsinc.com