LAFAYETTE PARISH BAR ASSOCIATION
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DECEMBER 13, 2012

PROFESSIONALISM
IN
MEDIATION

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National Academy of Distinguished Neutrals
NADN

MEDIATION - BEHIND THE SCENES [1]

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[1] Adapted from a joint presentation with U. S. Magistrate Judge Karen L. Hayes; Charles D. Elliott, Elizabeth Middleton and Associates Mediation Services; and Billy Guinn, Jr., Rountree & Guinn, on October 7, 2011 in Shreveport, Louisiana.

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HISTORY OF MEDIATION

Mediation appears in history as early as 3000 B.C. in Egypt, Bable, and Assyr. An institutionalized system of **combined mediation and arbitration** appears to have been the preferred method of resolving disputes in ancient Greece and Rome.[2] Mediation remains the dominant method of dispute resolution in many countries, such as China, Japan, African countries where kinship and tribal leadership are powerful influences, Islamic and Buddhist countries:

Provisions for some form of third party mediation were recently discovered in the Armarna letters (those refer to the reign of King Amenhotep IV around 3,500 years ago, see Cohen and Westbrook, 2000). References to acts of mediation abound in the Bible (ca. 2000 B.C.). They are found in Homer's *Iliad* (ca. 750 B.C.) and Sophocles' *Ajax* (ca. 500 B.C.). We learn too that mediation was the principal way of resolving interpersonal disputes in ancient China (Brown, 1982). It was frequently used in the many disputes between the Greek city-states (Adcock
and Mosley, 1975), and it became quite indistinguishable from the evolving pattern of Renaissance diplomacy and the codification of ambassadorial functions.
Few other devices of dispute settlement receive so eloquent a testimony as that given to mediation in Shakespeare's *Romeo and Juliet*. The failure of Mercutio's ill-advised mediation changes the mood and character of the play.

"Putting Mediation in Context," Jacob Bercovitch, p. 3, Studies in International Mediation, Palgrave Macmillan, 2002

The combined form of mediation/arbitration, particularly in ancient Rome, influenced civil procedure in continental Europe "and can still be found in contemporary court practice, particularly in Austria, Germany and Switzerland."[3]

STATUTORY AUTHORITY FOR MEDIATION/ADR

A. <u>Mediation/ADR in Federal Courts</u>

In the late 1980's Congress recognized ADR as a cost-efficient alternative to trial:

1) In 1988: Judicial Improvements and Access to Justice Act, 28 U.S.C. § 652 (1993 & Supp. 2003); permitted U.S. District Courts to submit disputes to arbitration.

2) Amended in 1998 by: Alternative Dispute Resolution Act of 1998,

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[2] Buhring-Uhle, Christian, Lars Kirchhoff, and Gabriele Scherer, "Arbitration and Mediation in International Business," 2006, Kluwer Law International, 177.

[3] *Id*.

Pub. L. No. 105-315, 112 Stat. 2994 (28 U.S.C. § 652) - requires each district court to require, by local rule, that litigants in all civil cases consider using an ADR process at the appropriate stage of litigation.[4]

3) In the Western District of Louisiana, LR 16.3.1W allows the judge to refer a matter to a mediator, but only with the prior approval of the parties:

> When the trial judge in a civil matter determines that disposition of the case may be enhanced by the use of mediation, an alternative dispute resolution (ADR), the judge may, with the prior approval of the parties or their counsel, refer the matter to a mediator of the judge's selection or to a mediator of the parties' selection. With the consent of the parties or their counsel, the trial judge may order a nonbinding mini-trial or summary jury trial under such terms and circumstances as agreed to by the parties or their counsel.
>
> * * *

LR 16.3.1W (in pertinent part).

B. <u>Mediation in Louisiana State Courts</u>

1) In Louisiana state court, mediation is encouraged, but usually remains voluntary:

> "Counsel are encouraged to discuss with their clients the appropriateness of using mediation in any civil case pending in the courts." **La. R.S. 9:4102.** "On motion of any party, a court may order the referral of a civil case for mediation. Upon filing of an objection to mediation by any party within fifteen days after receiving notice of the order, the mediation order shall be rescinded." **La. R.S. 9:4103.** In child custody or visitation proceedings, the court may order the parties to mediate their differences. **La. R.S. 9:332, *et seq***.

2) Mediation proceedings remain confidential, both by agreement, and under the Louisiana Mediation Act. ***See* La. R.S. 9:4112.**

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[4] Local Rules of the Eastern, Middle & Western Districts.

TYPES OF MEDIATION[5]

A. *Facilitative Mediation* – mediator serves mainly to facilitate communications, transmit offers, help overcome impasses;

B. *Evaluative Mediation* – mediator offers analysis, prediction of range of possible outcomes at trial, may recommend a settlement range; entails more structure and input from the mediator;

C. *Transformative Mediation* – most discussions are joint - emphasizes understanding of the other side;

D. *Neutral Evaluation* – usually done before extensive discovery - neutral provides views of likely result based upon factual and legal positions of the parties;

E. *Mini-Trial* – an abbreviated trial-like presentation attended by non-lawyer representatives of the parties who may serve as panel members along with the neutral - a settlement conference is held after the mini-trial;

F. *Non-Binding Arbitration* – like an arbitration, but decision is advisory only;

G. *Neutral Expert Fact-Finding* – helpful when parties need resolution of a technical issue. Usually part of a larger non-binding ADR process.

H. *Court Appointed Special Masters/Discovery Masters* – appointed by trial judges to assist with complex disputes, or those which require special expertise.

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[5] Adapted from JAMS Arbitration, Mediation, and ADR Services, http://www.jamsadr.com/adr-spectrum.

MEDIATION BASICS

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.

— Abraham Lincoln

A. Reasons to Mediate

1) **Conservation of Resources:** money, time, mental and physical effort;

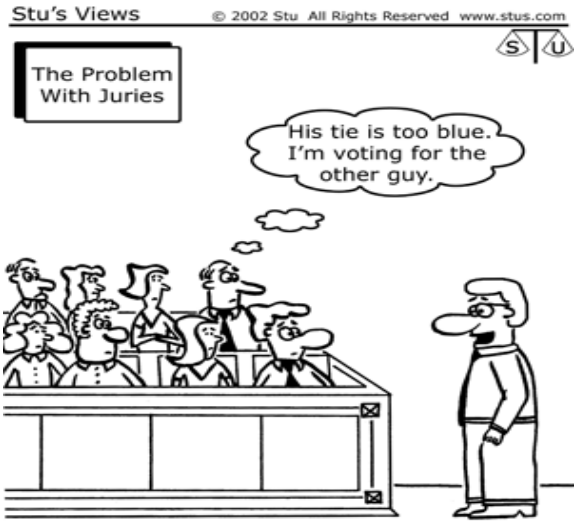
2) **Confidentiality:** the process is confidential;

3) **Flexibility**: the parties are not limited to remedies at law; they are free to create their own solution suited to the facts and circumstances;

4) **Relationships maintained**: each party achieves something of value in a mutual settlement, and ongoing business or personal relationships may be able to continue for mutual benefit;

5) **Enhanced Communication**: the mediator facilitates the negotiations and often times the parties significantly change their paradigms regarding the events in question;

6) **Retain Control:** juries and other fact finders do not always give the same weight to key pieces of evidence, as each side would like them to do.



B. Choosing a Mediator

The question should be, "who can help me settle this case with this client, and with these parties/lawyers on the other side of the table?" While the selection can be hit-or-miss, it is usually based on the recommendation of one or more attorneys in the case. The first step towards reaching an agreement in the case is agreeing on a mediator. Consider the type of mediator you need - facilitator or evaluator - and whether you need someone with particular expertise in the subject matter, or a particular background.

If you have an elderly client, you may want an older mediator (if that might be an issue). You need a mediator you can work with and trust. There has been no trusted rating system for mediators other than "is he/she any good?" The best advice is "ask around," and get a number of opinions. This makes it difficult for new mediators to "break in" since the usual process involves circulating the same 3 names. This makes it more difficult to schedule a mediation because those 3 mediators are always busy.

Sometimes the mediator gets blamed when a case doesn't settle, even though it was a lawyer or client that was unreasonable. You need someone you can trust with your confidences, get your legal case settled, and help you deal with a difficult client. If you aren't sure about the choice of a mediator, take the names that are floated by opposing counsel, and call the mediator for references from other lawyers who have worked with the mediator.

In summary, ensure that the mediator can:

1) maintain a fair process, build trust and effectively communicate;

2) understand the people, issues and the conflict; and

3) understand the legal and regulatory landscape.

Magistrate Judges as Mediators

For federal court cases, either the magistrate judge assigned to the case or another one in the district, subject to availability and willingness, may serve as mediator. As one commentator observed,

> . . . a client who is out of control may see reason if the bad news comes from a judge. A lawyer who is reluctant to deliver the bad news will know that he or she will have many other occasions to interact with the magistrate[6] and thus will have an incentive to give realistic advice before the magistrate does so. The key is that the magistrate is a judicial officer and now is more likely to be perceived as one.

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[6] At the time the article was written, Congress had only recently re-designated the title "magistrate judge" to reflect their increased role in the judicial process and to confirm their status as judges. *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650 (codified at 28 U.S.C. § 631).

* * *

> [Magistrate judge] mediation also has significant procedural advantages over other forms. It combines the legitimacy and authority of judicial office with the insulation of the non-judicial mediator. The magistrate is in a unique position to help parties overcome the obstacle to settlement without encountering the problems of referral mediation and trial judge mediation. . . .

Patrick E. Longan, *Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates as Mediators*, 73 Neb. L. Rev. 712, 744-45 (1994).

Finally, one extra benefit of mediation by magistrate judge is that there is no extra charge – the cost is included in the original filing fee.

C. <u>Preparing Your Case for Mediation or Trial</u>

For various reasons— most often economic— you may wish to pursue mediation earlier rather than later in a case. In either event, it is helpful to have a few things clearly in mind:

a. Know which *material facts* are disputed, and which are undisputed.

b. Outline the elements of each claim or counterclaim, and the facts that support each. If you are the defendant, outline your defense to each claim, and the facts that support each. These outlines can then serve as the background of your preliminary statement.

c. Know what result you want.

d. Know comparable jury verdicts (if any). This can be very important and helps you in evaluating your goals.

e. Assess the risks and expenses of going to trial, and the likely outcome.

f. Evaluate other ADR options, such as binding arbitration, summary trials (with or without a jury), or med/arb combinations.

g. Have a handle on all outstanding liens and expenses. Is Medicare or Medicaid involved? Who will deal with them? Are there any doctor or workers' comp liens? How will those be handled? Have all the necessary depositions been taken?

D. Preparing Your Client for Mediation

Here are some good ideas on client preparation from a blog uncovered by a quick Google search:

> It is just as important to prepare the client for the mediation as it is to do the other preparation. A prepared client will be able to make decisions as the mediation progresses on what terms and conditions of a settlement are to be considered and acceptable. Often, the client's perspective on settlement will change as the mediation progresses. That is good because the client hears what the other side has to say and can consider the points and counter-points of the case and factor those into the decision-making process.

Here are some thoughts:

- **Prepare for the Process:** Your client needs to be prepared for the process by having the appropriate attitude before attending the mediation. I usually have a pre-mediation conference several days before the mediation. During this conference I describe the informality of a mediation, that it is not a trial as the mediator has no power to decide anything, and that the mediator's role is to facilitate negotiations and resolution. I also describe the "give" and "take" of the process, and tell the client not to be discouraged by this bargaining process, nor be offended by it.

- **Understand Confidentiality and What that Means:** I also make sure the client understands that what takes place at the mediation is confidential. I stress that nothing which is said or done during a mediation can be brought up in court during the trial of the client's case. Clients often are surprised at this. They need to know that they will not be prejudiced by the process.

- **Get Down to Business:** This is where the client enters the business process of resolving disputes and essentially steps outside the courtroom. I stress that it is the client's decision whether to settle, and I make sure the client has all necessary information to make an informed decision about whether or not to settle.

- **A Chance for an Objective View of the Case:** I explain that the mediation is a chance for us to get an objective view of our case, so we should listen carefully to what the mediator says. The mediator will often comment on the issues and give his or her views on each side's case and the pros and cons of settlement versus proceeding further. This provides an objective, third-party's view of the matter, which can be very valuable.

- **Using the Proper Words:** The proper words should be used in getting the client ready for a mediation (or for settlement for that matter). Words like "victory," "doing battle," "defeating the other side," or words of war and combat have no place in getting a client ready for mediation and setting the right tone for the negotiation process. This is not war; this is a negotiation and a compromise, so words appropriate to that process should be used. I prefer using words like, "educating the other side about our case," or "working with the mediator [and the other side] to resolve the dispute." I also stress that we are not giving in, and these words don't mean that. I remind the client that it takes all parties having the same attitude to get a settlement or resolution that works for all.

- **Settlement is Voluntary; There is No Decision Unless All Agree:** Some clients think a mediation is an arbitration and the neutral will decide the case. I stress that no one is forcing the parties to settle. A deal will be done only if all agree to all terms and conditions. No one is going to shove a settlement down a party's throat; they should not even try, although sometimes a little persuasive effort may be used to make clear what a settlement means in the client's case and how the client can benefit from this process.

Some more thoughts:

- Do you give the client your views on the settlement value of the case, or do you reserve that for discussion during the mediation?

- What do you tell the client about the expectations at the mediation?

- Clients will often ask: What is my case worth? What will the other side offer? How much should I expect to get? What should I be prepared to settle for? Why should I take anything less than full value? I try to avoid giving the client a predicted range, although sometimes it is necessary to get a client to think in terms of a realistic figure for settlement.

  There are three ways to approach this:

- Don't give the client a number at all, but tell the client that a "demand" should be made first (if you are the plaintiff), and you and the client need to see how the defense responds and what the mediator says before you line up any numbers;

- Give the client a reasonable but fairly wide range for settlement, suggesting that the ultimate number will be affected by how the defense postures during the mediation and how effective the mediator is at moving to the higher number;

- Just set a rock bottom "walk away" number and work from there.

One of the major tasks in preparing for mediation, and any settlement negotiations for that matter, is to inquire about a client's expectations of how a settlement will benefit them. This involves advising the client of the pros and cons of a settlement, whether directly negotiated or resulting from a mediation:[7]

- The costs of further proceeding;

- The certainty of a settlement versus the uncertainty of a result by trial or arbitration;

- The emotional drain on the client and family or business partners;

- Adverse publicity that might result;

- Public "airing" of personal life and issues, particularly sensitive medical or psychological problems;

- The present value of money in hand versus the chance of a greater gain at trial [which can very much effect, and in fact lower, a client's unrealistic expectations];

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[7] Guy Kornblum. "Preparing Your Client for Mediation." *Guy Kornblum - The Resolution Advocate,* , 29 April 2008. Web. 11 December 2012.

- The positive impact on life planning of having money now rather than the long wait through trial and appeal.

E. The Position Paper

If you are truly preparing to settle your case, you should take the time to write a position paper for the mediator. This confidential discussion of your case will require that you think about the strengths and weaknesses of your case. It will also force you through the exercise of doing quantum research or research on the important legal issues. The mediator will start with knowledge of your case that would otherwise take a substantial amount of time at the mediation. Remember, the mediator only knows what you tell him or her about your case!

Skilled mediators can employ a number of approaches to facilitate settlement depending upon the needs and personalities in the case. By providing key information in advance, counsel can help the mediator be effective. The statement should include, at a minimum, a brief outline of the key factual and legal issues involved in the litigation, the main "sticking points" preventing settlement, a description your client's strongest and weakest points in the case, and a settlement proposal that you would be willing to make.[8]

F. Bring the Right Representative

Although it's possible to settle a case while the person holding the purse strings is a thousand miles away, it can be a challenge. Mediation works because of the unique dynamic which occurs when the parties in interest meet across the table. Very often, new information comes to light which must be considered and evaluated. Plaintiffs often need to vent, and this process is often hampered by an empty chair. When feasible, bring the right representative to the table, and ask whatever questions are necessary to make sure you know the extent of your representative's authority. If attendance of the proper person is not possible or practical, let the mediator know in advance.

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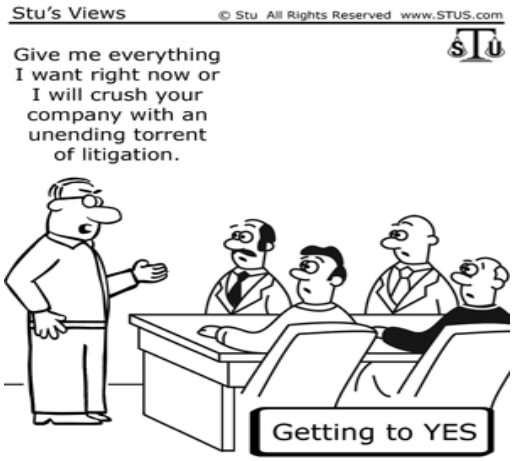
[8] Sample Confidential Settlement Statement Guidelines - APPENDIX A

THE NEGOTIATION

A. Opening Session



This is probably not such a good start. The opening session is a time to start to work towards a settlement. You should thank the other party for taking the time to come and try to settle. Your client should speak openly about the case, and how it affects him or her personally, or how the business is affected by the litigation. Give an indication that you intend to work in good faith to resolve the dispute.

If you represent a plaintiff in a personal injury case, ask your client to tell the story of the impact the injury has had in his life. Give some real-life examples that are similar to what the jury will hear. If you are a defendant, show some real concern for the plight of the defendant. It is risky to address remarks directly to the opposing party at a joint session. Most often, the motive is to communicate an apology to an injured plaintiff, but be careful! Such a tactic puts plaintiffs on the spot, as they feel all eyes watching for their reaction. In addition, once an attorney starts speaking to the opposing party, there is a risk that the monologue will fall into advocacy for the attorney's own client, which simply serves to polarize the session. Addressing your remarks to the mediator is a safer approach, and doesn't stop you from saying, "my client is genuinely sorry for what happened to the plaintiff."

Caveat: An apology, communicated directly to the plaintiff, without qualification or defensiveness, can set an extremely positive tone for a mediation. Just be careful of your wording and tone.

Having pulled an all-nighter, Gonzalez, Kaminsky and Smith were exceptionally well-prepared for the mediation, but...

c.09CharlesFincher01.26 Scribble-in-Law at LawComix.com

B. Caucuses in Private With the Mediator and Your Client

In this initial meeting, your client gets to speak more openly with the mediator, and you and your client establish a rapport with the mediator. Please let your client speak and don't impede the communication directly between your client and the mediator. It is not your case, and you don't make the decision – that belongs to your client.

C. Liens/Medicals/Costs[9]

Before you get to the mediation, you should have documented any liens that affect your client or your opponent's client. If you fail in this regard, your case may not settle at mediation, or your settlement may be less than satisfactory (i.e., you have to hold back money to satisfy liens until they are resolved). Some liens you should consider are:

1. WORKERS' COMPENSATION

> A workers' compensation intervenor has a first dollar lien or privilege on the proceeds of the employee's recovery from a 'third person" La. R.S. 23:1101-1103. the workers' compensation intervenor's recovery is reduced by the same percentage by which the employee's recovery is reduced as a result of comparative negligence. La. R.S. 23:1101(B), and the workers' compensation intervenor must bear its proportionate share of

[9] Some of this substantive material is borrowed (with implied permission for educational use) from a memo by LAFJ member, Yigal Bander, Kleinpeter & Schwartzberg, LLC, 619 Jefferson Highway, Suite 2H, Baton Rouge, Louisiana 70806 (225) 926-4130 yigalb@ksbrlaw.com

attorneys' fees and costs incurred in obtaining recovery from the third party, up to a limit of one-third of its intervention. La. R.S. 23:1103(c)(1).

2. <u>HEALTH CARE PROVIDERS</u>

A health care provider has a first dollar lien or privilege, with no reduction for attorney's fees and costs (except in special circumstances), on the net amount payable to an injured person by "another person on account of such injuries" or by "any insurance company under any contract providing for indemnity or compensation to the injured person." La. R.S. 9:4752. the privilege must be asserted in accordance with the prescribed manner prior to the payment of proceeds, La. R.S. 9:4753, and an itemized statement must be furnished on request. La. R.S. 9:4755. Warning: Failure to honor a perfected health care provider lien, or guarantee given to a health care provider, subjects the attorney to personal liability and is a violation of Rule 1.15 of the Rules of Professional conduct.

3. <u>MEDICARE</u>

Under the medicare Secondary Payer (MSP provisions, 42 U.S.C. 1395y(b)(2), Medicare has a right to recover whatever it has paid, subject to a reduction for its proportionate share of attorneys' fees and costs ("procurement costs"). The right does not have to be formally asserted in order to be enforceable, and an attorney may be held personally liable for his failure to honor Medicare's right. Dealing with medicare - officially the "Center for Medicare and Medicaid Services," or CMS - means dealing with the Medicare Secondary payer Recovery Contractor at 866-677-7220. If worker's compensation is involved, then it may e that a special "Medicare Set-Aside" (MSA) has to be calculated and submitted for medicare's approval.

4. <u>MEDICAID/DHH</u>

The governing state statute is La. R.S. 46:446. By its terms, medicaid, through DHH, has a right to recover what it has paid, including from UM and med pay proceeds. Unlike medicare, the right is enforceable against individual tortfeasors, not just insurers and self insurers.

5. **<u>STATE HOSPITALS</u>**

State and state-supported hospitals such as LSU/Earl K. Long and LSU/Charity have a privilege grounded in La. R.S. 46:8 as well as La. R.S. 9:4751 *et seq.*

6. **HEALTH INSURERS**

A health insurer's (or auto insurer's) right to recover medical benefits paid arises only out of the contractual provisions of the policy. The right, in other words, is purely contractual, not legal; thee is no "lien" or "privilege" or any other claim by operation of law. *Martin v. Louisiana Farm Bureau Casualty Insurance Company*, 94-0069 (La. 7/5/94), 638 So.2d 1067. Theoretically, the insurer's right can be one of subrogation or one of reimbursement only, depending on policy provisions. *Barreca v. Cobb*, 95-1651 (La. 2/28/96), 668 So.2d 1129.

7. **FEHBA**

Health plans covering federal employees are governed by the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. 8902.

8. **UM/MED PAY**

Often, there are subrogation issues that must be handled related to UM money or med pay reimbursements. These should be addressed before the mediation, or you should have a plan for handling them at the mediation.

9. **RULE 1.15**

This difficult ethics rule deals with the safekeeping of property belonging to others. When settling the case, you have to consider any outstanding liens, and whether they comport with the lien statute(s), and whether this is your problem or your client's problem.

D. Using Legal Research to Help Settle Your Case

Again, it's important that you know the law that applies to your case, and that you be prepared to prove your position at the mediation. If you are arguing about the law with another attorney who is equally unprepared (or more prepared than you), you will be frustrated at the mediation. You also need to be prepared to substantiate your position on quantum at the mediation, with copies of cases or , at a minimum, a memo that you can share with opposing counsel to substantiate your position.

E. Being Creative and Helping the Mediator

When the mediator is in your room, he/she is your best advocate. Educate the mediator, and try to win him over to your position. This will help him be more persuasive in the other room. Think of non-money things that might bring the parties together. Is there some agreement you can reach about how things will be handled in the future? Would a handshake help?

THE SETTLEMENT

A. Form

La. R.S. 9:4111. Written settlement agreements

> A. If, as a result of a mediation, the parties agree to settle and execute a written agreement disposing of the dispute, the agreement is enforceable as any other transaction or compromise and is governed by the provisions of Title XVII of Book III of the Civil Code, to the extent not in conflict with the provisions of this Chapter.
>
> B. The court in its discretion may incorporate the terms of the agreement in the court's final decree disposing of the case.

This is the same as Civil code article 3072: "A compromise shall be made in writing or recited in open court, in which case the recitation shall be susceptible of being transcribed from the record of the proceedings."

If you settle your case, and leave the mediation without getting the agreement signed by all the parties (and not just the lawyers), you risk having it undone when a party has buyer's remorse the next day.

A structured settlement expert sometimes proves beneficial.

B. Terms of Agreement in the Final Document

All of the terms of the agreement need to be included in the settlement document. If you want a confidentiality agreement, have that included in the settlement agreement. The same is true for court costs, the mediation costs, liens, receipt and release documents that are to be signed later, or any other matter that must be taken care of before the lawsuit is dismissed. If someone is reserving their rights against some other person or party, that should be described. If a minor is involved, the document should identify who will be responsible for getting the tutorship completed and for obtaining court approval of the settlement.[10]

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[10] ***See*** **Sample Settlement Form - APPENDIX B.**

ATTACHMENT A

SATORI
ALTERNATIVE
DISPUTE RESOLUTION

Confidential Mediation Statements

Please submit statements to: memethvin@gmail.com or 888.298.0566 FAX

Each party is requested to submit a brief (5 pages or fewer) confidential statement including:

1. **The name and position of the client or authorized representative who will attend the conference.**
2. **A brief statement of the key factual and legal issues involved in the litigation.**
3. **A description of the strongest and weakest points in your case, whether factual or legal.** ***Please be candid!***
4. **The main "sticking points" preventing settlement.**
5. **A description of any important rulings or pending motions which may have a bearing on settlement.**
6. **The status of settlement negotiations, including the last settlement proposal made by you and to you.**
7. **A likely judgment range if plaintiff were to prevail, and the chance, expressed as a percentage, that plaintiff will prevail at trial.**
8. **A settlement proposal that you would be willing to make in order to conclude the matter and stop the expense and turmoil of litigation.**
9. **A compensation intervenor is requested to provide the current amounts of compensation and medicals paid, an evaluation of the likelihood of future exposure and a calculation of future exposure including a description of the factors used in the calculation.**
10. **An estimate of costs and legal fees from the date of the conference through trial, if the case is not settled.**
11. **If applicable, please attach copies of any pretrial stipulations or pretrial orders which have been filed.**
12. **Copies of other documents may be submitted, at counsels' discretion, such as major relevant medical reports, economic loss reports, and/or liability expert reports.**

Thank you!

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MEDIATION SETTLEMENT AGREEMENT

Re*:* ***(Name of Case, Case No., Jurisdiction)***

The parties to the above referenced claim or suit hereby agree that any and all claims or controversies existing between them with respect thereto are hereby settled in accordance with the terms of this Settlement Agreement, as follows:

1. The Parties hereby acknowledge that bona fide disputes and controversies exist between them, both as to liability and damages, if any, but that, to avoid the expense and delay of litigation, as well as the risks attendant thereto, they desire to compromise and settle any and all claims and causes of action of every kind or character whatsoever which they have or may have arising out of the transaction or occurrence which is the subject of this claim or suit.

2. Each signatory hereto hereby warrants and represents that:

   a. such person has authority to bind the Party or Parties for whom such person acts; and

   b. the claims, suits, rights, and/or interests which are the subject matter hereto are owned by the Party asserting same, have not been assigned, transferred or sold, and are free of any encumbrance.

3. Except as set forth herein, the Parties hereby agree to release and discharge one another from any and all claims, demands, suits or damages arising from or related to the events and transactions which are the subject matter of the above referenced claim or suit. This mutual release binds and runs to the benefit of all attorneys, agents, employees, officers, directors, shareholders, partners, heirs, assigns, and legal representatives of the Parties hereby. It is understood and agreed that this is a compromise of a disputed claim and that nothing contained herein shall be construed as an admission of liability on the part of any party, all such liability being expressly denied.

4. The parties hereto, and their attorneys, agree not to publicize in any way (including talking to the newspaper or any reporter or submitting information to any publication even if the names of the parties are not used) the fact of the settlement and agree that the only reference that can be made to the resolution of this dispute is the following: "The matter has been resolved to the satisfaction of all parties." The

parties further agree that the terms of this settlement are confidential and will not be disclosed to any third persons, except such financial institutions and advisors as are consulted and persons related to the litigation (and as to these third persons they shall also be advised of the confidential nature of these settlement terms and shall agree, in advance, to maintain said confidence) or except as required by law. The parties hereto agree that the confidentiality agreement contained herein would not operate to preclude reporting requirements to appropriate state or governmental agencies as required by law, if any are so required, or cooperation with any such agencies.

5. Counsel for_____ shall deliver to counsel for the other Parties hereto within _____ days from the date hereof, any settlement funds payable, and drafts of any further documents to be executed in connection with this settlement. The Parties and their counsel agree to cooperate with one another in drafting and executing such additional documents as are reasonably requested or required to implement the provisions and spirit of this Settlement Agreement.

6. **SPECIFIC TERMS OF SETTLEMENT:**

_____

_____

_____

_____

_____

The aforesaid settlement Agreed to this _____ day of _____, 2011.

PLAINTIFF(S):

_____
Plaintiff

_____
Counsel for Plaintiff(s)

DEFENDANT(S):

_____
Defendant

_____
Counsel for Defendant(s)

Tax ID No. _____